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## Finkelstein v. Department of Transportation: The Supreme Court of Florida “Takes” a Look at Evidence of Contamination

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*Finkelstein v. Department of Transportation:*  
The Supreme Court of Florida “Takes” a Look at  
Evidence of Contamination

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I. INTRODUCTION

The cost of expanding Florida’s over-crowded urban traffic ways is skyrocketing. The Florida Department of Transportation’s (“FDOT”) actual total expenditure for right of way production and eminent domain litigation for June 1994 through May 1995 was \$271.1 million,<sup>1</sup> up from \$243.5 million the previous year.<sup>2</sup> According to these figures, \$166.1 million was spent for production costs, including purchasing right of way and paying severance and business damages to landowners and tenants.<sup>3</sup> An additional \$105 million was spent litigating FDOT’s takings state-wide.<sup>4</sup> One writer anticipates that over the next ten years, Florida will spend \$44.3 billion to

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1. Figures provided by the Cost Management Systems Department, State of Florida Department of Transportation, District IV, June 9, 1995 [hereinafter Costs]. During the first 11 months of fiscal year 1994-1995, i.e., June 1994 through May 1995, Florida Department of Transportation District IV, encompassing Broward, Palm Beach, Martin, and St. Lucie Counties, spent a total of \$22.9 million, compared to \$64.3 million spent by District VI, comprised of only Dade County.

2. See Erik Milstone, *Roadblock*, FLA. TREND, Mar. 1995, at 56, 59 (citing statistics provided by the Center for Urban Transportation Research in Tampa, Florida).

3. See Costs, *supra* note 1.

4. *Id.*

expand its roadway system.<sup>5</sup> This estimate is \$9 billion more than the state will have available at current tax rates.<sup>6</sup> Faced with the challenge of balancing Florida's constitutional guarantee of "full compensation"<sup>7</sup> against a rapidly expanding eminent domain program and its increasing cost, the Florida Legislature has taken steps to decrease the state's eminent domain litigation exposure.<sup>8</sup> Florida's courts, however, have been reluctant to follow the legislature's lead.

One of the many factors contributing to the increase in state-wide right of way costs is environmental contamination. Environmental contamination takes many forms including asbestos, urea-formaldehyde foam insulation, lead in drinking water, and petroleum hydrocarbon.<sup>9</sup> The Federal Highway Administration ("FHWA"), which contributes up to ninety percent of the funds spent by FDOT to revamp its overburdened state roads, often requires FDOT to clean up contamination prior to construction of federally-funded state roadways.<sup>10</sup> This cost traditionally has been paid by the FDOT and the FHWA. The cost of clean-up, however, ultimately falls on the taxpayer.

5. See Milstone, *supra* note 2, at 60.

6. *Id.*

7. See FLA. CONST. art. X, § 6(a), which states that "[n]o private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner." See also *Dade County v. Brigham*, 47 So. 2d 602 (Fla. 1950) (stating that test for full compensation is not met if landowner is required to pay attorney fees and costs out of damages awarded for value of property taken).

8. See, e.g., FLA. STAT. § 73.092 (1995) (restructuring attorney's fees awarded in eminent domain cases and generally limiting such awards to percentage of benefit obtained for condemnee/client); see also FLA. STAT. § 337.27(2) (1995).

9. See generally James R. Arnold, *The Appraisal and Valuation of Contaminated Properties*, C643 A.L.I.-A.B.A. 405 (1991), available in WL, TP-ALL Directory, ALI-ABA Database; Vincent D'Elia & Catherine M. Ward, *The Valuation of Contaminated Property*, 111 BANKING L.J. 350 (1994); John D. Dorchester, Jr., *Environmental Pollution: Valuation in a Changing World*, 59 APPRAISAL J. 289 (1991); Peter J. Patchin, *Valuation of Contaminated Properties*, 56 APPRAISAL J. 7 (1988) [hereinafter Patchin, *Valuation*]; William B. Johnson, Annotation, *State and Local Government Control of Pollution from Underground Storage Tanks*, 11 A.L.R.5TH 388 (1994); Gregor I. McGregor, *Some Practical Suggestions for Valuing Contaminated Real Estate*, MASS. LAW. WKLY., Feb. 21, 1994, at 40, available in WL, TP-ALL Directory, LP Database (providing general discussions on numerous types of contamination).

10. Telephone Interview with Paul Lampley, District Contamination Impact Coordinator, District IV, Florida Department of Transportation Environmental Management Office (June 26, 1995). Mr. Lampley also indicated that an agreement between the FDOT and the Florida Highway Contractor's Association states that the FDOT will not send construction personnel onto the right of way, if contaminated.

In the recent first impression case of *Finkelstein v. Department of Transportation (Finkelstein II)*,<sup>11</sup> the Supreme Court of Florida answered a question of great public importance. The court answered in the affirmative the question whether evidence of contamination was relevant to property value.<sup>12</sup> The decision has the potential to slow cost increases attributable to contamination because real estate appraisers may now consider the negative effect of contamination on the value of property acquired in eminent domain actions.<sup>13</sup> The *Finkelstein II* decision also gives the FDOT the authority to present evidence of contamination and its corresponding negative effect on fair market value at trial.<sup>14</sup> Full compensation is linked to an estimate of fair market value.<sup>15</sup> Because fair market value may now reflect the negative impact of on-site contamination,<sup>16</sup> it is possible that FDOT could pay less for property negatively “stigmatized” by contamination. In the end, FDOT’s exercise of this newly-granted authority should help to control a portion of Florida’s rising eminent domain costs.

This comment examines the decision of the Supreme Court of Florida in *Finkelstein v. Department of Transportation*. Part II presents the facts of the case, the procedural history, and a summary of the supreme court decision. Part III of this comment discusses the relevance of evidence of contamination in eminent domain valuation proceedings and current appraisal valuation methodology,<sup>17</sup> as a result of the *Finkelstein II* decision.

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11. 656 So. 2d 921 (Fla. 1995).

12. *Id.* at 922.

13. *Id.* at 924.

14. *Id.* at 925.

15. *See generally* FLA. STAT. § 73.071(3)(a) (1995) (giving a jury of twelve persons the power to determine “the amount of compensation to be paid, which compensation shall include . . . [t]he value of the property sought to be appropriated”). Additionally, Jacksonville Expressway Auth. v. Henry G. Du Pree Co., 108 So. 2d 289 (Fla. 1958), states:

[w]e feel our constitutional provision for full compensation requires that the courts determine the value of the property by taking into account all facts and circumstances which bear a reasonable relationship to the loss occasioned the owner by virtue of the taking of his property under the right of eminent domain.

*Id.* at 291.

16. *See Finkelstein II*, 656 So. 2d at 922.

17. *See id.* at 923.

## II. *FINKELSTEIN v. DEPARTMENT OF TRANSPORTATION*

### A. *Facts of the Case*

In March 1990, the FDOT filed a petition to condemn Parcel 239, a whole taking of an environmentally contaminated gasoline service station located at Davie Boulevard and Interstate 95 in Fort Lauderdale, Broward County, Florida, as a part of the Interstate 595 expansion project.<sup>18</sup> The parcel was owned by Ida Finkelstein and Alice Fox and was leased to Tenneco Oil Company ("Tenneco").<sup>19</sup> The petition stated a good faith estimate of value for the property of \$642,650.<sup>20</sup> After the Order of Taking hearing was held May 1, 1990, FDOT deposited \$642,650 into the registry of the court, and title to the property vested in the FDOT.<sup>21</sup> Finkelstein and Fox answered the petition in May and June of 1990, respectively, and no other pleadings were filed until April 3, 1992, when a pretrial order setting the cause for trial was filed.<sup>22</sup>

Prior to December 1988, Tenneco discovered petroleum groundwater contamination beneath the service station site.<sup>23</sup> According to the supreme court, Tenneco reported the contamination to the Department of Environmental Regulation ("DER")<sup>24</sup> as encouraged by Florida law,<sup>25</sup> and began monitoring the contamination.<sup>26</sup> The parties agreed that the DER had determined the site was eligible for Florida's Early Detection Incentive

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18. *Id.*; State Dep't of Transp. v. Finkelstein (*Finkelstein I*), 629 So. 2d 932 (Fla. 4th Dist. Ct. App. 1993) (certifying question to Supreme Court of Florida), *review granted*, 648 So. 2d 722 (Fla. 1994), *aff'd*, 656 So. 2d 921 (Fla. 1995); Amended Brief of Petitioners at 1, Finkelstein v. Department of Transp., 656 So. 2d 921 (Fla. 1995) (No. 83,308).

19. Amended Brief of Petitioners at 1, *Finkelstein* (No. 83,308).

20. *Finkelstein I*, 629 So. 2d at 932; Petition, State Dep't of Transp. v. Finkelstein, No. 90-06563(19) (Fla. Broward County Ct. Mar. 1, 1990).

21. See Certificate of the Clerk, State Dep't of Transp. v. Finkelstein, No. 90-06563(19) (Fla. Broward County Ct. May 1, 1990); see also discussion *infra* note 185.

22. *Finkelstein I*, 629 So. 2d at 932.

23. *Finkelstein II*, 656 So. 2d at 921, 923 (Fla. 1995).

24. *Id.* The Florida Department of Environmental Regulation is now known as the Florida Department of Environmental Protection.

25. See FLA. STAT. § 376.3071(9)(b) (1995).

26. Amended Brief of Petitioners at 2, *Finkelstein* (No. 83,308). Subsequently, FDOT investigated this matter and discovered that Tenneco, in fact, had not begun on-site remediation; rather, it was the FDOT itself who had begun the clean-up. See Transcript of Hearing on Remand at 29, Department of Transp. v. Finkelstein, No. 90-6563(19) (Fla. Broward County Ct. October 9, 1995).

("EDI") program.<sup>27</sup> The EDI program encouraged early detection, reporting, and clean-up of contamination from leaking petroleum storage systems through state reimbursement of clean-up expense.<sup>28</sup> Under the EDI program, only qualified sites were eligible for reimbursement, not qualified landowners.<sup>29</sup> Through a memorandum of understanding between the DER and the FDOT, the FDOT became the beneficiary of the site's EDI eligibility and state reimbursement of remediation costs.<sup>30</sup> Prior to the June 1992 trial, FDOT worked closely with the DER to quickly remediate the site to meet FDOT's construction schedule for the road improvement project.<sup>31</sup>

## B. Procedural Background

On June 12, 1992, FDOT filed a motion in limine seeking a pretrial determination of the admissibility of evidence that the property taken was contaminated with petroleum hydrocarbon and the cost of remediation.<sup>32</sup>

27. *Finkelstein II*, 656 So. 2d at 923.

