REPRESENTATIVES FOR PETITIONER:
Larry Stroble, Barnes & Thornburg
David Gillay, Barnes & Thornburg

REPRESENTATIVES FOR RESPONDENT:
Betty Smith, Wayne Township Assessor
Charles Todd, Todd Law Office

BEFORE THE
INDIANA BOARD OF TAX REVIEW

All Coast Logistics and Manufacturing, Inc.	)	Petitions No.: 89-030-02-1-3-00006
Petitioner,	)	89-030-02-1-3-00007
	)	89-030-03-1-3-00008
	)	89-030-03-1-3-00009
	)	89-030-04-1-3-00113
	)	89-030-04-1-3-00119
v.	)	
	)	Parcels: 46-29-000-104.000-29
	)	46-29-310-101.000-29
	)	
Betty Smith,	)	Township: Wayne
Wayne Township Assessor	)	Assessment Years: 2002, 2003 and 2004
Respondent.	)	

Appeal from the Final Determination of
Wayne County Property Tax Assessment Board of Appeals

July 10, 2006

FINAL DETERMINATION

The Indiana Board of Tax Review (the "Board") having reviewed the facts and evidence, and having considered the issues, now finds and concludes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

ISSUE

1. The issue presented for consideration by the Board was:

   Whether the value as determined by the Respondent exceeds the market value-in-use of the subject property for the indicated assessment dates.

PROCEDURAL HISTORY

2. Pursuant to Ind. Code § 6-1.1-15-3, the Petitioner, All Coast Logistics and Manufacturing, Inc., filed Form 131 Petitions for Review of Assessment, petitioning the Board to conduct an administrative review of the assessments of the above captioned parcels for assessment years 2002, 2003 and 2004. The Wayne County Property Tax Assessment Board of Appeals ("PTABOA") issued its determinations regarding the assessment of the above captioned parcels for assessment years 2002 and 2003 (Petition Nos. 48-030-02-1-3-00006, 48-030-02-1-3-00007, 48-030-03-1-3-00008 and 48-030-03-1-3-00009) on October 1, 2004. The PTABOA issued its final determination concerning the 2004 assessment of Parcel No. 46-29-310-101.000-29 (Petition No. 89-030-04-1-3-00119) on February 16, 2005. The PTABOA issued its final determination concerning the 2004 assessment of Parcel No. 46-29-000-104.000-29 (Petition No. 89-030-04-1-3-00113) on March 2, 2005. The Petitioner filed Petition Nos. 48-030-02-1-3-00006, 48-030-02-1-3-00007, 48-030-03-1-3-00008 and 48-030-03-1-3-00009 with the Wayne County Assessor on October 12, 2004. The Petitioner filed Petition Nos. 48-030-04-1-3-00113 and 48-030-04-1-3-00119 with the Wayne Township Assessor on March 18, 2005.

HEARING FACTS AND OTHER MATTERS OF RECORD

3. Pursuant to Ind. Code § 6-1.1-15-4 and § 6-1.5-4-1, a hearing was held on October 13, 2005, in Richmond, Indiana before Debra Eads, the duly designated Administrative Law Judge ("ALJ") authorized by the Board under Ind. Code § 6-1.5-3-3.

4. The following persons were sworn and presented testimony at the hearing:

For the Petitioner:

Matt Nepote, Real Estate Appraiser
Rudy Fields, Fields Environmental, Inc.
Chris Brumley, President – All Coast Logistics and Warehousing, Inc.

For the Respondent:

David Fradenburg, Wayne Township Field Worker
Michael Statzer, Wayne County PTABOA Secretary
Joseph Kaiser, Wayne County PTABOA President
Marie Elstro, Wayne County PTABOA Member
Richard Lee, Wayne County PTABOA Member
Dan Williams, Wayne County PTABOA Member

5. The following exhibits were presented for the Petitioner:

Petitioner's Exhibit 1 – Property Record Card (PRC) for 46-29-310-101.000-29
Petitioner's Exhibit 2 – PRC for 46-29-000-104.000-29
Petitioner's Exhibit 3 – 3-1-02 Form 115 for 46-29-000-104.000-29
Petitioner's Exhibit 4 – 3-1-02 Form 115 for 46-29-310-101.000-29
Petitioner's Exhibit 5 – 3-1-02 Form 131 for 46-29-000-104.000-29
Petitioner's Exhibit 6 – 3-1-02 Form 131 for 46-29-310-101.000-29
Petitioner's Exhibit 7 – 3-1-03 Form 11 for 46-29-000-104.000-29
Petitioner's Exhibit 8 – 3-1-03 Form 115 for 46-29-000-104.000-29
Petitioner's Exhibit 9 – 3-1-03 Form 115 for 46-29-310-101.000-29
Petitioner's Exhibit 10 – 3-1-03 Form 131 for 46-29-000-104.000-29
Petitioner's Exhibit 11 – 3-1-03 Form 131 for 46-29-310-101.000-29
Petitioner's Exhibit 12 – 3-1-04 Form 115 for 46-29-000-104.000-29
Petitioner's Exhibit 13 – 3-1-04 Form 115 for 46-29-310-101.000-29
Petitioner's Exhibit 14 – 3-1-04 Form 131 for 46-29-000-104.000-29
Petitioner's Exhibit 15 – 3-1-04 Form 131 for 46-29-310-101.000-29
Petitioner's Exhibit 16 – 3-1-05 Form 11 for 46-29-000-104.000-29
Petitioner's Exhibit 17 – 3-1-05 Form 11 for 46-29-310-101.000-29
Petitioner's Exhibit 18 – PRC for 46-29-000-104.000-29
Petitioner's Exhibit 19 – PRC for 46-29-310-001.000-29
Petitioner's Exhibit 20 – December 2001 purchase agreement
Petitioner's Exhibit 21 – Summary of bid proposal
Petitioner's Exhibit 22 – Amendment to purchase agreement
Petitioner's Exhibit 23 – Corporate special warranty deed
Petitioner's Exhibit 24 – Real estate mortgage and security agreement
Petitioner's Exhibit 25 – Environmental disclosure document
Petitioner's Exhibit 26 – Real estate appraisal
Petitioner's Exhibit 27 – Aerial photo of subject property

Petitioner's Exhibit 28 – Exterior photos of subject property
Petitioner's Exhibit 29 – Exterior photos of subject property
Petitioner's Exhibit 30 – Exterior photos of subject property
Petitioner's Exhibit 31 – Exterior photos of subject property
Petitioner's Exhibit 32 – Exterior photos of subject property
Petitioner's Exhibit 33 – Exterior photos of subject property
Petitioner's Exhibit 34 – Exterior photos of subject property
Petitioner's Exhibit 35 – Exterior photos of subject property
Petitioner's Exhibit 36 – Exterior photos of subject property
Petitioner's Exhibit 37 – Exterior photos of subject property
Petitioner's Exhibit 38 – Interior photos of subject property
Petitioner's Exhibit 39 – Photos of subject property
Petitioner's Exhibit 40 – Interior photos of subject property
Petitioner's Exhibit 41 – Interior photos of subject property
Petitioner's Exhibit 42 – Photos of subject property
Petitioner's Exhibit 43 – Photos of subject property
Petitioner's Exhibit 44 – Photo of subject property
Petitioner's Exhibit 45 – Current property tax assessment
Petitioner's Exhibit 46 – Summary of environmental conditions
Petitioner's Exhibit 47 – Present value calculation
Petitioner's Exhibit 48 – Present value calculation
Petitioner's Exhibit 49 – 2004 Department of Local Government Finance (DLGF) Lake County industrial information
Petitioner's Exhibit 50 – Board Determination for Gerber Lewis Partnership
Petitioner's Exhibit 51 – US Dept of Labor statistics
Petitioner's Exhibit 52 – US Dept of Labor statistics
Petitioner's Exhibit 53 – Gross domestic product implicit price deflator
Petitioner's Exhibit 54 – Comparative cost indexes
Petitioner's Exhibit 55 – Valuation of properties affected by contamination
Petitioner's Exhibit 56 – The appraisal of real estate from Appraisal Institute
Petitioner's Exhibit 57 – Environmental impact valuation
Petitioner's Exhibit 58 – Impact of environmental conditions on real property
Petitioner's Exhibit 59 – Environmental property appraisal
Petitioner's Exhibit 60 – Post hearing brief

