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## ECRA Tax Consequences

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# ECRA TAX CONSEQUENCES

## I. INTRODUCTION

New Jersey's Environmental Cleanup Responsibility Act (ECRA)<sup>1</sup> prohibits a landowner from conveying property if the conveyance does not comply with ECRA requirements.<sup>2</sup> Some commentators criticize ECRA's prohibition of transfers because it diminishes the value of contaminated land.<sup>3</sup> Some ECRA violators seek to have their property values reassessed for the tax purposes, claiming that the property is less valuable because the cost of cleanup renders the property unmarketable.<sup>4</sup> In *Inmar Associates, Inc. v. Borough of Carlstadt*,<sup>5</sup> a New Jersey Superior Court recently held that ECRA violations do not affect the

1. N.J. STAT. ANN. § 13:1K-6 to -14 (West Supp. 1988).

2. ECRA requires a property owner to prepare and implement cleanup procedures before closing or transferring contaminated property. *Id.* at § 13:1K-7. Procedurally, an owner must submit either: 1) a negative declaration stating that no ECRA problems exist; or 2) a copy of a cleanup plan and a surety bond guaranteeing funds for cleanup. *Id.* at § 13:1K-9. *See id.* at § 13:1K-9a regarding closure of industrial establishments. *See id.* at § 13:1K-9b regarding sale of industrial establishments.

Failure to comply with ECRA can result in severe penalties. *Id.* at § 13:1K-13. For instance, a transferee can void the sale and seek damages. *Id.* at § 13:1K-13a. In addition, the Act holds a violator strictly liable for all cleanup costs and any damages resulting from failure to implement a cleanup plan. *Id.* Violators are further susceptible to a \$25,000 fine. For violations of a continuing nature, each day constitutes a separate offense, and the \$25,000 fine accrues daily until the violation subsides. *Id.* at § 13:1K-13.

3. *See Note, The Environmental Cleanup Responsibility Act (ECRA): New Accountability for Industrial Landowners in New Jersey*, 8 SETON HALL LEGIS. J. 331 (1985); Comment, *New Jersey's Environmental Cleanup Responsibility Act: An Innovative Approach to Regulation*, 90 DICK. L. REV. 159, 197 (1985) (ECRA provides acceptable means of reducing cleanup expenditures, even though its application in some instances may appear harsh); Hogan, *Environmental Cleanup Responsibility Act: A Jeopardy to Corporate and Real Estate Transactions*, 113 N.J.L.J. (1984) (arguing that broadness of the ECRA statute and harshness of ECRA sanctions may lead investors to spend more money investigating property, which in turn may increase costs).

4. *See Inmar Assocs., Inc. v. Borough of Carlstadt*, 214 N.J. Super. 246, 260-61,

“true value”<sup>6</sup> of property for tax assessment purposes. This Recent Development examines the court’s decision in *Inmar*. The author suggests that precedent did not bind the court to decide the case as it did and that a contrary holding would provide a more equitable result.<sup>7</sup>

## II. *INMAR ASSOCIATES V. BOROUGH OF CARLSTADT*

In *Inmar*, the court held that a landowner has no right to a reduction in property value for tax purposes simply because his property violates ECRA requirements.<sup>8</sup> On appeal, GAF Corporation<sup>9</sup> argued that it should receive a real estate tax abatement equal to the cost of compliance with ECRA.<sup>10</sup>

No previous case law existed regarding the impact of New Jersey’s hazardous waste statutes on property tax assessments.<sup>11</sup> As a result, the court relied on *In re Great Lakes Container Corp.*,<sup>12</sup> a New Hampshire decision. *Great Lakes* concerned property which was the subject of litigation involving hazardous waste statute violations.<sup>13</sup> The property owner claimed that the pending litigation rendered the property worthless because no buyer would bear the risk of a potentially adverse judgment.<sup>14</sup> The New Hampshire Supreme Court found that the corporation had not sufficiently demonstrated that the pending litigation would diminish the value of the property.<sup>15</sup> The court suggested that the property owner could reassure fearful customers by postponing the transfer of title until the litigation concluded and any court-ordered

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518 A.2d 1110, 1113 (App. Div. 1986) (property owner brought suit claiming that ECRA violations on its property diminished property’s value).

5. 214 N.J. Super. 256, 518 A.2d 1110 (App. Div. 1986).

6. “True value” refers to the value of property for tax assessment purpose under N.J. STAT. ANN. § 54:4-2.25 (West 1986).