28. See FLA. STAT. § 376.3071(9)(a)-(b), (12)(b); see also *Finkelstein II*, 656 So. 2d at 923; *Finkelstein I*, 629 So. 2d 932, 933 (Fla. 4th Dist. Ct. App. 1993), *aff'd*, 656 So. 2d 921 (1995); *Puckett Oil Co. v. State Dep't of Env'tl. Regulation*, 549 So. 2d 720 (Fla. 1st Dist. Ct. App. 1989) (determining eligibility for gasoline service station site under EDI program); *Commercial Coating Corp. v. State Dep't of Env'tl. Regulation*, 548 So. 2d 677 (Fla. 3d Dist. Ct. App. 1989), *review denied*, 560 So. 2d 232 (Fla. 1990) (defining mineral spirits as "petroleum product" under EDI statute to find site eligible for remediation cost reimbursement); Amended Brief of Petitioners at 1-2, *Finkelstein* (No. 83,308); Johnson, *supra* note 9, §§ 3-5, 13-15, at 402-12, 428-37.

Prior to June 1995, only sites with leaky underground storage tanks were eligible to participate in the EDI program. FLA. STAT. § 376.3071(9)(a)-(b), (12)(b). The majority of sites with this contamination problem are gasoline service stations. Reforms to the problem-laden EDI program limit eligibility for reimbursement of remediation costs to sites which score more than 50 under a new ranking system. Prakash Gandhi, *Critics: State Tank Program Revised But Not Repaired*, THE FLORIDA SPECIFIER, June 1995, at 1, 23. Of the 12,000 sites eligible for the EDI program, only 2300 score 50 or greater. *Id.* See S. 2578, 1995 Fla. Reg. Sess. (1995) for changes to Florida's EDI program.

29. See FLA. STAT. § 376.3071(9) (1987).

30. Amended Brief of Petitioners at 2, *Finkelstein* (No. 83,308). FDOT filed for EDI reimbursement on September 5, 1995, after the original application had been lost. Letter from Paul A. Lampley, District Contamination Impact Coordinator, District IV Florida Department of Transportation Environmental Management Office, to Charles Williams, Florida Department of Environmental Protection, Petroleum Cleanup Reimbursement Section (Sept. 5, 1995) (on file with author).

31. *Id.*; see also Interview with Linda Feroli Nelson, Administrator of Eminent Domain, District IV, Florida Department of Transportation, in Plantation, Fla. (June 20, 1995).

32. *Finkelstein II*, 656 So. 2d 921, 923 (Fla. 1995); Petitioner's Motion in Limine, *State Dep't of Transp. v. Finkelstein*, No. 90-06563(02) (Fla. Broward County Ct. June 12, 1992).

The FDOT took the position that evidence of contamination was relevant to the issue of full compensation and should be admitted.<sup>33</sup> The defendants argued that the evidence was not relevant because remediation costs were not fully ascertained at the time of trial and because the amount of the EDI reimbursement was not determined.<sup>34</sup> Following argument, the trial judge denied the FDOT's motion,<sup>35</sup> later confirming that counsel for the parties would not be permitted to comment upon contamination during opening statements.<sup>36</sup> The FDOT then proffered the contamination and remediation testimony of its environmental consultants, who were responsible for assessing the contamination, designing a remediation plan, and implementing the plan.<sup>37</sup> The FDOT also proffered the testimony of its appraiser.<sup>38</sup> In sum, the FDOT contended that the testimony of its experts would have established that: 1) the property was contaminated at the date of taking; 2) remediation costs ranged between \$750,000 and \$800,000; 3) buyers, sellers, and lending institutions routinely request contamination assessments of real property; 4) banks are reluctant to finance "dirty" property or take such property back in default; and 5) contamination "stigmatizes" real property and affects the marketability and desirability of the property and would have a negative effect on the value of the subject property of at least twenty to twenty-five percent.<sup>39</sup> Defendant's counsel objected to FDOT's proffer.<sup>40</sup> The trial court sustained the objection.<sup>41</sup>

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33. *Finkelstein I*, 629 So. 2d 932, 933 (Fla. 4th Dist. Ct. App. 1993), *aff'd*, 656 So. 2d 921 (Fla. 1995).

34. *Id.*

35. *Finkelstein II*, 656 So. 2d at 923; Trial Proceedings at 7, *State Dep't of Transp. v. Finkelstein*, No. 90-06563(02) (Fla. Broward County Ct. June 30, 1992).

36. Hearing on Petitioner's Motion in Limine at 13, *State Dep't of Transp. v. Finkelstein*, No. 90-06563(02) (Fla. Broward County Ct. June 29, 1992).

37. Brief for Respondent at 2-4, *Finkelstein* (No. 83,308); *see also* *Swift & Co. v. Housing Auth.*, 106 So. 2d 616 (Fla. 2d Dist. Ct. App. 1958) (holding that trial court should have allowed jury to do its duty after hearing testimony regarding possible zoning changes and value of site as phosphate mine).

38. Amended Brief of Petitioners at 4, *Finkelstein* (No. 83,308); Brief for Respondent at 4-5, *Finkelstein* (No. 83,308); Trial Proceedings at 2, *State Dep't of Transp. v. Finkelstein*, No. 90-06563(02) (Fla. Broward County Ct. June 30, 1992).

39. *Finkelstein II*, 656 So. 2d at 923; Brief for Respondent at 2-5, *Finkelstein* (No. 83,308); Petitioner's Motion in Limine, *State Dep't of Transp. v. Finkelstein*, No. 90-06563(02) (Fla. Broward County Ct. June 11, 1992).

40. *Finkelstein I*, 629 So. 2d 932, 933 (Fla. 4th Dist. Ct. App. 1993), *aff'd*, 656 So. 2d 921 (Fla. 1995).

41. *Id.*

The case was tried as if the property were “clean” on the date of valuation.<sup>42</sup> At trial, the parties agreed that the value of the improvements located on the subject site was \$350,000.<sup>43</sup> The FDOT’s appraiser testified at trial that the land, as if it were clean on the date of deposit, had a value of \$300,000.<sup>44</sup> The owner’s appraiser testified that the land had a value of \$567,000.<sup>45</sup> The range of testimony on full compensation ranged from \$650,000, according to the FDOT’s estimate, to \$917,000, by the owner’s estimate.<sup>46</sup> All of the comparable sales used to estimate the site’s value were uncontaminated.<sup>47</sup> The jury returned a verdict in favor of the landowners for \$525,000 for the value of the land plus the stipulated \$350,000 for the improvements, a total award of \$875,000.<sup>48</sup> Final judgment was entered in the amount of the verdict on July 27, 1992.<sup>49</sup> The FDOT filed a notice of appeal on August 13, 1992.<sup>50</sup>

In *Finkelstein I*, the Fourth District Court of Appeal reviewed the record and concluded that the proffered contamination, remediation, and stigma evidence had been improperly excluded by the trial judge.<sup>51</sup> Based primarily on another case decided by the Supreme Court of Florida,<sup>52</sup> the district court held that evidence of contamination and cost of remediation were relevant to the value of the property and that these issues should have gone before the jury.<sup>53</sup> The appellate court reversed the final judgment, remanded the cause for a new trial on the valuation issues, and certified the question to the Supreme Court of Florida as a matter of great public importance.<sup>54</sup>

42. *Id.*

43. *Id.*

44. *Id.*; Testimony of Edward N. Parker, State Dep’t of Transp. v. Finkelstein, No. 90-06563(19) (Fla. Broward County Ct. May 1, 1990).

45. *Finkelstein I*, 629 So. 2d at 933.

46. *Id.*

47. *Id.*

48. *Finkelstein II*, 656 So. 2d 921, 923 (Fla. 1995); *Finkelstein I*, 629 So. 2d at 933.

49. Amended Brief of Petitioners at 4, *Finkelstein* (No. 83,308); Brief for Respondent at 7, *Finkelstein* (No. 83,308).

50. Brief for Respondent at 7, *Finkelstein* (No. 83,308).

51. *Finkelstein I*, 629 So. 2d at 934-35.

52. See *Florida Power & Light Co. v. Jennings*, 518 So. 2d 895, 899 (Fla. 1987) (stating that “any factor, including public fear, which impacts on the market value of land taken for a public purpose may be considered to explain the basis for an expert’s valuation opinion”).

53. *Finkelstein II*, 656 So. 2d 921, 923 (Fla. 1995); *Finkelstein I*, 629 So. 2d at 934.

54. *Finkelstein II*, 656 So. 2d at 922. The lower court did not construct a certified question for the supreme court. Instead, the supreme court had to “glean” the certified question from record, as phrased by the parties. *Id.*



### C. *The Supreme Court of Florida Decision*

Justice Wells, writing for the majority,<sup>55</sup> began the opinion by quashing that portion of the district court's ruling that reversed the trial court's ruling that testimony concerning remediation costs was not admissible.<sup>56</sup> The court found from their review of the record that there was no factual issue as to the contamination of the property, the liability for the contamination, or the payment for the remediation costs under the EDI program.<sup>57</sup> Based on the FDOT's statements that the purpose for the remediation testimony was to show the basis for its expert valuation opinion,<sup>58</sup> the court held that the evidence of contamination and remediation costs was not relevant to the valuation of the subject site.<sup>59</sup> The court, however, limited this holding to the facts of this case where there was a program for reimbursement of the remediation costs, such as EDI.<sup>60</sup> The court further declined to decide whether remediation costs would be relevant in a valuation proceeding involving property for which reimbursement for remediation costs was not available.<sup>61</sup>

The court next agreed "with the district court that evidence of the fact that property is or has been contaminated is relevant to the market value of property in an eminent domain valuation proceeding."<sup>62</sup> The court relied on several sources to support its position. First, the court noted, based on an eminent domain law treatise,<sup>63</sup> that contamination can "stigmatize" a property thereby creating a reduction in value resulting from the increased risk associated with contaminated property.<sup>64</sup> Second, the court noted that the issue of valuing contaminated property has been the subject of articles by real estate appraisers, which recognize contamination as a factor that

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55. Justice Wells delivered the opinion of the Court, in which Chief Justice Grimes, Justices Shaw, Kogan, and Harding concurred. *Finkelstein II*, 656 So. 2d at 923-26. Justice Anstead concurred specially with an opinion. *Id.* Justice Overton recused himself. *Id.*

56. *Id.* at 923.

57. *Id.*

58. *Finkelstein II*, 656 So. 2d at 923; *see also* Brief for Respondent at 11, *Finkelstein* (No. 83,308).

59. *Finkelstein II*, 656 So. 2d at 924.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* (citing 8 MELVIN A. RESKIN & PATRICK J. ROHAN, NICHOLS' THE LAW OF EMINENT DOMAIN § 14C.06[1] (1994)).