6. The following exhibits were presented for the Respondent:

Respondent's Exhibit 1 – Summary of witness testimony and exchange of evidence
Respondent's Exhibit 2 – Post hearing brief

7. The following additional items are officially recognized as part of the record of proceedings and labeled Board Exhibits:

Board Exhibit A – The Form 131 Petitions
Board Exhibit B – Notice of Hearing dated August 16, 2005
Board Exhibit C – Notice of Appearance for Charles Todd
Board Exhibit D – First stipulation of facts[1]
Board Exhibit E – Hearing Transcript

8. The property at issue in this appeal consists of two related parcels located in Richmond, Indiana at 1751 and 1761 Sheridan Street. *Board Ex.* D *(First Stipulation of Facts ¶ 1)*. The parcels are utilized for storage and light manufacturing. For purposes of this appeal, the Board will refer to the two parcels collectively as the "subject property."

9. The ALJ did not conduct an on-site inspection of the subject property.

10. The Wayne County PTABOA determined the assessed value of the property to be:

48-030-02-1-3-00006	Land:	$552,400	Improvements:	$5,263,500
48-030-02-1-3-00007	Land:	$206,400	Improvements:	$0
48-030-03-1-3-00008	Land:	$1,130,900	Improvements:	$5,263,500
48-030-03-1-3-00009	Land:	$240,800	Improvements:	$0
48-030-04-1-3-00113	Land:	$1,130,900	Improvements:	$5,348,600
48-030-04-1-3-00119	Land:	$240,800	Improvements:	$0

11. For each assessment year under appeal, the Petitioner contends the assessed value of the subject property should be $0. In the alternative, Petitioner contends that the subject property should be valued at no more than $750,000.

JURISDICTIONAL FRAMEWORK

12. The Indiana Board is charged with conducting an impartial review of all appeals concerning: (1) the assessed valuation of tangible property; (2) property tax deductions; and (3) property tax exemptions; that are made from a determination by an assessing official or a county property tax assessment board of appeals to the Indiana board under

[1] This was originally labeled as Board Exhibit C at the hearing.

any law. Ind. Code § 6-1.5-4-1(a). All such appeals are conducted under Ind. Code § 6-1.1-15. *See* Ind. Code § 6-1.5-4-1(b); Ind. Code § 6-1.1-15-4.

ADMINISTRATIVE REVIEW AND THE PETITIONER'S BURDEN

13. A petitioner seeking review of a determination of an assessing official has the burden to establish a prima facie case proving that the current assessment is incorrect, and specifically what the correct assessment would be. *See Meridian Towers East & West v. Washington Twp. Assessor*, 805 N.E.2d 475, 478 (Ind. Tax Ct. 2003); *see also, Clark v. State Bd. of Tax Comm'rs,* 694 N.E.2d 1230 (Ind. Tax Ct. 1998).

14. In making its case, the taxpayer must explain how each piece of evidence is relevant to the requested assessment. *See Indianapolis Racquet Club, Inc. v. Washington Twp. Assessor*, 802 N.E.2d 1018, 1022 (Ind. Tax Ct. 2004) ("[I]t is the taxpayer's duty to walk the Indiana Board . . . through every element of the analysis").

15. Once the petitioner establishes a prima facie case, the burden shifts to the assessing official to rebut the petitioner's evidence. *See American United Life Ins. Co. v. Maley*, 803 N.E.2d 276 (Ind. Tax Ct. 2004). The assessing official must offer evidence that impeaches or rebuts the petitioner's evidence. *Id; Meridian Towers*, 805 N.E.2d at 479.

ANALYSIS

Parties Contentions

16. The Petitioner contends that the subject property should be assessed at zero dollars ($0) or only nominal value until it completes remediation of the environmental contamination at the property. If the Board finds that it cannot assess a property as having zero or nominal value, the only reasonable value for the property is $750,000, which represents the appraised value of the subject property as if it were not environmentally contaminated minus the amount the appraiser assigned to the land in valuing the subject property under

the cost approach. While not truly reflective of the market value-in-use of the subject property, such a valuation recognizes that the land is worthless in its contaminated state.

17. The Respondent acknowledges that it did not completely understand the subject property at the time of the 2002 general reassessment. The Respondent, however, contends that its 2005 assessment of the subject property in the amount of $2,055,200 accounts for all of the obsolescence experienced by the subject property. The Respondent further contends that the effective sale price of the property, which the Respondent asserts is between $2,895,000 and $3,500,000, is the best indication of the property's market value-in-use.

18. The Petitioner presented the following evidence and testimony in support of its position:

   A. The Petitioner bought the subject property on March 29, 2002. *Tr. 27; Board Ex. D (Stip. at ¶ 1).*[2] The subject property contains approximately one-hundred (100) acres of land, an abandoned boiler building and two (2) other buildings situated parallel to one another. All told, the subject buildings contain 775,000 square feet of space. *Pet'r Exs. 1-2*. The Petitioner has not made any material changes to the subject property since 2002. *Tr. 46*.

   B. The Petitioner bought the subject property from Sanyo North America Corporation ("Sanyo"). *Pet'r Exs. 20, 22*. The subject property historically has been used for various manufacturing and warehousing activities. *Pet'r Ex. 46 (Remediation Work Plan ("RWP") at 8-9)*. The uses of the subject property have created several environmental conditions, including soil and groundwater contamination from polychlorinated biphenyls ("PCBs"), chlorinated solvents and heavy metals. *See Tr. 16, Pet'r Ex. 46, RWP at 8-9*. In 2001, Sanyo enrolled the subject property in a Voluntary Remediation Program (the "VRP" or Remediation Project") with the

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[2] In its post-hearing brief, the Petitioner asserts, without citation, that it is responsible for the taxes associated with the March 1, 2002, assessment date. *See Pet'r Ex. 60 at 2.* It appears that the Petitioner is responsible for payment of at least a portion of the taxes associated with the March 1, 2002, assessment pursuant to the written agreement governing its purchase of the subject property. *See Pet'r Ex. 20, at ¶ 14(A); Pet'r Ex. 22.* Thus, the Petitioner has standing to bring a claim regarding the March 1, 2002, assessment.

Indiana Department of Environmental Management ("IDEM"). The Petitioner applied to IDEM and took over the Remediation Project when it purchased the subject property from Sanyo. *Tr. 68-69*.

