

EXHIBIT 106

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McCARTER & ENGLISH
ATTORNEYS AT LAW
550 BROAD STREET
NEWARK, NEW JERSEY
07102

September 11, 1986

VIA MESSENGER

Re: Diamond Shamrock Chemicals Co.
80 Lister Avenue
Block 2438, Lots 58 & 59

Essex County Tax Board
110 South Grove Street
East Orange, New Jersey 07018

Gentlemen:

The above-captioned appeal is scheduled to be heard tomorrow, September 12, 1986 at 9:30 a.m.

We enclose an original and two copies of a Memorandum of Law in Support of Petitioner's Tax Appeal. Kindly forward the original and one copy to the appropriate commissioner who will be hearing this appeal and return a copy to our representative marked "filed".

Very truly yours,

Frank E. Ferruggia

FEF:jg

cc: Melvin Simon, Esq. (By Hand)
Joseph Frisina, Tax Assessor (By Hand)

bc: Edward Masek, Esq.
Edward Noble, Esq. ✓

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DIAMOND SHAMROCK CHEMICALS CO., :ESSEX COUNTY BOARD OF TAXATION
Petitioner, :Block 2438, Lots 58 and 59
vs. :80 Lister Avenue
:Newark, New Jersey
CITY OF NEWARK, :SEPTEMBER 12, 1986
Defendant. : HEARING AT 9:30 a.m.
-----:

MEMORANDUM OF LAW IN SUPPORT
OF PETITIONER'S TAX APPEAL

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Diamond Shamrock Chemicals Co.

Francis E. P. McCarter, Esq.
Of Counsel

Michael A. Guariglia, Esq.
On the Brief

STATEMENT OF FACTS .

Petitioner, Diamond Shamrock Chemicals Co. ("Diamond Shamrock"), is the owner of property at Block 2438, Lots 58 and 59 (80 Lister Avenue), in the City of Newark, State of New Jersey. This tax appeal seeks a reduction of the Petitioner's assessment for the 1986 tax year to zero, due to regulatory orders which have made this property unusable for any purpose and unsalable. Further, the cost to cure the present condition, even if this could be accomplished, is far above the value set by the assessor.

The property was purchased by Diamond Shamrock by Deed dated January 27, 1986, from Marisol, Inc. ("Marisol"), for \$676,000 pursuant to a settlement of crossclaims between Diamond Shamrock and Marisol Corporation in a law suit captioned Lamoreaux et al. v. Diamond Shamrock, Docket No. L-036231-83 in the Superior Court of New Jersey, Essex County. A copy of that Settlement Agreement is attached hereto as Exhibit "A".

The purchase price was not reflective of the market value of the property, but rather was arrived at in consideration of the crossclaims which Marisol had asserted against Diamond Shamrock in the Lamoreaux matter. Indeed, the purchase of the property by Diamond Shamrock was a condition of the settlement of the crossclaims. In other words, the sale between Diamond Shamrock and Marisol was not an arms length transaction which had

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anything to do with the market value of the property; the transfer was only Marisol's way of stopping its continuing liability.

Pursuant to the settlement agreement with Marisol, Diamond Shamrock agreed to perform remedial work on the property in accordance with and as required by an Administrative Consent Order dated March 13, 1984, to which Marisol, Diamond Shamrock and the State of New Jersey are signatories. A copy of the Order is attached hereto as Exhibit "B".

The Administrative Order recites that in June 1983 the New Jersey Department of Environmental Protection ("NJ DEP") determined that the soil at the Newark facility contained dioxin. Diamond Shamrock undertook "site stabilization" measures, including the placement of a suitable ground cover at the Newark facility, maintenance of a fence to prevent unauthorized access, and the posting of a 24-hour guard. The Order requires Diamond Shamrock to maintain the existing ground cover until a final remedial action plan is implemented.

An additional Administrative Consent Order, dated December 20, 1984, was executed by Diamond Shamrock and the NJ DEP. That Order requires additional remedial work at the site. A copy is attached hereto as Exhibit "C".

Executive Order No. 40 (attached hereto as Exhibit "D"), signed by Governor Kean in June, 1983, declares an emergency with respect to 80 Lister Avenue and empowers the Commissioner of

Environmental Protection to "use, seize, impound, quarantine, restrict access to, or require the vacating of, or the making of modifications or improvements, temporary or permanent" in order to abate the "emergency caused by the possible presence of dioxin" at the site.

In short, the facility at 80 Lister Avenue, both land and improvements, have become worthless by virtue of the executive and administrative orders of the State of New Jersey. The property is unsalable, and was purchased by Diamond Shamrock only to free Marisol from continuing liability and to dispose of litigation claims by Marisol against Diamond Shamrock.