64. *See Finkelstein II*, 656 So. 2d at 924.

experts consider in the valuation of property.<sup>65</sup> Finally, the court found its decision to be consistent with two other cases<sup>66</sup> holding that factors affecting market value are relevant in valuation proceedings.<sup>67</sup>

By analogizing to *Florida Power & Light Co. v. Jennings*, the court reasoned that if the fear of power lines was relevant to explain a decrease in value to the property in *Jennings*, evidence of contamination was a reasonable explanation for the decrease in value of the subject property.<sup>68</sup> In a quote from *Jennings*,<sup>69</sup> the court narrowed this reasoning by explaining that valuation experts routinely rely on sales of comparable property when valuing property.<sup>70</sup> Thus, the court stated, the focus of opinion testimony in a valuation proceeding must be value.<sup>71</sup> With regard to contaminated property, the court stated that “[e]vidence of contamination, because of its prejudicial nature, should not be a feature of a valuation trial beyond what is necessary to explain facts showing a reduction in value caused by contamination.”<sup>72</sup>

Returning to the facts of the case, the court recalled that the trial court had limited the FDOT’s proffer of evidence that the contamination stigma reduced the property value by twenty to twenty-five percent.<sup>73</sup> The court then noted that at oral argument, the FDOT’s counsel did not know whether its appraisal expert based his opinion on comparable sales of other contaminated property.<sup>74</sup> The court pointed out that for an appraiser’s opinion of a reduction in market value to be admissible it must have a basis

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65. *Id.* The court specifically cites a recent article appearing in the *Appraisal Journal*. See James A. Chalmers & Scott A. Roehr, *Issues in the Valuation of Contaminated Property*, 61 APPRAISAL J. 28 (1993), available in WL, TP-ALL Directory, JLR Database.

66. See *Florida Power & Light Co. v. Jennings*, 518 So. 2d 895, 899 (Fla. 1987); see also *Department of Agric. & Consumer Serv. v. Polk*, 568 So. 2d 35 (Fla. 1990) (stating that fair market value is that on which willing buyers and sellers agree only when they both are aware of all relevant facts regarding property at issue).

67. *Finkelstein II*, 656 So. 2d at 924.

68. *Id.* But see *Chappell v. Virginia Elec. & Power Co.*, 458 S.E.2d 282 (Va. 1995) (holding that owner’s testimony as to damages resulting to remainder property following condemnation for high voltage power lines was inadmissible).

69. See *Jennings*, 518 So. 2d at 898 (stating that eminent domain valuation trials “[t]ypically . . . involve[] real property brokers or appraisers who give valuation testimony based on, e.g., the current or potential use of the property in question, the population growth and development of the surrounding area, and sales of similar property”).

70. *Finkelstein II*, 656 So. 2d at 924-25.

71. *Id.*; see also *infra* part III.

72. *Finkelstein II*, 656 So. 2d at 925.

73. *Id.*

74. *Id.*

in facts and data reasonably relied upon by experts in the field of property valuation.<sup>75</sup> In addition, the court stated that such opinion testimony must pass the evidentiary test set forth in section 90.705(2) of the *Florida Statutes*.<sup>76</sup> The court held that there “must be a factual basis through evidence of sales of comparable contaminated property upon which to base a determination that contamination has decreased the value of the property.”<sup>77</sup> The court took this reasoning one step further by stating that if no evidence exists upon which a fact-finder could determine the decrease in property value, then the landowner would be entitled to fair market value of the property valued as uncontaminated.<sup>78</sup> After assigning to the condemnor the burden of proving decrease in value of contaminated property, the court found that because the Finkelstein property was in the process of being cleaned, it should be valued as if successfully cleaned on the date of taking.<sup>79</sup> In doing so, the court suggested that the FDOT’s appraiser base his opinion on sales of comparable properties which also have been successfully cleaned.<sup>80</sup>

Finally, the court rejected the landowner’s argument that because the stigma of contamination is temporary, it should not be admissible.<sup>81</sup> Relying on its previous discussion, the court concluded that if an expert’s opinion meets the evidentiary test described, then whether stigma is or is not temporary would be addressed during direct and cross examination.<sup>82</sup>

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75. *Id.* Section 90.704 of the *Florida Statutes* provides:

[t]he facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, him at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence.

FLA. STAT. § 90.704 (1995).

76. *Finkelstein II*, 656 So. 2d at 925. Section 90.705(2) of the *Florida Statutes* states: [p]rior to the witness giving his opinion, a party against whom the opinion or inference is offered may conduct a voir dire examination of the witness directed to the underlying facts or data for his opinion. If the party establishes prima facie evidence that the expert does not have a sufficient basis for his opinion, the opinions and inferences of the expert are inadmissible unless the party offering the testimony establishes the underlying facts or data.

FLA. STAT. § 90.705(2) (1995).

77. *Finkelstein II*, 656 So. 2d at 925.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Finkelstein II*, 656 So. 2d at 925.

In closing, the court declined to decide whether the FDOT's proffered evidence was admissible because the trial court so severely limited the proffer.<sup>83</sup> The court, however, repeated its holding that evidence of contamination is relevant to market valuation and is admissible upon meeting an adequate factual predicate.<sup>84</sup> This holding, however, was further limited to the particular circumstances of this case, where the site qualified for EDI reimbursement.<sup>85</sup> Accordingly, the supreme court approved of the district court's reversal of the trial court's ruling. The court then remanded the case for a determination by the trial court, upon a complete proffer of the FDOT's appraisal expert's testimony, of whether the evidence is admissible based on the analysis announced in the opinion.<sup>86</sup>

In a brief concurring opinion, Justice Anstead expressed uncertainty about the majority's imposition of additional restrictions on evidence of valuation.<sup>87</sup> While Justice Anstead stated that he would answer the certified question in the affirmative, he also stated he would "leave the issues of evidence and valuation to be resolved according to prevailing law."<sup>88</sup>

### III. DISCUSSION AND ANALYSIS

#### A. *Relevance of Contamination to Property Value*

Article X of the *Florida Constitution* guarantees that "[n]o private property shall be taken except for a public purpose and with full compensation therefor paid to each owner . . . ."<sup>89</sup> Full compensation made to the landowner should be the "fair actual market value at the time of the lawful

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83. *Id.*

84. *Id.*

85. *Id.* at 925 n.1.

86. *Id.* On remand, the FDOT made its complete proffer, including the testimony of Edward N. Parker, the FDOT's appraiser, and Douglas R. Ashline, one of the FDOT's consultant environmental engineers. *See* Hearing Transcript at 2, 31-99, Department of Transp. v. Finkelstein, No. 90-06563(19) (Fla. Broward County Ct. Oct. 9, 1995). Following FDOT's complete proffer and argument by counsel, the trial court denied FDOT's Motion in Limine and signed a final judgment presented to the court by defense counsel. *Id.* at 118, 120. Upon making his decision, the trial judge asked FDOT counsel "[y]ou want to take that up and see what happens on that?" *Id.* at 120.

87. *Finkelstein II*, 656 So. 2d at 926 (Anstead, J., concurring).

88. *Id.*

89. FLA. CONST. art. X, § 6(a).

appropriation.”<sup>90</sup> Fair market value is the amount a willing purchaser, under no compulsion to buy, would pay for the property.<sup>91</sup> Determining full compensation, fair market value, and the value of the property taken and damages<sup>92</sup> to the property remaining, is the primary purpose of an eminent domain valuation trial.<sup>93</sup> Typically, this process involves real estate appraisers or brokers who give testimony on a variety of factors affecting value, including the current or potential highest and best use of the property,

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90. See *Sunday v. Louisville & N.R. Co.*, 57 So. 351 (Fla. 1912); see also *United States v. 429.59 Acres of Land*, 612 F.2d 459, 462 (9th Cir. 1980).

91. See *Dade County v. General Waterworks Corp.*, 267 So. 2d 633 (Fla. 1972); see also *State Road Dep’t v. Stack*, 231 So. 2d 859 (Fla. 1st Dist. Ct. App. 1969). The court in *Stack* defines fair market value as the amount of money that a purchaser willing but not obliged to buy the property would pay an owner willing but not obliged to sell, taking into consideration all uses to which the property is adapted and might be applied in reason. *Id.* at 860. The American Institute of Real Estate Appraisers, now known as the Appraisal Institute, defines market value as:

[t]he most probable price in cash, terms equivalent to cash, or in other precisely revealed terms, for which the appraised property will sell in a competitive market under all conditions requisite to fair sale, with the buyer and seller each acting prudently, knowledgeably, and for self-interest, and assuming that neither is under undue duress.

Fundamental assumptions and conditions presumed in this definition are[:]

1. Buyer and seller are motivated by self-interest.
2. Buyer and seller are well informed and are acting prudently.
3. The property is exposed for a reasonable time on the open market.
4. Payment is made in cash, its equivalent, or in specified financing terms.
5. Specified financing, if any, may be the financing actually in place or on terms generally available for the property type in its locale on the effective appraisal date.
6. The effect, if any, on the amount of market value of atypical financing, services, or fees shall be clearly and precisely revealed in the appraisal report.

THE AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS, NATIONAL ASS’N OF REALTORS, THE DICTIONARY OF REAL ESTATE APPRAISAL 194-95 (1984) [hereinafter DICTIONARY].

92. See *Jacksonville Expressway Auth. v. Henry G. Du Pree Co.*, 108 So. 2d 289 (Fla. 1958). “We are persuaded to the view that the facts of this case, viewed in the light of our constitutional guaranty of full and just compensation, call for a positive assertion of appellee’s right to reasonable compensation for the cost of moving its personal property.” *Id.* at 292.

93. See FLA. STAT. § 73.071(3).

population and development trends of the subject neighborhood, and recent sales of similar property.<sup>94</sup>

Eminent domain defense attorneys argue that full compensation is limitless and, therefore, testimony regarding factors negatively affecting value necessarily should be restricted.<sup>95</sup> This argument likely stems from the constitutional protection afforded to landowners from the state's wrongful exercise of its eminent domain police power.<sup>96</sup> Because of these constitutional guarantees, the supreme court also has been hesitant to place quantifiable limits on full compensation.<sup>97</sup> The supreme court, however, has held that "[a]lthough fair market value is an important element in the compensation formula, it is not an exclusive standard in this jurisdiction. Fair market value is merely a tool to assist us in determining what is full or just compensation, within the purview of our constitutional requirement."<sup>98</sup> In the wake of *Finkelstein II*, contamination has become another part of the

94. See *Florida Power & Light Co. v. Jennings*, 518 So. 2d 895, 898 (Fla. 1987); see also *Boynton v. Canal Auth.*, 265 So. 2d 722 (Fla. 1st Dist. Ct. App. 1972) (approving appraisal testimony based on the "development approach" where appraiser considered profit ratio, time to sell lots, price of lots, and present value of lots); *Division of Admin. State Dep't of Transp. v. West Palm Beach Garden Club*, 352 So. 2d 1177 (Fla. 4th Dist. Ct. App. 1977) (stating that "value in use" appraisal approach, rather than market valuation predicated on use for residential purposes, was proper standard of valuation to be used for park property).

95. See, e.g., Amended Brief of Petitioners at 14-15, *Finkelstein* (No. 83,308) (stating that the admission of contamination evidence in condemnation valuation would thwart full compensation). This argument is based primarily on *Dade County v. Brigham*, 47 So. 2d 602 (Fla. 1950), which states that the test for full compensation is not met if a landowner is required to pay attorney fees and costs out of damages awarded for the value of property taken.