C. Sanyo originally listed the subject property for sale for approximately $400,000. *Tr. 53*. Sanyo did not provide any information on environmental issues with that listing. *Tr. 52-53*. Prior to the Petitioner's offer, Sanyo received offers ranging from $500,000 to $1,500,000. *Tr. 29*. Those offers, however, did not fully address environmental liability and the parties could not find a workable solution to support an agreement. *Id.*

D. The Petitioner had been looking for a distribution and warehouse facility that was more centrally located in relation to its top fifty (50) customers. *Tr. 27*. The Petitioner's president, Chris Brumley, ran a computer search from which he determined that the optimum distribution point for those customers would be located between Dayton and Cincinnati. *Id.* Mr. Brumley did a "loop net" search for properties within one hundred (100) miles of that location and found a listing for the subject property. *Id.*

E. In December 2001, the Petitioner offered to purchase the subject property for $3,500,000. *Tr. 29; Pet'r Ex. 20 at 18-22*. The Petitioner made its offer with the understanding that Sanyo would bear the costs of environmental remediation of the subject property. *Id.* On December 14, 2001, the Petitioner and Sanyo executed an Agreement to Sell and Purchase and Escrow Instructions between Sanyo North America Corporation as Seller and All Coast Logistics & Warehousing as Purchaser ("Original Purchase Agreement"). *Pet'r Ex. 20*.

F. After executing the Original Purchase Agreement, Sanyo received an estimate from its environmental consultant, Keramida, of $10,101,035.70 to clean up the subject property. *Tr. 32-33; Pet'r Ex. 21*. The negotiations changed after Sanyo received the estimate from Keramida; Sanyo could not afford to sell the property for $3,500,000

and clean it up for $10,000,000. *Tr. 32.* In conducting its due diligence after executing the Original Purchase Agreement, the Petitioner consulted with Rudy Fields, an independent environmental consultant. *Tr. 33*. The Petitioner believed that it could perform the remediation more cheaply by, among other things, purchasing and fueling the equipment itself rather than renting it, and training its own employees to perform some of the technical work rather than hiring subcontractors. *Tr. 76-77*. After talking to Mr. Fields, the Petitioner felt that it could perform the clean up for approximately $2,800,000 to $3,000,000. *Tr. 33*. Mr. Fields ultimately prepared a report pursuant to which he estimated the total project costs to be $2,895,013.78. *Tr. 46, cost estimates at 7.* When Hideki Yamagata, Senior Vice President of Sanyo, asked Mr. Brumely if the Petitioner would take the building, Mr. Brumely said yes. *Tr. 33-34*.

G. The parties then executed the First Amendment to the Agreement of Purchase and Sale ("Amended Purchase Agreement"). *Tr. 34; Pet'r Ex. 22*. The stated purchase price was reduced to $1.00, and the Petitioner agreed to assume responsibility for environmental liabilities. *Pet'r Ex. 22 at 1-2, 6-11.* The Petitioner further agreed to indemnify and defend Sanyo with regard to any liability relating to the environmental contamination and to purchase an environmental insurance policy naming Sanyo as an additional insured. *Id*. Sanyo conveyed a warranty deed to the Petitioner and the Petitioner granted Sanyo a mortgage to secure the Petitioner's performance of its environmental remediation obligations. *Tr. 35; Pet'r Exs. 23-24*. The Petitioner did not have any special relationship with Sanyo nor did it receive any discount in the sale price that would not have been available to another purchaser. *Tr. 36*.

H. Mr. Fields prepared a report summarizing the environmental conditions at the subject property ("Report"). *Tr. 64; Pet'r Ex. 46*. The Report compiled all available sampling data, figures, and costs to clean up the subject property. *See id*. The Report also included a copy of the 2003 Remediation Work Plan ("RWP") that the Petitioner submitted to IDEM. Two primary sources of contamination at the subject property threaten human health and the environment. First, an area identified as the

"Northwest Parking Lot" contains unexploded ordinance ("UXO") and buried drums. Second, the "East Disposal Area" contains buried drums with unknown contents, industrial and commercial wastes and some UXO. *Id.*

I. The RWP sets forth the Petitioner's plans to clean up the subject property. *Tr. 70-71*. A Phase II investigation has been completed, and the Petitioner has submitted the RWP to IDEM. *Tr. 71-73*. The Petitioner continues to perform additional investigation, and it is engaged in ongoing discussions with IDEM. *Tr. 80*. The Petitioner will not begin active remediation until IDEM approves the Petitioner's RWP. *Id*. The subject property is significantly impaired, and IDEM has identified the property as part of a regional groundwater problem known as the "Richmond Corridor." *Tr. 81-82*. Although the subject property is enrolled in a voluntary remediation program, IDEM or the federal government likely would order the Petitioner to complete the work if it terminated its voluntary clean up efforts. *Id.*

J. Mr. Fields' clean up approach includes source removal; constructing physical barriers preventing contact with the contamination; and placing restrictive covenants on the property preventing excavation and use of groundwater. *Pet'r Ex. 46, RWP at 93-94*. Mr. Fields determined that the cost to cure or clean up the subject property would be at least $2,895,013.78. *Tr. 78; Pet'r Ex. 46, cost estimates at 7*. The Petitioner would incur those costs over a four-year period beginning in 2005. *Tr. 78; Pet'r Ex. 47*. The Petitioner used the capitalization rate determined by Mr. Nepote in valuing the subject property under the income approach to discount the clean up costs to a present value of $1,600,764 as of 2002. *Pet'r Ex. 47; Tr. 100; Pet'r Ex. 26 at 83-84*.

K. Although the Petitioner bought the subject property to use as a warehousing and distribution center, those plans did not materialize. The Petitioner currently leases the subject property to various entities that use it for light manufacturing and warehousing operations. *Tr. 38*. The Petitioner has made no material improvements to the subject buildings, although it plans to do so once the RWP is completed. *Tr.*

46-47. When the Petitioner bought the subject property, the occupancy level was between 45% and 50%. *Tr. 42*. By 2005, that level had improved only marginally to approximately 50%. *Id*.

L. The Petitioner engaged Matt L. Nepote, a certified general appraiser, to determine the market value of the subject property as of March 1, 2002. *See Pet'r Ex. 26, passim.* Mr. Nepote did not address environmental factors influencing the market value of the subject property, and his appraisal estimates the market value of the subject property without considering the loss of value associated with the environmental contamination at the subject property. *See Tr. 109-110; Pet'r Ex. 46 at transmittal letter*.

M. Mr. Nepote personally inspected the subject property. *Tr. 114-15*. He also researched warehousing market conditions in Richmond, Indiana. *Tr. 111*. Mr. Nepote testified that the subject property faces serious competition both from existing older facilities and from newly constructed facilities. *Tr. 111-12*. Mr. Nepote also testified that the local market for manufacturing and warehousing is "soft, at best." *Tr. 111*. Mr. Nepote described significant functional deficiencies in the subject property, such as a leaky roof, paved surfaces that are in poor condition, and HVAC systems that are not functioning. *Tr. 112-13*.

N. Mr. Nepote used three approaches to estimate the market value of the subject property – the income capitalization, sales comparison and cost approaches.