7. This paper will focus only on New Jersey law, but is intended for any jurisdiction contemplating the enactment of statutes similar to ECRA.

8. *Inmar*, 214 N.J. Super. at 268, 518 A.2d at 1116.

9. *Id.* at 260-61, 518 A.2d at 1113.

10. *Id.* at 260, 518 A.2d at 1112. Arthur Dresner, GAF’s director of real estate, claimed that the cleanup cost would be \$450,000. *Id.* at 261, 518 A.2d at 1112.

11. *Id.* at 263, 518 A.2d at 1113.

12. 126 N.H. 167, 489 A.2d 134 (1985).

13. *Id.* at 168, 489 A.2d at 135. A collateral suit was pending in federal court for cleanup pursuant to federal statute. *Id.*

14. *Id.* at 168, 489 A.2d at 135-36.

15. *Id.* at 169, 489 A.2d at 136.

cleanup actions had been imposed.<sup>16</sup> The court further found that the property owner had not, in any event, presented sufficient evidence concerning the future value of the property.<sup>17</sup> The court concluded, therefore, that the property owner had not met his burden of proving diminution of property value.<sup>18</sup>

After discussing *Great Lakes*, the *Inmar* court considered the determination of the "true value" of property for tax assessment purposes.<sup>19</sup> The court noted that the amount a hypothetical buyer would pay a hypothetical seller<sup>20</sup> usually determined "true value." This was not the only method of valuation available, however.<sup>21</sup> The court reasoned that because the contamination in this case was self-imposed,<sup>22</sup> and because the legislature did not intend cleanup statutes to affect the "true value" of property, cleanup costs should not affect "true value" and, consequently, property tax assessments.<sup>23</sup>

The court offered several policy justifications for its decision.<sup>24</sup> First, statutes like ECRA deal with an unusual threat to the health and safety of the public.<sup>25</sup> The court reasoned that allowing tax abate-

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16. *Id.*

17. *Id.*

18. *Id.*

19. *Inmar Assocs., Inc. v. Borough of Carlstadt*, 214 N.J. Super. 256, 264, 518 A.2d 1110, 1113 (App. Div. 1986). The court cited N.J. STAT. ANN. § 54:4-2.25 (West 1986), which provides that "[a]ll real property subject to assessment and taxation for local use should be assessed according to the same standard of value, which shall be the true value of such real property." 214 N.J. Super. at 264, 518 A.2d at 1114.

20. *Id.* The court stated: "For tax assessment purposes 'the true value' may represent the price in money which a willing buyer would pay a willing seller where neither is obligated to buy or sell." *Id.*

21. *Id.* The court stated that "the price a willing buyer would pay a willing seller is 'in no wise the exclusive criterion of true value.'" *Id.* (citing *Rek Inv. Co. v. City of Newark*, 80 N.J. Super. 552, 559, 194 A.2d 368 (App. Div. 1963)).

22. *Id.* The court compared a landowner who pollutes his property to a builder who creates a building that is so costly that only a wantonly extravagant buyer would want to purchase it. *Id.*

The court cited *Town of Secaucus v. Damsil, Inc.*, 120 N.J. Super. 470, 295 A.2d 8 (App. Div. 1972), *cert. denied*, 62 N.J. 90 (1972) for the proposition that, in either of the above situations, a sale "at a discount is entitled to no evidential weight in ascertaining what 'a willing buyer would pay a willing seller.'" *Inmar*, 214 N.J. Super. at 264-65, 518 A.2d at 1114.

23. *Id.* at 265, 518 A.2d at 1114.

24. *Id.* at 266-68, 518 A.2d at 1115-16.

25. *Id.* at 266, 518 A.2d at 1115. The court noted the seriousness of the situation and stated that police power here is being used for the public good. *Id.*

ments for toxic cleanup would encourage pollution by making the penalty less expensive.<sup>26</sup> Because the property owner's contamination of the land made the land less attractive to investors, the court concluded that the property owner, not the public, should pay the cleanup cost.<sup>27</sup> The court compared the cleanup costs to other temporary economic situations which affect land prices and concluded that the owner should have calculated the cleanup costs into his operating expenses and his assessment of the property's value.<sup>28</sup> Finally, the court found that even if the state paid for cleanup costs in the form of a tax abatement,<sup>29</sup> the state would eventually recoup its costs from the property owner because ECRA creates a lien against contaminated property for cleanup costs.<sup>30</sup>

### III. ANALYSIS

The *Inmar* court's reasoning lacks force because the court misapplied the relevant case law and reached an incorrect policy result. *Great Lakes*<sup>31</sup> concerned land that was the subject of pending litigation.<sup>32</sup> The *Great Lakes* court based its decision on two factors: (1) The taxpayer could sell the land and delay transfer of title until he completed cleanup,<sup>33</sup> and (2) the corporation did not present sufficient evidence to determine a "true value" different from that determined by

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26. *Id.*

27. *Id.* at 267, 518 A.2d at 1115. The court noted: "Where the situation involves privately created contamination, remedial action is required because the private party intentionally or unintentionally disregarded the public good." *Id.* at 266, 518 A.2d at 1115.