96. See FLA. CONST. art. I, § 9 (Due Process Clause) (providing that "[n]o person shall be deprived of life, liberty or property without due process of law . . ."). *Daniels v. State Road Dep't*, 170 So. 2d 846 (Fla. 1964), states that the legislature cannot diminish the concept of full compensation as defined by the courts. The legislature, however, may require more than the amounts required by judicial interpretation. See also *De Soto County v. Highsmith*, 60 So. 2d 915 (Fla. 1952) (holding that except as limited by the constitution, proceedings for the acquisition of property by eminent domain shall be prescribed by law).

97. See *Daniels*, 170 So. 2d at 848 (concluding that both the United States and Florida Constitutions contain express provisions to safeguard private rights); see also *Peavy-Wilson Lumber Co. v. Brevard County*, 31 So. 2d 483 (Fla. 1947) (stating that the unrestrained power of eminent domain is one of the harshest proceedings practiced in the law).

98. See *Jacksonville Expressway Auth. v. Henry G. Du Pree Co.*, 108 So. 2d 289, 291 (Fla. 1958); see also *Jennings*, 518 So. 2d at 897 n.2 (stating "[t]here is no single test for determining what is full compensation").

full compensation formula and a tool by which Florida's definition of full compensation will be refined.

The starting place for determining full compensation in an eminent domain valuation proceeding is the appraiser's estimate of fair market value.<sup>99</sup> As stated above, fair market value reflects what willing buyers and sellers in the market place would pay for the property being acquired.<sup>100</sup> Numerous factors can affect this willing-buyer-seller test of fair market value.<sup>101</sup> Among them, physical characteristics of the property, use of the property, recent sales of other similar property, and improvements on the property are the most recognizable.<sup>102</sup> Until *Finkelstein II*, however, the list of judicially-recognized factors in Florida did not include evidence of contamination, even though buyers, sellers, appraisers, and mortgage lenders consider this important.<sup>103</sup>

As applied to the facts of the case, the Supreme Court of Florida rendered a narrow and limited decision in *Finkelstein II*. The broader holding, however, is that evidence of contamination is relevant to market value.<sup>104</sup> The decision requires condemnors to: 1) meet a factual predicate prior to introducing evidence of value decrease resulting from contamination;<sup>105</sup> 2) carry the burden of proof on this issue;<sup>106</sup> and 3) keep the focus of the eminent domain valuation proceeding on value.<sup>107</sup> Finally, the decision leaves open questions as to the legal requirements of the condemnor's appraiser in determining the effect of contamination on market value.

Applying the law announced in the decision to the facts of the case, the court specifically limited its holding in *Finkelstein II* to a site which had obtained EDI eligibility at the date of taking.<sup>108</sup> The decision, therefore, also is necessarily limited to the *Finkelstein* site, which was in the process

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99. *Du Pree*, 108 So. 2d at 292.

100. See *DICTIONARY*, *supra* note 91, at 116, 194-95.

101. See William G. Earle et al., *Compensation*, FLORIDA EMINENT DOMAIN PRACTICE AND PROCEDURE 175, 231-32 (4th ed. 1988) (providing a list of factors affecting the willing buyer-seller relationship and a list of factors that a willing buyer and seller probably would consider).

102. *Id.*

103. See *State v. Brandon*, 898 S.W.2d 224 (Tenn. Ct. App. 1994).

104. *Finkelstein II*, 656 So. 2d 921, 922 (Fla. 1995).

105. *Id.*

106. *Id.* at 922-25.

107. *Id.* at 925.

108. *Id.*

of being cleaned.<sup>109</sup> In *Finkelstein II*, the parties agreed that the site was contaminated and was eligible under the EDI program.<sup>110</sup> Remediation costs, however, were contested.<sup>111</sup> Because reimbursement for on-going remediation was available under the 1990 EDI program,<sup>112</sup> the supreme court found no factual issue regarding contamination and remediation costs.<sup>113</sup> The court also reasoned that to prevent the landowner from being prejudiced by the timing of FDOT's taking (during the clean-up process, for which the landowner would be reimbursed), the site should be assumed to be cleaned and valued as such.<sup>114</sup> Based on the facts of the case and the court's narrow application of the law to the specific facts presented, *Finkelstein II* would appear applicable only to sites with EDI eligibility and on-going remediation at the date of taking.

The broad holding of *Finkelstein II*, however, is that evidence of contamination is relevant to value.<sup>115</sup> The supreme court limited this broad holding only when applying it to the facts of this case.<sup>116</sup> Despite its narrow application here, *Finkelstein II* has the potential to apply in a variety of situations: 1) where any type of contaminant is present on a property; 2) alternate appraisal techniques are applied in valuing contaminated property; 3) in non-eminent domain valuation proceedings; and 4) where no EDI program or reimbursement plan exists. It is this broad holding regarding Florida valuation law which has the potential to impact the development of this continually evolving area of law.

The decision imposes a factual predicate on testimony regarding decrease in property value resulting from contamination.<sup>117</sup> Though the factual predicate, reflected in sections 90.704 and 90.705 of the *Florida Statutes*, is similar to evidence law throughout the nation,<sup>118</sup> the court articulated that to meet the predicate in this case, the appraiser "must [have] a factual basis through evidence of sales of comparable contaminated property upon which to base a determination that contamination has decreased the value of the property."<sup>119</sup> The court then assigned the

109. *Finkelstein II*, 656 So. 2d at 925.

110. *Id.* at 923.

111. Amended Brief of Petitioners at 2-3, *Finkelstein* (No. 83,308).

112. *See supra* note 28 and accompanying text.

113. *Finkelstein II*, 656 So. 2d at 924.

114. *Id.* at 925.

115. *Id.*

116. *Id.* at 925 n.1.

117. *Id.* at 922.

118. *See, e.g.*, FED. R. EVID. 704, 705.

119. *Finkelstein II*, 656 So. 2d at 925.



burden of meeting this evidentiary threshold, in addition to proving decrease in value, upon the condemnor.<sup>120</sup> Accordingly, the broad holding of *Finkelstein II* applies when a party meets the factual predicate set forth by the court and contained in the *Florida Statutes*.

The supreme court also stated that, in this case, the condemnor must prove value decrease based on market data.<sup>121</sup> Conversely, the condemnee would have to rebut with proof of no decrease or a lesser decrease, presumably based on market data.<sup>122</sup> In effect, parties must necessarily argue about market data and its effect on market value. Though the court stated that the focus of an eminent domain valuation proceeding must be value,<sup>123</sup> the court may not have realized the inherent difficulties associated with locating and analyzing sales of comparable contaminated property (market data).<sup>124</sup> As discussed in detail below, the difficulty with the court's approach is that if sales of contaminated sites are located at all, an appraiser may not be able to isolate a specific and quantifiable value decrease based on the data.<sup>125</sup> The court's decision, however, also is broad enough to allow for alternate methods of valuing contaminated property. These alternate methods would meet the factual predicate articulated by the supreme court and indicate that contaminated sites, or sites in the process of being cleaned, sell for less than uncontaminated sites. Without meeting the factual predicate, however, an appraiser's testimony would not be admissible. This result is consistent with the evidentiary threshold contained in the *Florida Statutes*, and with *Jennings*, holding that all factors relevant to value must be considered.<sup>126</sup>

Finally, the decision states that evidence of contamination should not become a central "feature" of an eminent domain valuation trial.<sup>127</sup> The court reasoned that the focus of an eminent domain valuation proceeding is value.<sup>128</sup> This rationale is supported by the court's reliance on *Jennings*. In *Jennings*, the supreme court articulated the issue in eminent domain

120. *Id.*

121. *Id.*

122. See *Florida Power & Light Co. v. Jennings*, 518 So. 2d 895, 896 (Fla. 1987). The landowner introduced expert testimony against a condemnor to rebut the condemnor's representation that potential buyers are knowledgeable about the alleged adverse effects and would depreciate the land adjacent to a power line before they would buy it. *Id.*

123. *Id.*

124. See *infra* text accompanying notes 265-76.

125. *Id.*

126. *Jennings*, 518 So. 2d at 899.

127. *Finkelstein II*, 656 So. 2d 921, 924-25 (Fla. 1995).

128. *Id.* at 925.

proceedings is to be full compensation to the landowner for the property taken.<sup>129</sup> In *Jennings*, the court disapproved of the landowner's use of expert witnesses to explain complex scientific evidence about alleged long-term medical effects from proximity to high-voltage power lines.<sup>130</sup> The court stated that "[a]llowing such scientific testimony into evidence . . . is irrelevant to the issue of full compensation."<sup>131</sup> The court further stated that "[t]he introduction into evidence of independent expert's scientific evidence is . . . unnecessary and only serves to confuse the actual issue before the jury."<sup>132</sup>

Based on *Jennings*, it is reasonable to believe that the court would similarly disapprove of complicated, technical evidence regarding contamination and cost of remediation in an eminent domain valuation proceeding, if full compensation and value are the focus of an eminent domain valuation proceeding.<sup>133</sup> It logically follows that the valuation expert (appraiser) should be the only expert witness required to testify regarding contamination. In addition, the valuation expert's testimony must necessarily be limited to the market-based effects of contamination on value, if any.<sup>134</sup> In this way, the "expert's valuation opinion is based on reasonable factors [which] may be determined by the jury without resort to other expert witnesses' testimony or documentary evidence concerning the reasonableness of the buying public's fears," as held in *Jennings*.<sup>135</sup> The supreme court's rationale is that this restriction should prevent eminent domain valuation proceedings from becoming a forum in which to resolve complicated environmental issues and present lengthy and complex expert testimony, both of which may be only peripherally related to value or full compensation. Finally, this limitation reserves for the jury, rather than for technical experts, the exclusive decision-making power with regard to the effect of contamination on value,<sup>136</sup> assuming that a trial court first permits the testimony.

From the condemnor's perspective, *Finkelstein II* has the potential to create conflict with the line of cases where landowners with contaminated

129. *Jennings*, 518 So. 2d at 898.

130. *Id.* at 899.

131. *Id.* at 897-98.

132. *Id.* at 899.

133. *Id.*

134. The *Jennings* court did not approve of the landowner's scientific experts' testimony. However, the court accepted the appraiser's testimony. *Jennings*, 517 So. 2d at 896.

135. *Id.* at 899.

136. *See id.* at 899. "We believe that a jury is certainly capable of determining whether an expert's valuation opinion is reasonable . . ." *Id.*

property seek tax abatement because of the contamination.<sup>137</sup> For example, a landowner may believe that his contaminated property is worth five dollars per square foot for tax purposes. Were this same landowner to become a condemnee, however, it is possible that the owner could assert that based on *Finkelstein II*, the property should be valued as if cleaned at fifteen dollars per square foot, leaving the condemnor to pay the clean-up bill. Because the taxing authority and the condemnor likely are not the same entity,<sup>138</sup> there is the potential for a landowner-turned-condemnee to “double-dip” and gain an incongruous advantage (or a fuller measure of compensation) in the combined tax abatement/condemnation situation. Almost all condemnees are taxpayers.<sup>139</sup> The converse, however, is not true. To prevent this result, *Finkelstein II* must necessarily cross litigation boundaries and be given full precedential effect in all types of valuation proceedings, including tax abatement cases.

