

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-340

JANUARY TERM, 2002

Robert C. and Deborah A.	}	APPEALED FROM:
Nicholas	}	
	}	Bennington Superior Court
v.	}	
	}	
Town of Pownal	}	DOCKET NO. 302-9-99 Bncv
	}	
	}	Trial Judge: John P. Wesley
	}	
	}	

In the above-entitled cause, the Clerk will enter:

The Town of Pownal appeals from a superior court judgment reducing the assessed valuation of property owned by appellees Robert and Deborah Nicholas. The Town contends: (1) the evidence failed to support the findings; (2) the court improperly shifted the burden of proof; and (3) the findings were inadequate. We affirm.

The facts as found by the trial court may be summarized as follows. Appellees purchased the subject property in 1989 for \$70,000. The property consists of four acres and includes a six-room house built by appellees' predecessor in title, and two older mobile homes. Appellees live elsewhere and until recently rented the house and mobile homes for residential use.

Appellees' property is located at the end of a dirt road on the west side of the Hoosic River. The property is adjacent to a landfill owned by the Pownal Tanning Company, which until 1990 operated a tannery business at a mill site about one-half mile north of appellees' property on the east side of the river. Since the early 1980s, the tannery had deposited sludge filled with hazardous materials into a series of lined cells located on the landfill adjacent to appellees' property. Later testing of the container cells determined that thousands of gallons of leachate from the cells was leaking into the soil and contaminating the groundwater. Investigations by the Vermont Agency of Natural Resources and the federal Environmental Protection Agency resulted in litigation against the tannery owners and a judgment for a portion of the costs of cleanup. In 1999, the former tannery site was placed on the National Priorities List as a Superfund Site.

An engineering study completed by the EPA in late 1998 found that contaminants in sludge and groundwater underlying the landfill adjacent to appellees' property pose a potential threat to the health of the nearby population; that the contaminants include dioxins, pesticides and metals; and that the contaminants are subject to continual flooding, erosion and leakages, threatening both surface and groundwater. The EPA remediation plan called for repairing the cells, disposing of contaminated materials from the mill site at the landfill adjacent to appellees' property, and capping the entire site with compacted and graded soil. The court here noted that the cleanup process was underway but that there was substantial uncompleted work, and that the remediation process would not be subject to assessment without many more years of monitoring.

Upon learning of the EPA study in 1999, appellees became concerned about the safety of their tenants and potential liability claims through exposure to the toxic wastes, and asked their tenants to vacate the properties. Concluding that the property was no longer viable for residential use, appellees then grieved their 1999 property tax assessment of

\$78,200. The Town's valuation included an "economic obsolescence" discount of 20% based on odors emitted from the former tannery. The Town evidently refused, however, to reduce the value any further based on the Superfund Site or hazards associated therewith. Appellees then appealed to superior court, under 32 V.S.A. 4461.

Following an evidentiary hearing, the court issued a written decision, finding that there were no comparable properties in the Town; that the Superfund site and hazards identified in the engineering study had rendered the property "economically obsolete" for any prospective residential use; that the highest and best use of the property was limited to non-residential uses such as storage; and that a fair valuation of the property was half of the unimproved fair market value of the land on the residential market (\$16,608), resulting in an overall assessed value of \$8,304. This appeal by the Town followed.

The Town contends the evidence was insufficient to support a reduction in the valuation of the subject property, that appellees failed to carry their burden of showing that the Town's assessment was incorrect, and that the court's findings were insufficient to support its conclusion. We will set aside the trial court's findings only if clearly erroneous, giving due regard to the court's opportunity to judge the credibility of the witnesses and weigh the evidence. See Scott Constr., Inc. v. Newport Bd. of Civil Auth., 165 Vt. 232, 236 (1996). The Town's argument focuses principally on appellees' failure to adduce evidence that their property was contaminated. The Town notes a statement in a Department of Environmental Conservation analysis indicating that, because surface and groundwater from the landfill flows east to the river, it is not expected that a water supply well in the vicinity of appellees' property will be affected.

Although the Town cites several out-of-state cases, none supports the argument that the trial court was precluded from considering the potential effect, often referred to in the case law as "stigma," that contamination on the adjacent landfill may have on the fair market value of their property. On the contrary, courts and commentators have recognized that "a stigma factor can attach to property whether contaminants are present, are threatened, or are totally absent." Dealers Mfg. Co. v. County of Anoka, 615 N.W.2d 76, 79 (Minn. 2000) (noting that stigma may exist where property adjacent to subject site has been contaminated or has even been remediated); see also L. Lewandroski, Toxic Blackacre: Appraisal Techniques & Current Trends in Valuation, 5 Alb. L.J. Sci. & Tech. 55, 88 (1994) ("stigma value has been recognized by some courts in granting real property tax assessment reductions for diminution in property value caused by proximity to contaminated sites [and] those perceived to be contaminated").

The extensive evidence of leakages of toxic waste on the landfill adjacent to appellees' property, the health hazard posed by these contaminants, and appellees' testimony concerning their reasonable fear of illness to themselves or their tenants and concerns over potential liability was sufficient to support the court's finding that the property's potential for residential sale or rental had been effectively destroyed. We discern no basis to conclude that this finding was clearly erroneous. See Scott, 165 Vt. at 236. Nor does the court's ruling offer any basis to support the Town's claim that the court improperly shifted the burden of proof to the Town to justify its assessment, or failed to set forth findings sufficient to explain and support its ruling.

The Town also faults the court's finding that there were no comparable properties, citing evidence of a property located near the former tannery that had recently sold at near its assessed value. The property in question, however, was not adjacent to the landfill utilized by the EPA for dumping contaminated sludge, as is appellees' property. Thus the court did not abuse its discretion in failing to consider this property for purposes of valuation. See id. at 239 (comparability is question for trier of fact, subject to review for abuse of discretion).

The Town also asserts that there was no valid basis for the court's decision to set the value of the property at \$8,304. The Town notes, in this regard, the court's finding that neither party had submitted evidence of an appraiser or an accepted methodology incorporating the court's conclusion that the property had a severely limited range of uses. As we observed in Scott, however, "the court was not limited to evidence of comparables and was free to weigh any competent, relevant, and probative evidence of valuation." Id. at 237. "The unswerving goal of the [valuation] statute is fair market valuation, but there is no single pathway to that goal." Gionet v. Town of Goshen, 152 Vt. 451, 453 (1989). In view of the court's finding that the property - and implicitly the residential structures thereon - had no value for residential purposes, it was reasonable for the court to set the value at half of the unimproved residential fair market value of the land. See Lake Morey Inn Golf Resort v. Town of Fairlee, 167 Vt. 245, 248-49 (1997) (any and all methods for determining fair market value based on competent evidence may be explored). Accordingly, we discern no basis to disturb the judgment.

BY THE COURT:

Jeffrey L. Amestoy, Chief Justice

James L. Morse, Associate Justice

Denise R. Johnson, Associate Justice