At the present time, a decision as to what remedial action is to be taken is in limbo. As of the relevant assessment date, October 1, 1985, no decision as to curing the present condition had been made. The property was completely fenced and covered to prevent access or airborne transmission of materials on the site. In other words, as of the relevant assessment date, the site was utterly useless and unused.

In addition, the cost to cure the above condition (which could involve removal of the dioxin in the barrels and treatment of the soil) will far outstrip the assessed value on the property. Pursuant to the March, 1984 Order of the NJ DEP, a letter of credit for \$12 million was committed to the remedial efforts by Diamond Shamrock, while alternatives which may be implemented range as high as \$188 million. (See Exhibit E).

LAW

Pursuant to N.J.S.A. 54:4-23, the assessor of the taxing district in which the Petitioner's property is situated must assess that property as follows:

"The assessor shall ascertain the names of the owners of all real property situate in his taxing district, and after examination and inquiry, determine the full and fair value of each parcel of real property situate in the taxing district at such price as, in his judgment, it would sell for at a fair and bona fide sale by private contract on October 1 next preceding the date on which the assessor shall complete his assessments..."

Here, there is no question but that the property in question could not command any price at all in the open market. Such a purchaser would only face mammoth, continuing remedial costs, made mandatory by State order. Indeed, it is likely that the property would only have "negative" value to a prospective purchaser, because of the costs associated with the property.

More to the point, Diamond Shamrock cannot sell this property. It is under government order to maintain the property in a kind of protective custody until a remedial plan can be decided upon. Further, the provisions of the Environmental Cleanup Responsibility Act ("ECRA"), N.J.S.A. 13:1K-6 prohibit a sale unless remedial action is taken. As of today, and as of the assessment date, no remedial plan was or has since been approved.

The impact of governmental regulations upon property value, specifically regulations governing permissible uses, has always been recognized by the courts as affecting what assessment is proper. Sage v. Bernards Township, 5 N.J. Tax 52, 71 (1982) (A property's permissible use under a zoning ordinance bears "crucially" upon its value); Halocarbon Products Corp. v. Borough of South River, 1 N.J. Tax 294 (1980), affirmed and remanded 181 N.J. Super. 1 (1981) (the Tax Court cannot ignore the impact of flood hazard regulations upon value); Newark v. Vernon Township, 1 N.J. Tax 90 (1980), affirmed 179 N.J. Super. 332 (1981) (zoning ordinance putting property in a "conservation district" affected value).

Most pertinent to the case herein is Inmar Associates, Inc. v. Borough of Carlstadt, 7 N.J. Tax 482 (1985), where Judge Kahn was faced with an appeal for the 1983 tax year on property located in a heavy industrial area. As of the relevant assessment date, the property contained approximately 60 storage tanks and tank wagons containing hazardous chemicals. The taxpayer contended that the chemicals leaked into the ground, "causing significant damage to the realty and reducing its true value." 7 N.J. Tax at 485.

The taxpayer presented testimony showing that the New Jersey Department of Environmental Protection had filed suit against the taxpayer, which suit resulted in an order placing the

property in the custodial care of the DEP and empowering the DEP to order the taxpayer to take remedial action. 7 N.J. Tax at 486.

Taxpayer further offered evidence that the cost of removing the toxic waste from the site would be \$450,000. Taxpayer's expert opined that the value of the property without the toxic waste would be \$742,250. Deducting for the remedial costs, the taxpayer alleged true value to be \$292,500. Id.

Judge Kahn accepted the premise that governmental regulations could adversely affect the value of the property, 7 N.J. Tax at 490, citing Inmar Associates, Inc. v. Edison Township, 2 N.J. Tax 59, 65 (1980). However, Judge Kahn noted that:

"The best evidence suggests that the property has some value above the cost to cure. This evidence is insufficient, however, to determine the true value."

7 N.J. Tax at 490. Judge Kahn rejected the taxpayer's expert testimony on comparables, holding that they were not in fact "comparable" to the subject property. 7 N.J. Tax at 489.


Here, there can be no dispute about the status of the regulatory impact on this property as of October 1, 1985, the relevant assessment date. The situation at present, and as of the relevant assessment date, is utterly incurable, as no adequate remedy has yet been decided upon. Nevertheless, the possibilities are all extremely costly, and even the lowest estimates far exceed the value placed on the property by the City of Newark. The

governmental orders have made this property valueless and
unsalable. The assessment must be reduced accordingly.

CONCLUSION

For the foregoing reasons, the assessment on 80 Lister Avenue in the taxing district of Newark, New Jersey, Block 2438, Lots 58 and 59 should be reduced to zero.

McCarter & English
Attorneys for Petitioner,
Diamond Shamrock Chemicals Co.

By: 
MICHAEL A. GUARIGLIA, ESQ.

Dated: 9 . 11 , 1986