*Finkelstein II* also encourages landowners of contaminated property to begin remediation quickly to gain the advantage of the decision, should they become a condemnee. For instance, if a landowner of contaminated property immediately begins environmental assessment or remediation and subsequently becomes a condemnee, it is likely that courts would find a factual similarity with, and therefore, reason to apply, *Finkelstein II*.<sup>140</sup> The decision, however, does not state in what stage of the remediation process the site must be to gain this valuation advantage. For example, the landowners of the *Finkelstein* site had “begun remediation” at the date of the taking.<sup>141</sup> It is uncertain as to how far into the remediation process the

137. See, e.g., Robert I. McMurry, *Treatment of Environmental Contamination in Eminent Domain Cases*, C975 A.L.I.-A.B.A. 237, 251-53 (1995), available in WL, TP-ALL Directory, ALI-ABA Database [hereinafter McMurry, *Treatment*] (presenting case law and an analysis of valuing contaminated property for tax purposes with an extensive bibliography); see also *University Plaza Realty Corp. v. City of Hackensack*, 624 A.2d 1000 (N.J. Super. Ct. App. Div.), cert. denied, 634 A.2d 527 (N.J. 1993).

138. In Florida, the Department of Transportation is authorized to condemn property to widen state roads. FLA. STAT. chs. 73, 74, 334-39 (1995). County government is responsible for real estate taxation.

139. It is generally known that examples of tax-exempt owners are not-for-profit corporations, charitable organizations, property owned by the state, county, or city, churches, libraries, and schools, and other public buildings.

140. *Finkelstein II* held that because clean-up on the site was under way at the date of taking, the site should be valued as if the clean-up were completed. *Finkelstein II*, 656 So. 2d 921, 925 (Fla. 1995).

141. Interview with Linda Ferroli Nelson, *supra* note 31; see also *supra* text accompanying note 26.

site was at the date of the taking.<sup>142</sup> Conversely, if a landowner in a similar factual setting had not begun remediation prior to the taking, it is likely that the *Finkelstein II* decision would require denial of a landowner's request to limit expert testimony on the effect of contamination on the value of the site.

The *Finkelstein II* decision also leaves open several other avenues for broader application. It would be reasonable for the decision to apply in cases where sites suffer from contamination other than underground petroleum hydrocarbon. Because of the court's reliance on *Jennings*, it is possible that *Finkelstein II* could apply in cases litigating the value of sites contiguous to contaminated sites, but which may not themselves be contaminated.<sup>143</sup> This also seems reasonable considering the court's reference to "stigma" created by the increased risk associated with contaminated property.<sup>144</sup> Appraisal professionals generally agree that stigma accrues to property that adjoins contaminated property, as well as to the contaminated property itself.<sup>145</sup> Finally, because value is the focus of any type of valuation proceeding, evidence of contamination also would be relevant in non-eminent domain valuation proceedings.

This is as far as the Supreme Court of Florida has gone. Until recently, little, if any, case law on this issue had emerged nationwide. Like *Finkelstein II*, however, a handful of courts in other states recently have held that evidence of contamination is relevant to market value.<sup>146</sup> These cases

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142. See *supra* text accompanying note 26.

143. See Lorraine Lewandrowski, *Toxic Blackacre: Appraisal Techniques & Current Trends in Valuation*, 5 ALB. L.J. SCI. & TECH. 55, 87-92 (1994), available in WL, TP-ALL Directory, JLR Database (discussing valuation techniques applicable to property near or adjacent to contaminated sites).

144. *Finkelstein II*, 656 So. 2d at 924.

145. See Lewandrowski, *supra* note 143, at 89; see also Howard R. Cabot, *Post-Remediation 'Stigma' Damages Hinge on Hard Evidence of Residual Risk*, INSIDE LITIG., Oct. 1994, at 28, available in WL, Law Reviews, Legal Texts and Periodicals Directory, Journals and Law Reviews Database; Arnold, *supra* note 9, at 415-16.

146. See *Redevelopment Agency v. Thrifty Oil Co.*, 5 Cal. Rptr. 2d 687 (Ct. App. 1992) (holding that evidence of contamination is just one of many factors that jury may consider in determining fair market value in eminent domain proceeding); *Murphy v. Town of Waterford*, No. 520173, 1992 WL 170588, at \*1 (Conn. Super. Ct. July 9, 1992) (holding that locality cannot reduce amount payable to landowner as just compensation for taking for cleanup expenses, because Connecticut statute provides for reimbursement of such expenses); *Department of Transp. ex rel. People v. Parr*, 633 N.E.2d 19 (Ill. App. Ct. 1994) (holding that state may not introduce cost required to remediate contaminated property in eminent domain proceeding because such costs are not condition influencing property's value); *City of Olathe v. Stott*, 861 P.2d 1287 (Kan. 1993) (holding that in eminent domain proceeding,

are similar to *Finkelstein II* in that each involved condemnation of contaminated property where the court addressed the question of whether evidence of contamination was relevant to value.<sup>147</sup> Of these few cases, those involving mass acquisition of uranium mines,<sup>148</sup> as well as tax abatement cases,<sup>149</sup> are not as analogous to *Finkelstein II* as are the following cases. Though considering the broad holding of *Finkelstein II*, the factually distinguishable uranium mine and tax abatement cases provide a valuable comparative source for case law addressing collateral issues such as appropriate and/or admissible appraisal methodology.<sup>150</sup>

In *State v. Brandon*,<sup>151</sup> the issue before the court was whether evidence of contamination and remediation costs were relevant in determining the fair market value of a property being acquired under eminent domain.<sup>152</sup> The Tennessee appellate court held that evidence of contamination and the cost to remediate it was relevant in determining the fair market value of a property being acquired under eminent domain.<sup>153</sup>

The Tennessee Department of Transportation ("TDOT") acquired a portion of a bulk oil distributorship and gasoline service station in December 1991.<sup>154</sup> After the court transferred title to the state, the state's contractor found underground petroleum hydrocarbon contamination.<sup>155</sup> Between

evidence of contamination is admissible for purpose of determining fair market value); *State v. Brandon*, 898 S.W.2d 224 (Tenn. Ct. App. 1994) (holding that trial court erroneously excluded environmental contamination evidence which was relevant to issue of valuation in eminent domain proceeding). All of these cases involve condemnation of contaminated property where relevance of evidence of contamination was questioned.

147. See cases cited *supra* note 146.

148. See, e.g., *Department of Health v. Hecla Mining Co.*, 781 P.2d 122 (Colo. Ct. App. 1989) (holding that jury may consider present and future use and condition of condemned land for purpose of determining value after state has exercised its power of eminent domain pursuant to Uranium Mill Tailings Radiation Control Act); see also *State Dep't of Health v. The Mill*, 887 P.2d 993 (Colo. 1994), *cert. denied*, 115 S. Ct. 2612 (1995).

149. See *McMurry, Treatment*, *supra* note 137, at 251-53.

150. See, e.g., *Westling v. Mille Lacs*, Nos. C4-93-504-R, C2-94-379-R, C9-94-380-R, C5-93-706-R, 1995 WL 128511, at \*2-\*3 (Minn. Tax Ct. Mar. 17, 1995), *aff'd*, 1996 WL 39626 (Minn. 1996) (holding that value of property for tax assessment purposes should account for negative "stigma" which attaches to previously contaminated property); *University Plaza Realty Corp. v. City of Hackensack*, 624 A.2d 1000 (N.J. Super. Ct. App. Div.), *cert. denied*, 634 A.2d 527 (N.J. 1993).

151. 898 S.W.2d 224 (Tenn. Ct. App. 1994).

152. *Id.* at 225.

153. *Id.*

154. *Id.*

155. *Id.*

January and April 1992, the state began to remediate the site.<sup>156</sup> In June 1992, the property owner was notified by TDOT of the contamination and was ordered to conduct additional pollution surveying and abatement procedures.<sup>157</sup> The landowners denied the existence of contamination and did not acquiesce to the state's demands to clean up the site.<sup>158</sup> The state subsequently completed the contamination remediation, at a total cost of \$64,525.58.<sup>159</sup> Acting on the motion of the landowners, the trial court ordered the state, its attorneys, and expert witnesses, not to mention at trial the existence of the contamination nor to reveal the cost of remediation.<sup>160</sup> The valuation experts were forced to testify on the value of the land as if it was uncontaminated.<sup>161</sup> The jury returned a verdict in favor of the landowners.<sup>162</sup> After the jury retired, TDOT attempted to proffer evidence concerning the contamination on the property and the cost of remediation.<sup>163</sup> The court stated that the proffer could be made at a later date.<sup>164</sup> TDOT then filed a Motion for Remittitur, or offset of remediation costs against the verdict and requested a new trial.<sup>165</sup> The trial court denied the motions and TDOT appealed.<sup>166</sup>

Relying on the *Tennessee Rules of Evidence*,<sup>167</sup> which state that relevant evidence is generally admissible,<sup>168</sup> the court held that the contaminated nature of the property is relevant to the issue of valuation because it tends to make a lower market value more probable than it would without the evidence.<sup>169</sup> The court also reasoned that the form of property, or a property characteristic, is relevant to valuation.<sup>170</sup> In reviewing the facts of the case, the court looked to the testimony of two experts.<sup>171</sup> An affidavit from a banker stated that banks generally will not finance

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156. *Brandon*, 898 S.W.2d 224, 225 (Tenn. Ct. App. 1994).

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Brandon*, 898 S.W.2d at 225.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Brandon*, 898 S.W.2d at 225-26.

167. *See* TENN. R. EVID. 401, 403.

168. *Id.*

169. *Brandon*, 898 S.W.2d at 227.

170. *Id.*

171. *Id.* at 226-27.

contaminated property or take back contaminated property, and that the subject site was the type of site which typically required an environmental assessment.<sup>172</sup> Similarly, the appraiser stated in an affidavit that some offset for remediation was required and that stigma was the detrimental effect of contamination on property value.<sup>173</sup> The court finally found support for its decision based on three cases from other jurisdictions,<sup>174</sup> including *Finkelstein I*.<sup>175</sup> In applying the law to the facts, the court found evidence of contamination relevant, but rejected a pure “1 to 1 offset” of remediation costs to land value.<sup>176</sup>

*Brandon* is consistent with *Finkelstein II*. However, *Brandon* is broader than *Finkelstein II* because it holds remediation costs, in addition to evidence of contamination, to be relevant to value.<sup>177</sup> The case is distinguishable on its facts because in *Brandon*, the contamination was not known at the date of the taking.<sup>178</sup> However, the balance of the factual circumstance is strikingly similar. Also, by relying on Tennessee evidence rules and case law,<sup>179</sup> the court’s reasoning is similar to that utilized in *Finkelstein II*. At the time briefs for *Finkelstein II* were submitted to the Supreme Court of Florida,<sup>180</sup> *Brandon* had not yet been decided.<sup>181</sup> If it had, it is likely that the Tennessee decision would have bolstered the FDOT’s position in *Finkelstein II*.