O. Under the income capitalization approach, Mr. Nepote first estimated the potential rental income that the subject property may produce, which he referred to as its "gross potential rental income." *Tr. 117; Pet'r Ex. 26 at 73-74*. Next, Mr. Nepote subtracted anticipated vacancy and collection losses from the gross potential rental income to yield the "effective gross income" of the subject property. *Tr. 117; Pet'r Ex. 26 at 78*. In determining vacancy and collection loss, Mr. Nepote looked both at the actual vacancy rate experienced by the subject property and the market conditions

prevailing in the Richmond area. *Tr. 146-149*. Mr. Nepote then examined the expenses associated with the operation of the subject property, such as utilities, maintenance and replacement reserves. Mr. Nepote relied upon information provided by the Petitioner, but he discarded various expenses that he determined were not appropriate to use in preparing a real estate appraisal. *Tr. 144-46; Pet'r Ex. 26 at 79*. Mr. Nepote also excluded a $100,800 expense for environmental clean up because he prepared his appraisal on the assumption that no environmental issues affected the property. *Pet'r Ex. 26 at 79*. Mr. Nepote testified that the expense level of the subject property was consistent with the market and with customary management practices for that type of property. *Tr. 148-49*. Mr. Nepote subtracted what he viewed to be the legitimate expenses for the subject property from its effective gross income to arrive at a "net operating income" for the subject property of $171,635.49. *Pet'r Ex. 26 at 81*.

P. Mr. Nepote capitalized the net operating income of the subject property using the direct capitalization approach. *Tr. 129; Pet'r Ex. 26 at 82*. Mr. Neopte used market extraction and the mortgage equity techniques to compute a capitalization rate. Because his appraisal was to be used in an appeal of real estate taxes, Mr. Nepote removed those taxes as an expense so as not to underestimate the value of the property. *Tr. 129-30; Pet'r Ex. 26 at 83-84*. Mr. Nepote therefore calculated the effective property tax rate and added that to the capitalization rate. *Id*. Mr. Nepote applied an overall capitalization rate of 14.14% to the subject property's net operating income and arrived at an estimated market value for the subject property of $1,215,000. *Pet'r Ex. 26 at 83-84*.

Q. In applying the sales comparison approach, Mr. Nepote compared the subject property's physical characteristics and geographical layout to the characteristics and layouts of other similarly situated properties. *Tr. 116*. Mr. Nepote evaluated certain parameters to facilitate the comparison, including: location, building and warehousing space, age, type of heating systems, dock facilities, percentage of office space, zoning, and utilities. *Tr. 115-16*. Mr. Nepote adjusted the sale prices of the

comparable properties to account for differences between those properties and the subject property with regard to the identified parameters and arrived at a price per square foot of gross building area for each comparable property. *See Pet'r Ex. 26 at 52-57*. The adjusted sale prices ranged from $2.97 per square foot to $4.04 per square foot. *Id.* Mr. Nepote gave the most weight to comparable properties with sale prices of $4.04 per square foot and $3.58 per square foot due to the degree of similarity between those properties and the subject property with respect to location and construction. *Pet'r Ex. 26 at 54*. Mr. Nepote then determined that the subject property should be valued at the rate of $3.80 per square foot of gross building area, which resulted in an estimated market value of $2,950,000 under the sales comparison approach. *Tr. 122; Pet'r Ex. 26 at 55*.

R. Mr. Nepote also testified that the NATCO building, which he did not include as a comparable property in his appraisal, had recently sold for an amount equal to $1.65 per square foot. *Tr. 123*. According to Mr. Nepote, had the NATCO sale been available at the time he prepared his appraisal, he would have used it, despite the fact that the sale occurred three years after the appraisal's valuation date. *Tr. 125*. Mr. Nepote did not view the time difference as significant because "things don't tend to change a lot" in the area. *Tr. 125*. In fact, Mr. Nepote testified that, of all the comparable properties he identified, the NATCO property was by far the most comparable to the subject property. *Id*. Mr. Nepote testified that if he were to multiply the $1.65 per square foot sale price of the NATCO property by the amount of usable building area in the subject property, the resulting value would be $1,280,000. *Tr. at 124*.

S. Under the cost approach, Mr. Nepote determined the fair market value of the subject land and used the Respondent's estimate of value for the replacement cost new of the subject buildings. *Pet'r Ex. 26 at 49; Tr. 118*. Mr. Nepote adjusted the replacement cost new of the buildings to account for depreciation, which included physical deterioration and functional and external obsolescence. *Tr. 118; Pet'r Ex. 46 at 49-50*. Mr. Nepote used the market extraction method to estimate an appropriate amount

of depreciation. *Tr. 118*. In doing so, Mr. Nepote reviewed the allocated sale prices of three other buildings as compared to their respective replacement costs to determine total depreciation on a percentage basis. *Tr. 119*. Mr. Nepote estimated the market value of the subject property to be $3,172,500 using the cost approach. *Tr. 120; Pet'r Ex. 26 at 51*.

T. Mr. Nepote reconciled the values he determined under the three approaches to arrive at a final conclusion of value of $1,250,000. *Tr. 130; Pet'r Ex. 26 at 89-90*. Mr. Nepote gave the income capitalization approach the greatest weight, because the subject property "is the type of property that is typically bought for its ability to produce income." *Tr. 131; see also Pet'r Ex. 26 at 89.* Mr. Nepote gave significantly less weight to the cost approach. In fact, Mr. Nepote testified that he would not even have included the cost approach in his appraisal if he had not been asked to do so. *Tr. 126*. Mr. Nepote felt that the age of the subject buildings meant that cost of construction bore little relationship to the property's market value. *Id*.

U. On July 29, 2005, the Respondent issued Form 11s reassessing both parcels comprising the subject property. The assessment for the parcel at 1751 Sheridan Street was reduced to a total of $1,817,500. Similarly, the assessment for the parcel at 1761 Sheridan Street was reduced slightly to $237,700 (land only). *Board Ex. D, Stip. at § 12; Pet'r Exs. 16-19*. Thus, the Respondent reduced the total assessment of the subject property to $2,055,200, despite the fact that there had been no material changes to the property since the prior assessments. The Respondent applied an 80% obsolescence adjustment where before it had applied no obsolescence with the exception of two small items. *Tr. 168*.

V. In light of Mr. Fradenburg's testimony, the Petitioner contends that the undisputed evidence demonstrates that the assessments under appeal are incorrect. The Petitioner, however, believes that the 2005 assessment is also excessive and that subject property should be assessed for zero or nominal value.

W. The Petitioner bases its contention on a combination of Mr. Nepote's appraisal and Mr. Fields' testimony regarding the costs of environmental remediation. *See Tr. 19-21*. As an initial matter, the Petitioner contends that Mr. Nepote's appraisal and testimony establishes the market value-in-use of the subject property as if it were in an environmentally unimpaired state. *Tr. 19*. The Petitioner, however, contends that the appraised value must be adjusted to account for the loss in value attributable to the environmental contamination at the subject property. *Tr. 20*. In support of its position, the Petitioner points to a statement in the Real Property Assessment Guidelines for 2002 – Version A ("Guidelines") identifying "[n]oise, air, water, or light pollution" as causes of obsolescence. REAL PROPERTY ASSESSMENT GUIDELINES FOR 2002 – VERSION A, App. F at 4. *Pet'r Ex. 60 at 24*. The Petitioner also points to excerpts from the APPRAISAL OF REAL ESTATE (12th Ed.), the "Standard on the Valuation of Properties Affected by Environmental Contamination" (July, 2001) published by the International Association of Assessing Officials ("IAAO Standard") and several other works for the proposition that environmental conditions should be considered in valuing properties. *See Pet'r Exs. 55-59; Pet'r Ex. 60 at 24-25.*

X. Given that the Petitioner presented undisputed evidence concerning the presence of environmental contamination at the subject property, the Petitioner contends that the only issue before the Board is how to quantify the effect of such contamination on the property's market value-in-use. *See Pet'r Ex. 60 at 23-24*. The Petitioner relies on the excerpt from APPRAISAL OF REAL ESTATE (12th Ed.), the IAAO Standard and other professional literature for the proposition that the appropriate way to value environmentally contaminated property is to subtract the present value of the costs to cure the contamination from the value of the property in an unimpaired state. *See Pet'r Exs. 55-59* (APPRAISAL OF REAL ESTATE (12th Ed.); IAAO Standard; Environmental Analysis & Valuation, Inc., "Environmental Impact Valuation: Procedures and Cases Studies," in IAAO, ISSUES CONFRONTING PROPERTIES AFFECTED BY CONTAMINATION OR ENVIRONMENTAL PROBLEMS (2002); Colorado Division of Property Taxation, "Environmental Property Appraisal" in IAAO, ISSUES CONFRONTING PROPERTIES AFFECTED BY CONTAMINATION OR ENVIRONMENTAL

PROBLEMS (2002); Smart, Wynes "The Impact of Environmental Conditions on Real Property.").