28. *Id.* at 267, 518 A.2d at 1115-16.

29. *Id.* at 268, 518 A.2d at 1116. If the state reduces a property owner's tax assessment due to ECRA violations, the owner may disburse the money saved for cleanup purposes. In effect, this reduction constitutes a diversion of tax revenues from the state to the property owner to subsidize the owner's compliance with ECRA. *Id.*

30. *Id.* at 268, 518 A.2d at 1116. The court stated: "Even if taxpayers were to pay for cleanup costs in the form of tax abatement, the taxing district would be entitled to seek reimbursement for lost tax revenues from the Spill Compensation Fund which would be subrogated to the claim against the polluting landowner for the loss of tax dollars." *Id.* See Spill Compensation and Control Act, N.J. STAT. ANN. §§ 58:10-23.11g(a)(4) & 58:10-23.11q (West 1982); *Tree Realty, Inc. v. Department of Treasury*, 205 N.J. Super. 346, 348-49, 500 A.2d 1075-76 (App. Div. 1985) (lessor held liable under Spill Compensation and Control Act without regard to fault).

31. *In Re Great Lakes Container Corp.*, 126 N.H. 167, 489 A.2d 134 (1985).

32. See *supra* note 13 and accompanying text.

33. *Great Lakes*, 126 N.H. at 169, 489 A.2d at 136.

the tax board.<sup>34</sup> The first factor does not apply to *Inmar* because property violating ECRA standards is unavailable for sale until the owner completes cleanup.<sup>35</sup> The second reason merely posed a question of fact which the New Hampshire court declined to resolve because the taxpayer failed to present sufficient evidence.<sup>36</sup>

The *Inmar* court cited *Rek Investment Co. v. City of Newark*<sup>37</sup> to support its theory that the hypothetical sale price of property is not the sole criterion for determining true value.<sup>38</sup> The court identified other factors which would protect against overemphasis on temporary market factors that affect market price of contaminated property.<sup>39</sup> It is debatable whether ECRA violations are temporary, however. Owners can remove the hazardous conditions only with substantial effort.<sup>40</sup> In contrast, the market factors discussed in *Rek Investment*<sup>41</sup> are truly temporary and do not require remedial effort by the owner. Because a diminution in property value attributable to ECRA violations is not actually temporary, the court's reliance on *Rek Investment* is misplaced.

The court also cited *Town of Secaucus v. Damsil, Inc.*<sup>42</sup> for the prop-

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34. *Id.*

35. N.J. STAT. ANN. § 13:1K-7 (West Supp. 1988). There is an exception to this general rule: A property owner can defer cleanup until the purchaser or transferee sells or transfers the property in question, provided the purchaser or transferee employed the land for the same hazardous purposes as the seller. *Id.* at § 13:1K-8.

36. *See supra* note 17 and accompanying text. Had the taxpayer presented evidence of market value so that the court could determine the price for a hypothetical sale, the court may have decided the case differently. *Great Lakes*, 126 N.H. at 169, 489 A.2d at 136.

37. 80 N.J. Super. 552, 194 A.2d 368 (App. Div. 1963). *Rek* appealed from the decision of the Division of Tax Appeals which refused to recognize the price paid for the property at a sale just prior to the beginning of the tax year. *Id.* at 555, 194 A.2d at 370.

38. *Inmar Assocs., Inc. v. Borough of Calstadt*, 214 N.J. Super. 256, 267, 518 A.2d 1110, 1114 (App. Div. 1986).

39. The court stated that the factor which tended to depress the property's price in *Inmar* was the contamination of GAF's property. The court recognized that this depression was only temporary in nature, however, and therefore did not affect the property's true value. *Id.* at 267, 518 A.2d at 1115.

40. *See Note, supra* note 3, at 331 (noting the high cost of complying with ECRA). *See also* Comment, *supra* note 3, at 159; Hogan, *supra* note 3, at 1 (both outline the burdensome and costly procedures for complying with ECRA).