Likewise, the issue presented in *Department of Transportation ex rel. People v. Parr*,<sup>182</sup> also was whether evidence of contamination and remediation costs are relevant in determining the fair market value of a property being acquired under eminent domain.<sup>183</sup> However, the Illinois appellate court held that under the facts of the case, evidence of contamina-

172. *Id.* at 226.

173. *Id.* at 226-27.

174. *Brandon*, 898 S.W.2d at 227.

175. 629 So. 2d 932 (Fla. 4th Dist. Ct. App. 1993), *aff’d*, 656 So. 2d 921 (Fla. 1995).

176. *Brandon*, 898 S.W.2d at 228.

177. *Id.* at 226-28.

178. *Id.* at 225.

179. *Id.* at 225-28.

180. The Amended Brief of Petitioners was submitted July 7, 1994 and Respondent’s Brief was submitted July 26, 1994. See Amended Brief of Petitioners at 30, *Finkelstein* (No. 83,308); Brief for Respondent at 25, *Finkelstein* (No. 83,308).

181. *Brandon* was decided on December 30, 1994. *Brandon*, 898 S.W.2d at 224.

182. 633 N.E.2d 19 (Ill. App. Ct. 1994).

183. *Id.* at 21.

tion and the cost to remediate was not relevant to the fair market value of a property being acquired.<sup>184</sup>

At the same time that the Illinois Department of Transportation (“IDOT”) notified the landowner that his property would be required to construct a bridge, IDOT informed the owner that he owed \$100,000 for the property’s environmental remediation costs.<sup>185</sup> Subsequently, IDOT filed a complaint to condemn the property via Illinois’ “quick-take” statute.<sup>186</sup> At the quick-take bench trial, IDOT presented evidence that the property’s value was zero due to the alleged presence of contamination and because of remediation costs.<sup>187</sup> The court awarded possession of the site to IDOT.<sup>188</sup> Pursuant to the Illinois “quick-take” law, the court’s written order following the trial stated that evidence of environmental contamination was not admissible in an eminent domain proceeding.<sup>189</sup> The trial court further found that IDOT failed to prove the existence of an “unsafe or unlawful condition” on the property, according to Illinois law.<sup>190</sup> IDOT undertook to remediate the site.<sup>191</sup> At the valuation trial, the landowners filed a motion to bar all testimony concerning environmental contamination.<sup>192</sup> The trial court held a hearing and ordered the parties to submit briefs and argument addressing: 1) whether evidence of environmental contamination and remediation costs was admissible; and 2) whether such evidence would implicate the landowner’s procedural due process rights.<sup>193</sup> After both parties submitted briefs, the trial court granted the landowner’s Motion to Bar Testimony on Contamination and Remediation.<sup>194</sup> The trial court certified the question to the Illinois appellate court. IDOT filed a Motion for Leave to Appeal.<sup>195</sup> The appellate court granted IDOT’s motion.<sup>196</sup>

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184. *Id.*

185. *Id.* at 20.

186. *Id.* The “quick-take” statute described is similar to that outlined in chapter 74 of the *Florida Statutes*, where a condemnor may take property under an expedited, or shortened, schedule.

187. *Parr*, 633 N.E.2d at 20.

188. *Id.*

189. *Id.*

190. *Id.* at 21. The court refers to § 7-119 of the Illinois Eminent Domain Act.

191. *Id.*

192. *Parr*, 633 N.E.2d at 21.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*



Though the court in *Parr* held that, based on the facts of the case, evidence of contamination was not relevant to value,<sup>197</sup> *Parr* also is consistent with *Finkelstein II*. If the IDOT had proved that the contamination constituted an illegal condition affecting the value of the property, it is likely that the court would have found the contamination relevant to value,<sup>198</sup> in accord with Illinois' Eminent Domain Act.<sup>199</sup> Similarly, the Illinois court held that without proving the existence of the illegal condition (contamination), evidence of remediation costs also was not relevant to value.<sup>200</sup> This is not unlike the holding in *Finkelstein II* that because the site was eligible for EDI reimbursement, evidence of remediation cost also was not admissible.<sup>201</sup> The Illinois court, however, took this rationale a step further. It declared that evidence of remediation costs, if admissible in this case, would violate the procedural due process rights of the landowner because IDOT did not follow the procedural safeguards set forth in the Environmental Protection Act.<sup>202</sup> Specifically, IDOT failed to notify the landowner of the nature or extent of the environmental hazard on the property.<sup>203</sup> IDOT also failed to inform the landowner that it sought to hold them liable for remediation costs.<sup>204</sup> Because of these failures, the landowner's procedural due process claim succeeded.<sup>205</sup> Such a claim would not have been viable in *Finkelstein II* because the tenant was aware of the contamination and had taken steps to remediate it prior to the taking.<sup>206</sup> Aside from this constitutional claim, *Parr* also stands for the

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197. 633 N.E.2d at 21.

198. *Id.*

199. *See id.* at 21-22 (quoting ILL. ANN. STAT. ch. 735 para. 5/7-119 (West 1992)). Paragraph 5/7-119 provides that:

[e]vidence is admissible as to . . . (2) any unsafe, unsanitary, substandard, or illegal condition, use or occupancy of the property; . . . and (4) the reasonable cost of causing the property to be placed in a legal condition, use or occupancy. Such evidence is admissible notwithstanding the absence of any official action taken to require the correction or abatement of such illegal condition, use or occupancy.

ILL. ANN. STAT. ch. 735 para. 5/7-119.

200. *Parr*, 633 N.E.2d at 22.

201. *Finkelstein II*, 656 So. 2d at 922-24.

202. *Parr*, 633 N.E.2d at 22-23.

203. *Id.* at 23.

204. *Id.*

205. *Id.*

206. *Finkelstein II*, 656 So. 2d 921, 922-23 (Fla. 1995); Amended Brief of Petitioners at 1, *Finkelstein* (No. 83,308); Interview with Linda Ferrolli Nelson, *supra* note 31.

proposition that given the correct evidentiary predicate, evidence of contamination would be relevant to value.

A third case, similar to *Finkelstein II*, was rendered by the Supreme Court of Kansas in *City of Olathe v. Stott*.<sup>207</sup> Like *Finkelstein II*, the court in *Stott* considered the relevance of contamination to value and, also like *Finkelstein II*, concluded that the Kansas underground storage tank reimbursement program did not prohibit evidence of the effect that contamination and stigma had on the subject property's value.<sup>208</sup>

In mid-1990, the city of Olathe, Kansas condemned eight tracts of land to expand the intersection at 119th Street and Interstate 35.<sup>209</sup> Two of the tracts had been operated as service stations for twenty-five years.<sup>210</sup> Each site had leaking underground gasoline and diesel fuel storage tanks.<sup>211</sup> At the eminent domain valuation trial, the appraisers for the city were allowed, over the landowners' objections, to testify to the impact of the contamination on value.<sup>212</sup> The landowners sought to introduce testimony that on previous occasions, the city had acquired contaminated sites without investigating the contamination.<sup>213</sup> The landowners also proffered testimony to impeach the credibility of the city's appraisers.<sup>214</sup> The trial court ruled that the landowners' evidence was not admissible because it was not relevant.<sup>215</sup> After the trial was concluded, the court inquired of the jury about how it considered the evidence of the contamination in reaching its verdict.<sup>216</sup> The juror who responded indicated that the jury did, in fact, consider the contamination and that it reduced the property's value by ten percent.<sup>217</sup> The landowners appealed claiming that the trial court erred by excluding their proffered testimony and by inquiring of the jury.<sup>218</sup>

The pertinent part of the decision presents a detailed look at the Kansas Storage Tank Act ("Act"),<sup>219</sup> which is similar in structure to Florida's EDI

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207. 861 P.2d 1287 (Kan. 1993).

208. *Id.* at 1289.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Stott*, 861 P.2d at 1289.

213. *Id.* at 1290.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Stott*, 861 P.2d at 1290.

218. *Id.*

219. *Id.* at 1289-93 (citing KAN. STAT. ANN. § 65-34,100 to 65-34,212 (1993)).

program.<sup>220</sup> In brief, the Act provides for reimbursement of remediation costs for qualified sites.<sup>221</sup> The landowners' primary argument was that the Act preempted all other law that might address funding the clean-up costs required from the contamination.<sup>222</sup> In addition, the landowners argued that because of the Act, the impact of contamination on property value should not be an issue in an eminent domain valuation proceeding.<sup>223</sup> The court, however, sided with the city, stating that the Act did not specifically address reduction in property value attributable to risk or stigma associated with contamination.<sup>224</sup> Furthermore, the court held that the Act did not address what appeared to be primarily a cost issue—the reduction in value attributable to risk and stigma associated with the contamination.<sup>225</sup> The court held that the trial court did not abuse its discretion in permitting the appraisers' testimony that risk and stigma associated with the contamination had a negative effect on the properties' value because their opinion was formed over time after market investigation.<sup>226</sup>

The reasoning used in *Stott* is strikingly similar to that found in *Finkelstein II*. In effect, the Supreme Court of Florida held that the EDI program, like the Kansas Storage Tank Act, did not provide the only remedy for matters associated with on-site contamination and that any consideration of the issue is otherwise improper in an eminent domain valuation proceeding.<sup>227</sup> Like the Florida court, the Supreme Court of Kansas also recognized that a negative stigma attaches to property even after it has been cleaned.<sup>228</sup> Consideration of this issue in an eminent domain valuation proceeding, as noted by both courts, is proper because stigma has a direct bearing on, and is relevant to, property value.<sup>229</sup> Finally, it is interesting to note that the *Stott* decision was available to the Supreme Court of Florida at the time its decision in *Finkelstein II* was rendered.<sup>230</sup> The *Stott* decision, despite its similarities, is not mentioned in the *Finkelstein II*

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220. See *supra* note 28 and accompanying text.

221. *Stott*, 861 P.2d at 1290-93.

222. *Id.* at 1292.

223. *Id.*

224. *Id.*

225. *Id.* at 1293.

226. *Stott*, 861 P.2d at 1298.

227. *Finkelstein II*, 656 So. 2d 921, 922-23 (Fla. 1995).

228. *Stott*, 861 P.2d at 1293-98.

229. *Id.*; *Finkelstein II*, 656 So. 2d at 924.

230. *Stott* was decided by the Supreme Court of Kansas on October 29, 1993. *Stott*, 861 P.2d at 1287.

decision, however. Perhaps the Supreme Court of Florida was not compelled to place reliance on *Stott*, particularly because of the availability and applicability of *Jennings*, a Florida case.