Y. The Petitioner therefore subtracted what it determined to be the present value of the cost to cure the contamination ($1,600,714) from the value of the subject property in an unimpaired state as estimated by Mr. Nepote's appraisal ($1,250,000). *Tr. 20-21*. Thus, according to the Petitioner, the subject property has zero or negative value.

Z. The Petitioner contends that its valuation analysis is supported by the arms-length transaction pursuant to which it bought the subject property for $1.00. According to the Petitioner, the sale price demonstrates that the subject property has no value-in-use unless and until IDEM approves the RWP and it is successfully implemented. The Petitioner acknowledges that it signed an agreement to purchase the subject property for $3,500,000. The Petitioner, however contends that the agreement was contingent upon the Petitioner's performance of a due diligence investigation, and that the parties subsequently restructured the transaction. Thus, there is no basis for believing that the original transaction ever would have been completed, and the proposed sale price has no relevance to these proceedings.

AA. The Petitioner further contends that, should the Board find that assigning zero value to the subject property violates public policy, the maximum value that could be supported would be $769,825. *Tr. 21*. The Petitioner basis its claim on the theory that there is no reason to refuse to apply a 100% negative influence factor to the subject land in light of the extensive contamination. *Id*. The $769,825 figure is what remains if the land value as determined by Mr. Nepote's appraisal is subtracted from the appraisal's overall estimate of value. *Id*.

BB. Finally, the Petitioner contends that, if the Board assigns anything more than nominal value to the subject property, it should trend that amount back to a value as of January 1, 1999, using an index for inflation. *Pet'r Ex. 60 at 29-30*. The Petitioner contends that such an approach is consistent with guidance from the

Department of Local Government Finance and with a prior decision of the Board. *Id*. The Petitioner further claims that the Consumer Price Index ("CPI") is the proper index for trending purposes, and that the change in the CPI between January 1, 1999, and March 1, 2002, amounts to 8.1%. *Id*. Consequently, the Board should reduce any valuation other than a nominal valuation by 8.1% to reflect a value as of January 1, 1999. *Id*.

19. The Respondent presented the following evidence and argument in support of its position.

A. The Respondent asserts that the Petitioner did not establish a prima facie case justifying any reduction beyond the effective sale price of the subject property. The Respondent contends that the effective sale price is between $3,500,000 - the sale price set forth in the Original Purchase Agreement - and $2,895,000 - Mr. Fields' estimate of the costs of remediation. *See Tr. 190-93; Resp't Ex. 2 at 6-16*. To the extent that the Board finds that the Petitioner established a prima facie case for a further reduction, the Respondent contends that the Board should not reduce the value of the subject property below the Respondent's 2005 assessment of $2,055,200. *See Resp't Ex. 2 at 15*. The lowest amount to which the value should be reduced is $1,250,000 – the amount estimated by Nr. Nepote in his appraisal. *Id*.

B. As an initial matter, the Respondent contends that the Petitioner's reliance on the $1.00 stated sale price set forth in the Amended Purchase Agreement is misplaced. The Respondent contends that special financing and concessions affected the sale price and that such price therefore is not reflective of the subject property's market value. *Resp't Ex. 2 at 10*. Specifically, the Respondent points to the facts that the Petitioner agreed to assume liability for the environmental remediation, that Sanyo paid the real estate agent a commission of $160,000, that the Petitioner gave Sanyo a mortgage, and that the Petitioner was required to purchase an environmental insurance policy in the amount of $10,000,000 naming Sanyo as an insured. *Tr. 54; Resp't Ex. 2 at 7-9; Pet'r Ex. 22 at 10; Pet'r Ex. 23*. The Respondent contends that

the transaction is more analogous to the Petitioner purchasing the subject property for $1.00 and assuming an existing mortgage. According to the Respondent, the purchase price under such a scenario would be the amount of the mortgage rather than the nominal amount of $1.00. *Resp't Ex. 2 at 6-7*. Thus, the Respondent contends that the actual purchase amount is either the $3,500,000 originally agreed to by the parties prior to the deal being restructured, or the $2,895,000 estimated by Mr. Fields as the cost of curing the environmental contamination. *Id*.

C. The Respondent also points to the testimony of David Fradenburg, an employee of the Wayne County Assessor's office who is a Level II certified assessor for the State of Indiana. *Tr. 161*. Mr. Fradenburg testified that he met with Mr. Sullivan[3] to try to "get a better vacancy issue, obsolescence issue, land determinations, things of that nature" with regard to a change in the subject property's 2005 assessment. *Tr. 162-63*. Mr. Fradenburg arrived at a figure of 80% obsolescence after considering the vacancy rate at the subject property and some functional issues that existed in the building for 2005. *Tr. 163*. In addition, the Respondent placed a 95% negative influence factor on the "environmental acreage" of the subject land. *Tr. 166; see also Resp't Ex. 1*. The Respondent also made other changes, including fixing some encoding errors, and arrived at a total assessment of $2,055,200. *Tr. 162-71*. Mr. Fradenburg testified that the Respondent would have assessed the property for around $2,055,200 in 2002-2004 if the Respondent had possessed the same knowledge about the subject property that it possessed when it made the 2005 assessment. *Tr. 170-71*.

D. The Respondent also takes issue with the Petitioner's methodology of subtracting the anticipated costs of curing the environmental contamination from Mr. Nepote's estimate of the market value of the subject property in an unimpaired state. The Respondent contends that Mr. Nepote's estimate of value already incorporates the effects of the environmental contamination. *Resp't Ex. 2 at 11-12*. The Respondent acknowledges that Mr. Nepote testified that he prepared his appraisal with the

[3] It appears that the Petitioner employs Mr. Sullivan, although the record does not reflect the capacity in which he is employed.

assumption that environmental conditions in no way affected the occupancy levels of the subject property. The Respondent, however, points to the testimony of Brumley and Fields to show that Mr. Nepote's consideration of the subject property's historical income and actual vacancy rate necessarily incorporated the effects of contamination into his opinion of value. Thus when Mr. Brumley was asked if there was any reason why the subject property had not been able to achieve a higher occupancy level, he answered, "Yeah, We can't – there's certain areas of the - the plot that we can't make any upgrades to the facility because of - we can't have environmental constraints." *Tr. 42-43*. Similarly, when asked if the environmental issues had an effect on the subject property's income, Mr. Brumley responded: "Definitely. It – it renders probably 30 to 40 percent of the building, you know, not useless, but it's useless to any practical utilization for warehousing and distributing." *Tr. 57*. Likewise, Mr. Fields testified that he had advised the Petitioner not to allow tenants to occupy certain portions of the subject property and that the Petitioner had followed his advice. *Tr. 85*.