41. *Rek*, 80 N.J. Super. at 559-60, 194 A.2d at 373-74.

42. 120 N.J. Super. 470, 295 A.2d 8 (App. Div. 1972) (reversing judgment of Division of Tax reducing the property assessment due to doubtful title).

osition that because toxic contamination is an injury a property owner imposes upon himself, the injury should not affect the true value of the property.<sup>43</sup> *Town of Secaucus*, however, dealt with property subject to a cloud on the title,<sup>44</sup> a circumstance that is not truly analogous to ECRA violations. A cloud on the title is a claim or encumbrance on the property which may make it less attractive to buyers without affecting the underlying "true value" of the property.<sup>45</sup> On the other hand, ECRA violations do affect the underlying "true value" of property.<sup>46</sup> Consequently, ECRA violations may have a greater adverse effect on the true value of the property than a cloud on the title.

Lastly, the court relied on *Tree Realty Co. v. Department of Treasury*<sup>47</sup> to support its assertion that ECRA violations create a lien against the property owner for cleanup costs.<sup>48</sup> In *Tree Realty Co.*, New Jersey expended funds for clean up of contaminated property and then sought restitution from the owner.<sup>49</sup> An action for restitution, however, is not comparable to a tax abatement. The tax abatements merely represent a reassessment of property value for tax purposes, which may result in lower property taxes for the owner. Because the owner remains liable for cleanup costs, the government has nothing to recoup.

The *Inmar* court's reasoning rests on a patchwork of cases that have

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43. See *supra* note 22 and accompanying text for analogy of contaminated land to other peculiar uses of property.

44. *Town of Secaucus*, 120 N.J. Super. at 474, 295 A.2d at 9. A cloud on title is "an outstanding claim or encumbrance which, if valid, would affect or impair the title of the owner of a particular estate, and on its face has that effect, but can be shown by extrinsic proof to be invalid as inapplicable to the estate in question." BLACK'S LAW DICTIONARY 232 (5th ed. 1979).

45. A cloud on title is more akin to the pending litigation situation in *In re Great Lakes Container Corp.*, 126 N.H. 167, 489 A.2d 134 (1986). See *supra* and notes 11-18 and accompanying text. A potential purchaser may protect himself, however, by conditioning transfer of title on having the previous owner work out any underlying problems.

46. Unlike a problem of pending litigation or a cloud on title, a seller cannot condition transfer of title with ECRA problems on the working out of any underlying problems. No owner may transfer property until the owner remedies all ECRA violations. N.J. STAT. ANN. § 13:1K-7 (West Supp. 1988). This renders ECRA a more complicated problem than a simple cloud on title.

47. 205 N.J. Super. 346, 500 A.2d 1075 (App. Div. 1985) (lessor sought cleanup costs from Spill Compensation Fund where lessee discharged hazardous waste on the land).

48. See *supra* note 31 and accompanying text.

49. *Tree Realty*, 205 N.J. Super. at 347, 500 A.2d at 1076.

no application to the facts of *Inmar*. The court also reached the improper policy result. ECRA emphasizes prevention of hazardous waste spills because prevention is cheaper than cleanup.<sup>50</sup> In addition, prevention is a more effective means of preserving the environment.<sup>51</sup> These laudable goals make ECRA one of the most progressive hazardous waste statutes.<sup>52</sup> Nevertheless, ECRA has two major weaknesses: the courts apply the statute unfairly, and the statute has a harmful effect on New Jersey's real estate market and industrial development.

ECRA is unfair because it is retroactive in application.<sup>53</sup> Landowners who committed acts which were not illegal until the legislature enacted ECRA receive unexpected and severe penalties.<sup>54</sup> Retroactive application is especially unfair where a previous property owner committed the act which now violates ECRA.<sup>55</sup> Property polluted by a previous landowner presents a situation analogous to that faced by the New Jersey Superior Court in *Cappture Realty Corp. v. Board of Ad-*

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50. See Comment, *supra* note 3, at 195-96 (discussing ECRA's preventive nature and arguing that prevention is less costly than cleanup).

51. *Id.*

52. See Schmidt, *supra* note 3 (introduction), at 1 (ECRA "places New Jersey firmly in the vanguard of the national environmental movement").

53. N.J. STAT. ANN. § 13:1K-7 (West Supp. 1988) (ECRA does not take into consideration the identity of the polluter of the land requiring cleanup). See generally Note, *supra* note 3 (discussing the scope of ECRA).