Finally, a California Court of Appeal reached a similar conclusion in *Redevelopment Agency v. Thrifty Oil Co.*<sup>231</sup> The claim arose in an eminent domain proceeding involving the condemnation of a petroleum hydrocarbon contaminated gasoline service station.<sup>232</sup> In recognizing that evidence of contamination is relevant to value, the court rejected the condemnee's contention that remediation costs were not properly before the jury.<sup>233</sup> The court stated that contamination was considered by all experts in determining the fair market value of the property acquired.<sup>234</sup> The court in *Thrifty*, unlike the court in *Finkelstein II*, also stated that remediation was a characteristic of the property which would affect its value.<sup>235</sup> Despite the broader holding in *Thrifty*, the thrust of the decision is quite similar to and supportive of the reasoning announced in *Finkelstein II*.

Because only a handful of cases of this type exist, it would be somewhat premature to state that a trend in the law has developed. It is possible, however, to draw several distinct conclusions from a comparison of these cases. First, most courts seemed willing to recognize that given the proper factual predicate, evidence of contamination is relevant to value.<sup>236</sup> This evidence, in the form of a properly-qualified appraiser's testimony, could include the risk and stigma associated with the contamination<sup>237</sup> and remediation costs where a plan of clean-up was not already under way or completed.<sup>238</sup> Second, it is apparent that courts favor a "back-door" approach to admitting evidence of the effect of contamination on property value. In each case, the evidence sought to be admitted came from a valuation expert, not a contamination or environmental expert.<sup>239</sup> Accordingly, the relevant factors related to the contamination and effecting market

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231. 5 Cal. Rptr. 2d 687 (Ct. App. 1992).

232. *Id.* at 688.

233. *Id.* at 689 n.9.

234. *Id.*

235. *Id.*

236. See *Finkelstein II*, 656 So. 2d 921, 922-23 (Fla. 1995); *Thrifty*, 5 Cal. Rptr. 2d at 689; *State v. Brandon*, 898 S.W.2d at 224 (Tenn. Ct. App. 1994). *But see* Department of Transp. *ex rel.* *People v. Parr*, 633 N.E.2d 19, 22 (Ill. App. Ct. 1994).

237. *Finkelstein II*, 656 So. 2d at 925; *Thrifty*, 5 Cal. Rptr. 2d at 689; *Brandon*, 898 S.W.2d at 225. These cases describe factors which generally make up stigma.

238. See *Finkelstein II*, 656 So. 2d at 924; *Parr*, 633 N.E.2d at 21-23.

239. See *Finkelstein II*, 656 So. 2d at 924; *Thrifty*, 5 Cal. Rptr. 2d at 689; *Brandon*, 898 S.W.2d at 226; *Parr*, 633 N.E.2d at 20.

value should be addressed by a single valuation witness, such as an appraiser testifying on the question of “stigma.” In this way, eminent domain valuation proceedings also do not become environmental trials. By following the courts’ suggestions, a host of environmental technicians and expert witnesses would not dominate the trial, prejudice the defendant,<sup>240</sup> or confuse the jury.<sup>241</sup> Finally, those courts which have admitted evidence of remediation cost, have also disfavored “1-to-1” remediation cost to value set-offs.<sup>242</sup> Presumably, if an appraiser employs a valuation approach considering “stigma,”<sup>243</sup> the problem of a “1-to-1” set off can be avoided.

*Finkelstein II* declares that evidence of contamination is relevant to value.<sup>244</sup> Though the decision seems to be limited to the facts of the case, its broader holding should apply to the many situations where contamination and value intersect. The decision also is consistent with case law in other jurisdictions. Finally, *Finkelstein II* suggests a plan by which a condemnor may litigate both issues without prejudicing the defendant and without creating a highly technical environmental proceeding with the potential to confuse the jury.

### B. *Methods of Valuing Contaminated Property*

The Supreme Court of Florida noted that the issue of valuing contaminated property has been the subject of much recent discussion within the appraisal profession.<sup>245</sup> Particularly, the court noted that these sources recognize contamination as a factor considered by appraisers.<sup>246</sup> The court did not, however, stop at merely recognizing that the appraisal profession is developing techniques by which appraisers may estimate the value of contaminated property. In applying the law to the facts of the case, the court stated, based on Florida evidence law,<sup>247</sup> that a proper factual basis on which to base an opinion of the effect of contamination on property

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240. *Finkelstein II*, 656 So. 2d at 925 (stating that evidence of contamination, by its nature, is prejudicial).

241. See *Florida Power & Light Co. v. Jennings*, 518 So. 2d 895, 899 (Fla. 1987).

242. See *Brandon*, 898 S.W.2d at 226; see also *University Plaza Realty Corp. v. City of Hackensack*, 624 A.2d 1000 (N.J. Super. Ct. App. Div.), cert. denied, 634 A.2d 527 (N.J. 1993); *Inmar Assoc., Inc. v. Borough of Carlstadt*, 549 A.2d 38 (N.J. 1988); see generally *McGregor*, *supra* note 9.

243. See *infra* notes 283-89 and accompanying text.

244. *Finkelstein II*, 656 So. 2d at 922.

245. *Id.* at 923.

246. *Id.*

247. See FLA. STAT. §§ 90.703, .705 (1995).

value is through reliance on evidence of sales of comparable contaminated property.<sup>248</sup> Based on the court's statement, it would seem that such an approach is only one method of valuing contaminated property. Since the late 1980s, new approaches to valuing contaminated property have emerged from within the appraisal community. Prior to discussing these new approaches to valuing contaminated property, however, a brief discussion of general appraisal practice is appropriate.

The *Uniform Standards of Professional Appraisal Practice* requires appraisers to consider the three traditional approaches to valuing property.<sup>249</sup> These approaches are the cost approach, the income approach, and the market or sales comparison approach.<sup>250</sup> The outcome of each approach is weighed by the appraiser when making her final estimate of market value.<sup>251</sup>

The cost approach is a specialized set of procedures in which an appraiser derives a value indication by estimating the current cost to reproduce or replace the existing structure, deducting for all accrued depreciation in the property, and adding the estimated land value.<sup>252</sup> The cost approach is particularly useful in valuing new or nearly new improvements and properties that are not frequently exchanged in the market.<sup>253</sup> Specialty properties, like gasoline service stations, are particularly suited to being valued by the cost approach because of the absence of a significant market and comparable sales data.<sup>254</sup> In developing the cost approach for a *Finkelstein*-like site, the appraiser would be required to locate sales of comparable contaminated vacant land.<sup>255</sup> The appraiser also must develop

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248. *Finkelstein II*, 656 So. 2d at 925.

249. UNIFORM STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE 13-15 (Appraisal Foundation ed., 1995). Rule 1-4 sets forth the standards.

250. APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE 71 (10th ed. 1992) [hereinafter APPRAISAL TEXT].

251. *Id.* at 553-60.

252. See DICTIONARY, *supra* note 91, at 75.

253. See APPRAISAL TEXT, *supra* note 250, at 80. Gasoline service stations are generally considered to be "special purpose" properties. Special use properties, or limited market properties, are properties that are not frequently exchanged in the market because of unique physical design, special construction materials, specialized use improvements, or layouts that restrict their utility to the use for which they were originally built. *Id.* at 21; see also *Great Atlantic & Pacific Tea Co. v. Kiernan*, 366 N.E.2d 808, 811 (N.Y. 1977) (holding that special purpose properties are those which are uniquely adapted to business conducted upon them, or use made of them, and cannot be converted to other uses without expenditure of substantial sums of money); *Lewandrowski*, *supra* note 143, at 59.

254. See APPRAISAL TEXT, *supra* note 250, at 23.

255. See *id.* at 298-310 (discussing land valuation techniques).

a market-based rate of depreciation for any improvements on the property.<sup>256</sup> If the appraiser cannot locate comparable sales, she would have to employ an alternate appraisal method<sup>257</sup> which, if speculative or untried<sup>258</sup> within the professional appraisal community, may not satisfy the proper factual predicate.

The income approach is a set of procedures which an appraiser uses to derive a value indication for income-producing property by converting anticipated income benefits into an indication of present value.<sup>259</sup> Specifically, an indication of value is derived by capitalizing the property's net income based on a market-derived overall capitalization rate, which considers the risk associated with the investment.<sup>260</sup> For contaminated property, the income approach should consider factors including: 1) the extent and nature of the contamination, which may result in unmarketability or reduced marketability; 2) the type of contaminated property involved; 3) the presence of assumable financing; and 4) demand for alternative uses.<sup>261</sup> Most appraisal methodologists agree that the presence of contamination increases the risk associated with an investment-type, income-producing property.<sup>262</sup> Increased risk typically translates into less value.<sup>263</sup> In addition, factors including remediation costs, lost rental or investment

256. *Id.* at 243-65.

257. See, for example, Patchin, *Valuation*, *supra* note 9, which presents three different approaches to valuing contaminated property and frequently recognized as the seminal article addressing valuation of contaminated property. See also Peter J. Patchin, *Contaminated Properties—Stigma Revisited*, 59 APPRAISAL J. 167 (1991) [hereinafter Patchin, *Stigma Revisited*] (continuing the development of innovative valuation analyses and techniques).

258. See *Terra-Products, Inc. v. Kraft General Foods, Inc.*, 653 N.E.2d 89 (Ind. Ct. App. 1995); Robert I. McMurry & David H. Pierce, *New Developments for Environmental Practitioners in Hazardous Materials Litigation*, C750 A.L.I.-A.B.A. 343, 371-73 (1992), available in WL, TP-ALL Directory, ALI-ABA Database [hereinafter McMurry & Pierce, *New Developments*]; Anthony J. Rinaldi, *Contaminated Properties—Valuation Solutions*, 59 APPRAISAL J. 377 (1991). But see *Westling v. Mille Lacs County*, Nos. C4-93-504-R, C2-94-379-R, C9-94-380-R, C5-93-706-R, 1995 WL 128511, at \*1 (Minn. Tax Ct. Mar. 17, 1995), *aff'd*, 1996 WL 39626 (Minn. 1996) (approving of an appraiser's use of the cost, market, and income approaches to reach correlated opinions of "unimpaired value," then deducting a stigma factor and cost to cure from the unimpaired values to reach final conclusions of market value).

259. See DICTIONARY, *supra* note 91, at 159.

260. See APPRAISAL TEXT, *supra* note 250, at 409.

261. See Lewandrowski, *supra* note 143, at 60-61.

262. See, e.g., Patchin, *Valuation*, *supra* note 9, at 13 (advancing modified income capitalization method as most reliable approach to valuation of contaminated investment properties).