E. The Respondent also contends that, by deducting certain expenses in determining the net operating income of the subject property, Mr. Nepote may have included some discount for environmental contamination in his estimate of value. Specifically, the Respondent points to Mr. Nepote's inclusion of $90,645 worth of insurance as an expense. *Tr. 143*. The Respondent contends that Mr. Brumely did not specifically identify the risk against which the Petitioner was insuring with regard to that expense. *See Tr. 181*. Given that the Petitioner was required to purchase an environmental insurance policy as part to the Amended Purchase Agreement, the Respondent contends that the insurance expense used by Mr. Nepote may be related to the environmental contamination at the subject property. *See Tr. 194*.

F. The Respondent further notes that the Petitioner did not offer as "evidence" the IAAO Standard upon which it relies to support its quantification of the effect of the environmental contamination on the market value of the subject property. *Resp't Ex. 2 at 12; Tr. 25*. Moreover, in the event that the Board accepts the IAAO Standard for

consideration, the Respondent contends that the IAAO Standard does not support the Petitioner's claim for a dollar-for-dollar reduction in market value to account for the impact of environmental contamination.

G. The Respondent points to several sections of the IAAO Standard in support of its position.

- Section 4.1 notes that fully deducting the costs of cure may overstate the decline in value of a property because the value in use concept would then be ignored. It suggests that a property which is still in use, or which can be used in the near future, has a value to the owner. That proposition is true even if the costs to cure exceed the unencumbered value of the property.
- Section 4.2 indicates that a property may be able to maintain an income stream while costs of remediation are incurred, and the costs may be amortized over a longer period.
- Section 4.4 notes that some states, such as Indiana, have limited liability for non-responsible owners and prospective buyers, and that the effect of liability on value may be more or less pronounced depending upon state actions.
- Section 6.1 indicates that the sales comparison approach to value would best be supported via comparison with similarly affected properties, and Mr. Nepote's appraisal contains no such comparables.
- Section 6.3 notes that courts have held that there is a "value-in-use" to the owner of contaminated property even where no other market exists as long as the owner continues to operate the facility.
- Section 7.3 indicates that period in which the value of the property is affected by contamination must be established. The shorter the period, the less probable the effect on value because the disruption to the property's income stream is less pronounced and the perception of the property as "clean" will occur sooner. The period can also be important because it may be inappropriate to take into account costs that are incurred later than a certain date, such as the assessment date. The Respondent contends that this section

is particularly applicable. According to the Respondent, the Petitioner could sell the subject property in the next few months, and structure the deal so that the purchaser takes over the voluntary remediation program and is responsible for the actual clean-up costs. Allowing a dollar-for-dollar reduction of the anticipated costs for curing the contamination would provide the Petitioner with a windfall tax reduction without suffering any diminution in the value-in-use of the property beyond the diminution in its income stream that is already reflected in Mr. Nepote's appraisal.

Resp't Ex. 2 at 12-13; Pet'r Ex. 55.

H. The Respondent also points to a document entitled Valuation of Lake County Industrial Facilities Greater than $25 Million in Value for the 2002 General Reassessment, which was issued by the Department of Local Government Finance ("DLGF") and presented as Petitioner's Exhibit 49. The Respondent observes that, although the DLGF noted that large portions of land underlying certain integrated steel mills in Lake County had potential environmental contamination, it valued all land at $19,000 per acre based upon the amount paid by Ispat International to purchase the Inland Steel Mill. *Resp't Ex. 2 at 13*.

I. Finally, the Respondent contends that the subject property cannot have zero or nominal value because the Petitioner is actually putting the property to use. Assessing the subject property at zero or nominal value would not permit any distinction between impaired, usable properties and those properties that are so contaminated that they cannot be used for any purpose. *Resp't Ex. 2 at 12*.

<u>Discussion</u>

20. The Respondent does not seriously dispute that the assessments under appeal are incorrect. The Respondent effectively concedes that the subject property is worth no more than $2,895,000 to $3,500,000, which the Respondent characterizes as the effective sale price from the Petitioner's March 29, 2002, purchase of the subject property.

Moreover, the Respondent's own witness, David Fradenburg, testified that the Respondent likely would have assessed the subject property for $2,055,200 in 2002-2004 had it possessed the same knowledge about the subject property that it possessed when it performed the 2005 assessment. *Tr. 170-71*. Thus, the Petitioner clearly established the first prong of its prima facie case. The parties, however, disagree as to what the correct quantification of the market value-in-use of the subject property is. The Board therefore must address whether the Petitioner established a prima facie case for a reduction in assessment beyond the amount effectively conceded by the Respondent.

21. The Petitioner contends that the subject property should be assessed for zero dollars ($0) or nominal value. The Petitioner arrives at this value in two ways. First, the Petitioner contends that its cost to cure the environmental contamination at the subject property exceeds the market value-in-use of the property in an unimpaired state. Second, the Petitioner asserts that it purchased the subject property for $1.00 in March 2002.

22. The Petitioner's first contention hinges initially upon the probative value of Mr. Nepote's appraisal of the subject property in an unimpaired state. It is well established that a taxpayer may use an appraisal prepared in accordance with the Manual's definition of true tax value to rebut the presumption that an assessment is correct. 2002 REAL PROPERTY ASSESSMENT MANUAL at 5 (incorporated by reference at 50 IAC 2.3-1-2); *Kooshtard Property VI*, 836 N.E.2d at 505-06 n.6 ("[T]he Court believes (and has for quite some time) that the most effective method to rebut the presumption that an assessment is correct is through the presentation of a market value-in-use appraisal, completed in conformance with the Uniform Standards of Professional Appraisal Practice [USPAP].").

23. Mr. Nepote, who is a certified appraiser, estimated the market value-in-use of the subject property using three generally accepted methods of appraisal – the cost, income and sales comparison approaches to value. *Nepote testimony; Pet'r Ex. 26 at 29-89*; *see also* MANUAL at 13 ("Mass appraisal and single-property appraisal methods are based upon what are known as the three approaches to value. These approaches are the cost

approach, the sales comparison approach, and the income approach."). Moreover, Mr. Nepote certified that he performed his appraisal in conformity with USPAP. *Pet'r Ex. 26 at 91*. Thus, Mr. Nepote's appraisal constitutes probative evidence of the subject property's market value-in-use without regard to the impact of environmental contamination.

24. Mr. Nepote, however, valued the subject property as of March 1, 2002. *Pet'r Ex. 26 at 89-90*. Thus, the Petitioner is required to explain how Mr. Nepote's opinion of value relates to the subject property's market value-in-use as of January 1, 1999 – the valuation date set forth in the Manual. *See* MANUAL at 4, 8; *see also Long v. Wayne Twp. Assessor,* 821 N.E.2d 466, 471 (Ind. Tax Ct. 2005) (holding that an appraisal indicating the market value of a property on December 10, 2003, lacked probative value in an appeal from the 2002 assessment of that property).