54. In addition to monetary sanctions, which landowners might expect, ECRA makes any industrial property with ECRA violations wholly unsalable until the present owner remedies those violations. N.J. STAT. ANN. §§ 13:1K-7 & 13:1K-13 (West Supp. 1988). See generally Hogan, *supra* note 3; Comment, *supra* note 3 (both noting that the broadness of ECRA may ensnare unsuspecting landowners who did not think they fell within its ambit). Hogan argues forcefully: "Because virtually every business has, at some point, stored some common household chemical considered a 'hazardous material,' every enterprise in the enumerated major groups will be subject to the Act." Hogan, *supra* note 3, at 21.

55. See Note, *supra* note 3, at 369 (noting that commentators have criticized ECRA for ignoring predecessor landowner liability). See also Comment, *supra* note 3, at 190-91, which questions the constitutionality of imposing liability on innocent successor landowners. This Comment also notes that both State Dep't of Env'tl. Protection v. Exxon Corp., 151 N.J. Super. 464, 376 A.2d 1339 (Ch. Div. 1977) and State Dep't of Env'tl. Protection v. Ventron Corp., 94 N.J. 473, 468 A.2d 150 (1983), have held that mere ownership of land is insufficient to justify imposing liability. Defendant must contribute to the pollution to justify liability. Comment, *supra* note 3, at 191. The Comment questions the argument that innocent landowners found liable could eventually recover from the actual polluter, arguing that placing such a burden on innocent landowners is "unconstitutionally oppressive." *Id.* at 191.



*justment of Elmwood Park.*<sup>56</sup> In *Cappture*, a landowner complained that the tax assessor's determination of true value failed to take into account an ordinance declaring a moratorium on construction in a floodplain.<sup>57</sup> The court agreed with the landowner and held that the tax assessor's failure to consider the ordinance resulted in an excessive tax assessment.<sup>58</sup> The circumstances in *Cappture* and under ECRA, which penalizes a current landowner for pollution committed by a previous landowner, are analogous: each involves an innocent landowner and government action for the public good. A current property owner innocent of ECRA violations should, therefore, receive a tax reassessment similar to the taxpayer in *Cappture*.

The argument against retroactivity loses much of its strength when applied to previous owners who committed ECRA violations. A tax abatement is economically justified even in that case. From the moment the New Jersey Legislature passed ECRA, critics argued that it would have a chilling effect on the real estate market and industrial development in New Jersey.<sup>59</sup> If the cost of compliance becomes too great, businesses will leave New Jersey for jurisdictions with less stringent environmental statutes.

From a purely moral standpoint, the taxpayers of New Jersey should not subsidize those who pollute, but from a practical standpoint, the tax abatement may still be good public policy. While a policy of tax abatement might cause New Jersey to lose some tax dollars, ECRA's freeze on the transfer of industrial land could cost New Jersey even more tax dollars and jobs. It is unrealistic to assume that every landowner will be able to factor such costs into his operating expenses. Tax abatements make compliance with ECRA less burdensome by allowing landowners to recoup some of the cleanup costs through lower taxes. The availability of these abatements may alleviate some of the concern over ECRA on behalf of pollution-prone firms seeking to locate in New Jersey. Tax abatement could further the policies of ECRA<sup>60</sup> while

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56. 126 N.J. Super. 200, 313 A.2d 624 (Law Div. 1973), *aff'd*, 133 N.J. Super. 216 (App. Div. 1975).

57. 126 N.J. Super. at 217, 313 A.2d at 633-34.

58. *Id.*, 313 A.2d at 634. The court, however, noted that plaintiff's proper avenue of redress was with the tax appeals process. *Id.*

59. See Note, *supra* note 3, at 369. The author noted that ECRA may adversely affect New Jersey's real estate market. See also Hogan, *supra* note 3 (arguing that the broadness and ambiguity of the statute will make real estate transactions more costly and burdensome).

60. *Cf. Inmar Assocs., Inc. v. Borough of Carlstadt*, 214 N.J. Super. 256, 267, 518

minimizing economic damage.

#### IV. CONCLUSION

The law did not compel the court in *Inmar* to reach its decision. For the policy reasons, the court should have decided the case differently. The court should allow a property tax reassessment until cleanup is complete (assuming a reasonable time period) when the owner announces an intention to transfer the property. Not only would this policy produce a more equitable result for taxpayers and landowners, it would also ameliorate ECRA's harsher effects on New Jersey's economy.

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A.2d 1110, 1116 ("The commercial landowner could have and should have factored into the rental value or its operation expenses the financial responsibility to avoid contamination or the cleanup costs required after contamination.").

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