263. See APPRAISAL TEXT, *supra* note 250, at 415-19.

income, and “down time” during clean-up, also can negatively impact on an income stream and translate into less value.<sup>264</sup>

The market approach, or sales comparison approach, is a set of procedures by which an appraiser derives a value indication by comparing the property being appraised to similar properties that have recently been sold.<sup>265</sup> The appraiser then analyzes the appropriate units of comparison, and makes adjustments, based on the elements of comparison, to the sales prices of the comparable sales.<sup>266</sup> An appraiser considers factors including property rights conveyed, financing terms, conditions of sale, market conditions, location, physical characteristics, economic characteristics, use, and other non-realty components of the sale price.<sup>267</sup> The sales comparison approach is particularly appropriate and persuasive when sufficient market data, or recent sales of similar properties exist.<sup>268</sup> This approach, however, is rarely applied to specialty properties, such as gasoline service stations, because few similar properties may be sold in a given market, even one that is geographically broad.<sup>269</sup> In such a case, the market approach may establish only a broad limit for the value of the property being appraised and help to verify the findings of the other approaches to value.<sup>270</sup>

Most appraisal methodologists agree that the market approach has limitations which render it virtually ineffective when appraising contaminated property.<sup>271</sup> The ineffectiveness of this approach primarily arises due to the lack of market data.<sup>272</sup> Because the nature and extent of contamination on a property is unique to that parcel, it is all but impossible

264. Patchin, *Valuation*, *supra* note 9, at 11-13.

265. See *DICTIONARY*, *supra* note 91, at 268; D'Elia & Ward, *supra* note 9, at 357.

266. See *APPRAISAL TEXT*, *supra* note 250, at 371.

267. See *id.* at 367.

268. *Id.* at 368-69; see also Lewandrowski, *supra* note 143, at 63.

269. Lewandrowski, *supra* note 143, at 63.

270. *Id.*

271. See D'Elia & Ward, *supra* note 9, at 359; McMurry, *Treatment*, *supra* note 137, at 249 (discussing petroleum contaminated properties); Arnold, *supra* note 9, at 418; Robert I. McMurry & David H. Pierce, *Environmental Contamination and its Effect on Eminent Domain*, C791 A.L.I.-A.B.A. 133, 162 (1993); McMurry & Pierce, *New Developments*, *supra* note 258, at 343; Robert I. McMurry & David H. Pierce, *Environmental Remediation and Eminent Domain*, C709 A.L.I.-A.B.A. 105, 135 (1992), available in WL, TP-ALL Directory, ALI-ABA Database.

272. *APPRAISAL TEXT*, *supra* note 250, at 368-69; see also Lewandrowski, *supra* note 143, at 63; Chalmers & Roehr, *supra* note 65, at 36. *But see* McMurry, *Treatment*, *supra* note 137, at 249 (indicating that some appraisers have had success with appraising petroleum contaminated sites because such contamination is so common among the property type).



to locate sales of property similarly contaminated.<sup>273</sup> In addition, because the degree and nature of contamination is unique to each property, it also is difficult to compare remediation plans and costs.<sup>274</sup> Similarly, the owner's liability stemming from the contamination may vary from site to site, thereby making unit to unit comparison virtually impossible.<sup>275</sup> Even if market data exist, the amount of adjustment required to make a sale of contaminated property similar to the contaminated property being appraised may make any value indication highly speculative.<sup>276</sup>

Since the *Finkelstein* case was first litigated, advances in appraisal methodology have led to the development of several new and innovative approaches to appraising contaminated property.<sup>277</sup> The income approach is particularly well-suited to modification for use in valuing contaminated property. Once the income stream to the property is estimated, a complex series of mathematical calculations and income valuation models may be employed. Because of the appraiser's ability to more realistically and accurately quantify the effects of contamination through these models, the most promising advances in appraisal theory in regard to appraising contaminated property have developed here. At best, these new models are complex, intricate, and likely difficult for the average juror to understand. Though these methods are gaining industry approval, courts are likely to disfavor them as being complicated and too technical.

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273. See Lewandrowski, *supra* note 143, at 63. On remand, the FDOT made its complete proffer, including the testimony of Edward N. Parker, MAI, the FDOT's appraiser. See Hearing Transcript at 48-99, Department of Transp. v. Finkelstein, No. 90-06563(19) (Fla. Broward County Ct. Oct. 9, 1995). During FDOT's proffer, Mr. Parker testified to the information and data available to him since the time of trial and at the time of the hearing. *Id.* at 49. As to market data found after the trial, Mr. Parker discovered only seven case studies of Florida properties which were either contaminated or in the process of clean-up at the time of sale. *Id.* at 70 (case studies on file with author). Mr. Parker also testified to the extreme difficulty and time consuming process involved in locating this type of market data. *Id.* at 66, 69. The data indicated that "stigma" attaching to contaminated property ranged from 26 to 94%. *Id.* at 68.

274. See Arnold, *supra* note 9, at 418.

275. See Patchin, *Valuation*, *supra* note 9, at 10-12.

276. See APPRAISAL TEXT, *supra* note 250, at 373-74.

277. See, e.g., Patchin, *Valuation*, *supra* note 9; Lewandrowski, *supra* note 143, at 74-88 (describing the application to contaminated properties of such valuation techniques as future benefit analysis, discounted cash flow method, modified income approach, discounting for remediation costs, nominal value to site, and sales method); Rinaldi, *supra* note 258, at 377 (asserting as preferable a form of depreciation which involves appraisal of property as if uncontaminated, followed by appraisal which accounts for existence of contamination).

One of these new valuation approaches is a modified version of the income approach. The approach adjusts the overall capitalization rate to reflect higher risk associated with the contaminated site.<sup>278</sup> The higher capitalization rate, when applied to the property's income stream, indicates a lower overall value.<sup>279</sup> Another method, proposed by the same appraisal theorist, is to appraise the property as clean, then re-appraise it as dirty, and subtract the value indication of the latter from the former for an indication of damages to the property resulting from the contamination and clean-up costs.<sup>280</sup> Yet another approach is based on the premise that the contamination changes the highest and best use of the site, thereby resulting in reduced value.<sup>281</sup> Despite the emergence of these new methods, the appraisal community, as well as the courts, continues to struggle to find a way to quantify the effect that contamination has on market value.<sup>282</sup>

Perhaps the most frequently approved means of quantifying this effect is through testimony of "stigma."<sup>283</sup> Stigma has been defined as the impact on property value stemming from the increased risk associated with the property and the effect of this risk on marketability and financeability.<sup>284</sup> One author suggests that stigma contains seven elements including disruption, concealability, aesthetic effect, responsibility, prognosis, degree of peril, and level of fear.<sup>285</sup> This author also suggests that these seven

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278. Patchin, *Valuation*, *supra* note 9, at 13-14; *see also* Chalmers & Roehr, *supra* note 65. *But see* University Plaza Realty Corp. v. City of Hackensack, 624 A.2d 1000 (N.J. Super. Ct. App. Div.), *cert. denied*, 634 A.2d 527 (N.J. 1993) (disapproving of a landowner's appraiser's use of a discounted cash flow valuation technique). For another article discussing this topic *see* Richard A. Newstein, *Estimating Value Diminution by the Income Approach*, 60 APPRAISAL J. 293 (1992).

279. Patchin, *Valuation*, *supra* note 9 at 13-14.

280. *Id.* at 14.

281. *Id.*

282. *See generally* D'Elia & Ward, *supra* note 9.

283. *See Finkelstein II*, 656 So. 2d 921, 924 (Fla. 1995); *see also* Westling v. Mille Lacs, Nos. C4-93-504-R, C2-94-379-R, C9-94-380-R, C5-93-706-R, 1995 WL 128511, at \*1 (Minn. Tax Ct. Mar. 17, 1995), *aff'd*, 1996 WL 39626 (Minn. 1996) (approving of appraiser's testimony that stigma associated with the contamination had a negative effect on property value); City of Olathe v. Stott, 861 P.2d 1287 (Kan. 1993). *See generally* D'Elia & Ward, *supra* note 9 (stating that judicial recognition of reductions in market value because of the existence of contamination has been slow in coming).

284. Chalmers & Roehr, *supra* note 65; *see also* Terra-Products, Inc. v. Kraft General Foods, Inc., 653 N.E.2d 89 (Ind. Ct. App. 1995); Patricia R. Healy & John J. Healy, Jr., *Lenders' Perspectives on Environmental Issues*, 60 APPRAISAL J. 397 (1992).

285. Bill Mundy, *Stigma and Value*, 60 APPRAISAL J. 7 (1992).

criteria are used to evaluate and determine the degree of stigma.<sup>286</sup> Determining stigma, however, ultimately boils down to extensive research because appraisers will seldom find this type of market data in recorded transactions.<sup>287</sup> Not only does stigma attach to property that is contaminated, appraisers now contend that stigma also remains after the property has been cleaned.<sup>288</sup> Despite the difficulties inherent in quantifying stigma in the marketplace, courts seem willing to accept testimony regarding stigma if the appraiser supports an estimate of stigma based on reasonable appraisal methodology, including the methodology outlined above.<sup>289</sup> In addition, the logical simplicity of the "stigma approach" may make it more attractive and appeal to both judges and jurors who likely are unfamiliar and uncomfortable with complicated and highly technical valuation techniques.

#### IV. CONCLUSION

The Supreme Court of Florida held in *Finkelstein II* that evidence of contamination is relevant to market value. At first glance, the decision appears to be limited to eminent domain valuation proceedings in which the value of whole takings of contaminated sites with EDI eligibility is determined. *Finkelstein II*, however, presents a broader holding that transcends the factual limitations of the case. The decision expands the list of factors admissible when valuing all types of contaminated property. The decision is consistent with Florida case law and the law developing in other jurisdictions. Finally, the decision also suggests a means through which testimony regarding the negative effect of contamination on property value may be presented.

Evidence of contamination has only just begun to make its way into the courtroom. In the future, appraisers, attorneys, and courts will continue to struggle with this topic. Though *Finkelstein II* may appear to be a small

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286. *Id.* at 9.

287. Patchin, *Stigma Revisited*, *supra* note 257, at 172.

288. See Cabot, *supra* note 145, at 27; see also Bradford D. Roth & Neville M. Bili-moria, "Post-Cleanup Stigma" Claims: *It Can Happen to You*, ENVTL. PROTECTION, June 1995, at 52.

289. See *Terra-Products, Inc. v. Kraft General Foods, Inc.*, 653 N.E.2d 89 (Ind. Ct. App. 1995); *Westling v. Mille Lacs*, Nos. C4-93-504-R, C2-94-379-R, C9-94-380-R, C5-93-706-R, 1995 WL 128511, at \*1 (Minn. Tax Ct. Mar. 17, 1995), *aff'd*, 1996 WL 39626 (Minn. 1996); *City of Olathe v. Stott*, 861 P.2d 1287 (Kan. 1993); see also James D. Masterman, *Opinion Testimony in Eminent Domain Trials*, C975 A.L.I.-A.B.A. 87 (1995), available in WL, TP-ALL Directory, ALI-ABA Database (listing other cases in which appraiser testified regarding stigma).

step toward resolving the countless issues this type of litigation raises, it is a measured step in the right direction. It is logical to hold that evidence of contamination is relevant to value. Future decisions should begin to clarify this general logical basis and provide the legal and appraisal communities with specific guidance on this important, emerging area of law.

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