25. The Petitioner contends that it is unnecessary to relate Mr. Nepote's estimate of value to a specific value as of January 1, 1999, because the subject property has only nominal market value once the present value of the costs of environmental remediation are considered. Nonetheless, the Petitioner contends that if one were to trend Mr. Nepote's appraisal to a value as of January 1, 1999, utilization of inflation indexes is the proper methodology for doing so. The Respondent submitted information regarding three different indexes: the consumer price index ("CPI"), the producer price index ("PPI") and the "Gross Domestic Product: Implicit Price Deflator" ("Price Deflator"). *Pet'r Exs. 51-53*. The Petitioner also presented calculations under the CPI and Price Deflator indicating inflation rates of 8.1% and 4.92%, respectively. *Pet'r Exs. 51, 53*. The Petitioner asserts, without explanation, that the CPI is the most appropriate of the indexes to use in trending the property's March 1, 2002, value to a value as of January 1, 1999. *Pet'r Ex. 60 at 30.*

26. The Board agrees that parties may use inflation indexes to trend appraised values to a value as of January 1, 1999. As the Petitioner points out, the Board previously has found that a national inflation index may be used to establish a property's market value in use as

of January 1, 1999, in absence of data more specifically targeted to the property's geographic location. *See Pet'r Ex. 50* (*Gerber Lewis Partnership, et. al. v. Center Twp. Assessor*, Indiana Bd. of Tax Review, Pet. Nos. 34-002-1-4-00113 et. al. (July 20, 2005)). Of the inflation indexes presented by the Petitioner, the Board finds the CPI to be the most persuasive. The source of the information is clearly identified on the Petitioner's exhibit, and the calculations used by the Petitioner are self-explanatory. *See Pet'r Ex. 51.* Thus, the Petitioner established a prima facie case that the market value-in-use of the subject property, as of January 1, 1999, does not exceed $1,148,750 ($1,250,000 x 91.9%).

27. The Respondent did little to impeach the reliability of Mr. Nepote's opinion of value of the property in an unimpaired state. At most, the Respondent explored three points relating to the reliability of Mr. Nepote's opinion. First, the Respondent asked Mr. Nepote about his reasons for choosing whether to include various expenses provided by the Petitioner in determining the net operating income of the subject property. Next, the Respondent asked Mr. Nepote whether his conclusions under the three approaches to value typically were more in line with each other than were his conclusions in the present case. Finally, the Respondent questioned Mr. Nepote concerning his knowledge about the NATCO property that Mr. Nepote referenced in his testimony.

28. In each instance, Mr. Nepote provided credible answers that did not detract from the reliability of his opinion of value. For example, Mr. Nepote testified that he examined the expenses provided to him by the Petitioner and disregarded various items. *Tr.* 144-46. In his appraisal report, Mr. Nepote specifically identified several items that he excluded as not being proper expenses to use in a real estate appraisal. *See Pet'r Ex. 46 at 79.* Similarly, Mr. Nepote acknowledged that his conclusions under the three approaches to value typically would be more in line with each other; however, he also testified that he did not consider the cost approach to be relevant to the appraisal of the subject property and would not have considered that approach had he not been specifically asked to do so. *Tr. 126.* With respect to his sales comparison approach, Mr. Nepote testified: "the sales data just really isn't quite what I would have liked it to be. And when that's the case, it

really tends to compromise the reliability of that approach to value." *Tr. 122*. Mr. Nepote also testified that he had appraised the NATCO property on two occasions, and that he had interviewed the realtor involved in the September 2005 sale of that property. *Tr. 136-37*. In any event, Mr. Nepote's testimony regarding the NATCO property is merely tangential to his opinion of value, given that he arrived at his opinion without considering the sale of that property.

29. The Respondent seeks to rebut Mr. Nepote's appraisal with alternative quantifications of the market value-in-use of the subject property. First, the Respondent points to what it deems to be the effective sale price of the subject property. According to the Respondent, the Petitioner effectively bought the subject property for at least $2,895,013.78 – the Petitioner's estimated cost to cure the environmental contamination. In fact, the Respondent contends that the real sale price was $3,500,000, as contained in the Original Purchase Agreement.

30. While the sale price of a property often is the best evidence of that property's market value, the price must be readily quantifiable. As an initial matter, the Board finds that the $3,500,000 sale price specified in the original Purchase Agreement is not probative of the subject property's market value-in-use given that the parties ultimately did not engage in a transaction at that price. The Board, however, agrees with the Respondent that the Petitioner's assumption of liability represents consideration for the sale of the subject property that has substantial value above and beyond the $1.00 cash payment specified in the Amended Purchase Agreement. Nonetheless, there is insufficient evidence by which to quantify the value of that assumption of liability with a significant degree of reliability. The $2,895,013.78 amount relied upon by the Respondent is simply Mr. Fields' estimate of the costs of clean up. Those costs ultimately could be lower or higher. Moreover, Mr. Fields projected that the Petitioner would incur remediation costs through 2008. *Tr. 100; Pet'r Ex. 47*. Thus, even if Mr. Fields' estimate generally were a sufficient quantification of value, one still would have to discount his estimate to present value as of 2002. The Respondent did not offer any evidence concerning what an appropriate discount would

be.[4] Given the uncertainties inherent in the Respondent's proposed quantification of the sale price, the Board finds Mr. Nepote's opinion to be more probative of the subject property's market value-in-use.

31. Finally, the Respondent points to the testimony of David Fradenburg concerning the Respondent's assessment of the subject property in 2005. As indicated above, Mr. Fradenburg testified that, after considering the vacancy rate at the subject property and other obsolescence issues, the Respondent applied an obsolescence adjustment of 80% to the subject improvements. Mr. Fradenburg further testified that the Respondent applied a negative influence factor of 95% to the "environmental acreage," which the Respondent apparently viewed as consisting of twenty-seven (27) acres. *Tr. 163, 166; see also Resp't Ex. 1*.

32. Mr. Fradenburg's testimony regarding the basis for the 2005 assessment is wholly conclusory. Mr. Fradenburg did not testify regarding how the Respondent arrived at its obsolescence adjustment or negative influence factor. In fact, when asked whether he used any type of quantification or calculation method to arrive at his estimate of 80% obsolescence, Mr. Fradenburg replied "[n]ot at all." *Tr. 173*. The Board therefore finds that the 2005 assessment lacks probative value regarding the market value-in-use of the subject property.

33. Thus, the Petitioner has established by a preponderance of the evidence that the market value in use of the subject property, as of January 1, 1999, does not exceed $1,148,750.

34. The Petitioner, however, does not rest solely upon Mr. Nepote's appraisal, which the Petitioner contends does not account for the substantial impact of environmental

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[4] When discounted at the rate proposed by the Petitioner, Mr. Fields' estimated cost of remediation had a present value of $1,600,764. *See Pet'r Ex. 47*. As the Respondent demonstrated at hearing, however, Mr. Fields did not actually perform the present value calculation and did not understand it. *Tr. 83-84, 94*. The Petitioner did not present any witness to testify regarding how that calculation was performed or why the discount rate selected was appropriate to use in determining present value. Instead, the Petitioner contends that it simply applied the capitalization rate used by Mr. Nepote in his income approach. *See Tr. 101; Pet'r Ex. 60 at 8, 27*. The Board therefore gives little weight to the Petitioner's present value calculation.

contamination on the market value-in-use of the subject property. The Petitioner contends that the Board must deduct the present value of the costs of remediation, as estimated by Mr. Fields, from Mr. Nepote's appraisal in order to establish the market value-in-use of the subject property.

35. The Petitioner relies upon several pieces of professional literature to support its position, including the IAAO Standard. *See Pet'r Exs. 55-59.* Each piece of literature referenced by the Petitioner appears to be directed to professional practitioners, such as assessors and appraisers. *See id.* The Petitioner's own expert witness, however, did not apply that literature in valuing the subject property. In fact, Mr. Nepote expressly disclaimed consideration of any environmental contamination in preparing his appraisal. *See Pet'r Ex. 26 at cover letter*. Mr. Nepote did testify on direct examination that it would be logical for a buyer to deduct remediation costs from the amount that he is willing to pay for impaired property. *Tr. 132-34*. On cross-examination, however, Mr. Nepote clarified that his testimony in that regard was not his professional opinion as an appraiser, but was in the nature of speculation as to how potential buyers and sellers might behave. *See Tr. 135*.

36. The lack of expert testimony on how to account for environmental contamination is significant. Even a cursory review of the literature submitted by the Petitioner demonstrates that the authors do not uniformly advocate mechanically subtracting the present value of the cost of remediation from the unimpaired value of contaminated property in all instances. In fact, the IAAO Standard specifically cautions against such a mechanical application. Thus, the IAAO Standard provides:

> There is a tendency to discount [the unencumbered value] based on costs related to remediating or isolating environmental contamination. Fully deducting the costs may overstate the decline in value because the value in use concept would then be ignored. Value in use suggests that a property which is still in use, or which can be used in the near future, has a value to the owner. This would be true even if costs to cure environmental problems exceed the nominal, unencumbered value.

Pet'r Ex. 55 (IAAO Standard ¶ 4.1). The IAAO Standard further provides:

> Cost to cure must be recognized, but it is usually not appropriate to deduct such costs on a dollar for dollar basis, as an owner's expenditures are not conclusive of value. . . . Great care should be taken in this regard to gauge and interpret the marketplace adequately. In some cases, it may be appropriate to treat these costs as capital improvements, to be depreciated over the useful life of the property or improvements (if their life is shorter).

Id. (IAAO Standard at ¶ 6.2.1) (citations omitted).

37. Moreover, both the literature submitted by the Petitioner and case law addressing the issue demonstrate that identification of appropriate methodologies for valuing environmentally contaminated real estate is an evolving question. Thus, the excerpt from the APPRAISAL OF REAL ESTATE (12th Ed.) submitted by the Petitioner states: "[t]he appraisal of real property impacted by environmental contamination and any accompanying stigma is an area of ongoing investigation and appraisal scholarship subject to an ever-changing legal environment." *Pet'r Ex. 56* (The Appraisal Institute, THE APPRAISAL OF REAL ESTATE (12th Ed.) 216).

38. Similarly, while the Board has been unable to find a published Indiana decision directly on point, courts from other jurisdictions have split as to whether simple deduction of the costs of remediation from the unimpaired value of a property is an allowable methodology by which to establish the market value of an environmentally impacted property. *Compare, e.g., Inmar Assocs., Inc. v. Borough of Carlstadt*, 549 A.2d 38 (N.J. 1988) (rejecting taxpayer's claim for a dollar-for-dollar reduction based upon cost of clean-up and discussing other potentially appropriate ways to value contaminated property) and *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 621 N.W.2d 518 (2001) with *Commerce Holding Corp. v. Bd. of Assessors of Town of Babylon*, 88 N.Y.2d 724, 673 N.E.2d 127, 131, 649 N.Y.S.2d 932 (N.Y. Ct. of App. 1996) (upholding valuation that included deduction for environmental contamination in amount of outstanding cleanup costs). In some instances, courts that otherwise recognize

the viability of such a methodology caution against its use in cases where it would lead to zero or nominal value for a property that is actually being used. *E.g. Commerce Holding Corp.*, 673 N.E.2d at 772 n. 5 ("The use of this method would be disfavored, for example, when the property is capable of productive use, but the high cleanup costs yield a negative property value. In such a case, the cleanup cost could be more appropriately accounted for by adjustments to the projected income stream.").

39. The Board similarly gives no weight to the Petitioner's claim that the March 2002 sale price for the subject property demonstrates that it has only nominal market value-in-use. As explained above, the sale included substantial consideration beyond the nominal sale price of $1, the most significant portion of which was the Petitioner's agreement to assume liability for remediating the environmental contamination.

40. Thus, the Board finds that the Petitioner failed to establish a prima facie case that the environmental contamination reduced the market value of the subject property to zero or nominal value. The Board's finding should not be read as necessarily precluding the deduction of the present value of costs of remediation from the unimpaired value of a property as a method of valuing environmentally contaminated property in all cases. Instead, the Board finds that the Petitioner's reliance on professional literature, without expert testimony interpreting or applying the varying methodologies referenced in that literature, is insufficient to demonstrate that the subject property has zero or nominal value. The Board finds additional support for its conclusion from the fact that the Petitioner has continuously used the subject property to derive income despite the presence of environmental contamination. Thus, the subject property clearly has some value-in-use despite the presence of contamination. Moreover, the Petitioner bought the subject property for substantial consideration with full knowledge of the presence of contamination. Although, as explained above, the precise amount of that consideration remains unquantified, the fact that the Petitioner was willing to give such consideration demonstrates that the subject property has more than merely nominal value.

41. Finally, the Board finds that the Petitioner failed to provide any support for its alternative quantification of $769,825. The Petitioner simply asserts that there is no reason for the Respondent to refuse to apply a 100% negative influence factor to the subject land in light of the extensive contamination and urges the Board to subtract Mr. Nepote's land valuation from his overall estimate of value ($1,250,000 - $480,175 = $769,825). The Petitioner, however, did not demonstrate that the environmental contamination completely deprived the subject land of market value-in-use any more than it demonstrated that such contamination completely deprived the property as a whole of market value-in-use.

42. Based on the foregoing, the Petitioner demonstrated that the market value-in-use of the subject property does not exceed $1,148,750. The Petitioner failed to submit probative evidence to quantify the amount of any additional diminution in value attributable to the presence of environmental contamination.

SUMMARY OF FINAL DETERMINATION

43. The Board finds that the Petitioner established by a preponderance of the evidence that the combined assessment for parcels at issue in this appeal should be reduced to a total of $1,148,750 for each of the assessment years under appeal. The Board further finds that the Petitioner failed to establish a prima facie case for any further reduction attributable to environmental contamination at the subject property.

This Final Determination of the above captioned matter is issued by the Indiana Board of Tax Review on the date first written above.

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Commissioner, Indiana Board of Tax Review

IMPORTANT NOTICE

- Appeal Rights -

You may petition for judicial review of this final determination pursuant to the provisions of Indiana Code § 6-1.1-15-5. The action shall be taken to the Indiana Tax Court under Indiana Code § 4-21.5-5. To initiate a proceeding for judicial review you must take the action required within forty-five (45) days of the date of this notice. You must name in the petition and in the petition's caption the persons who were parties to any proceeding that led to the agency action under Indiana Tax Court Rule 4(B)(2), Indiana Trial Rule 10(A), and Indiana Code §§ 4-21.5-5-7(b)(4), 6-1.1-15-5(b). The Tax Court Rules provide a sample petition for judicial review. The Indiana Tax Court Rules are available on the Internet at <http://www.in.gov/judiciary/rules/tax/index.html>. The Indiana Trial Rules are available on the Internet at <http://www.in.gov/judiciary/rules/trial_proc/index.html>. The Indiana Code is available on the Internet at <http://www.in.gov/legislative/ic/code>.