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MCDONALD, C. J., with whom FLYNN, J., joins, concurring in part and dissenting in part. I agree that the judge trial referee should not have granted the motion in limine as to environmental contamination and that a new trial is required. I also agree, however, with Judge Flynn’s concurring and dissenting opinion.

I also respectfully disagree with the majority’s suggestion that the identity of the party ultimately responsible for property cleanup costs is not relevant to determine fair market value. Of course, a willing buyer will be concerned and pay less for property that the buyer will be required at his cost to clean up. “The costs of cleanup, along with liability to the public and stigma, often eliminate or significantly reduce a property’s value.” (Internal quotation marks omitted.) 7A P. Nichols, *Eminent Domain* (3d Ed. Rev. 2000, P. Rohan & M. Reskin eds.) p. 13B-103 n.2, quoting P. Patchin, “Valuation of Contaminated Properties,” 56 *Appraisal J.* 7 (Jan. 1988). Conversely, should some other responsible party stand ready to bear that cost, be required to pay those costs or actually pay those costs, the remediation costs should not have a direct effect on fair market value. Therefore, I would follow the rationale of *Finkelstein v. Dept. of Transportation*, 656 So. 2d 921, 922 (Fla.

1995), in not admitting costs of remediation where there is a program for reimbursement.¹ I would conclude, therefore, that evidence that federal and state funds may be available for reimbursement and that a polluter, American Thread Company, is obligated to remediate the site, should be considered as to the effect, if any, that remediation costs may have on fair market value.

I accordingly disagree with the formula for fair market value as stated in the majority opinion insofar as it discounts fair market value by remediation costs that may cost a buyer, as in this case, nothing. This is especially so in the present case, where ATC Partnership (ATC) gave vital support to the application for the reimbursement grant. The trial court found that, since 1992, well before the September, 1994 taking, ATC, Northeast Ct. Economic Alliance, Inc., and the town of Windham had been engaged in a cooperative effort to obtain governmental funding for the rehabilitation and redevelopment of the property pursuant to the Economic Development and Manufacturing Assistance Act of 1990; General Statutes §§ 32-220 through 32-234. This cooperation resulted in the state bonding commission's awarding a \$130,000 grant for structural, economic and environmental feasibility analysis and development of the master plan, and, thereafter in 1993, the awarding of an additional \$3 million in regional economic development bonding funds for the environmental remediation and rehabilitation of the first 100,000 square feet of space. As counsel for ATC stated at oral argument, the costs of remediation largely have been covered by federal and state funds.

The trial court also found that the principals of ATC had made major contributions to the development plan for those grants. It found that, without their help, the preparation and submission of the plan would not have been possible. In May, 1994, however, negotiations for the voluntary acquisition of the property broke down and this taking followed.

Although the measure of damages, fair market value, is what a willing seller and willing buyer would agree upon, eminent domain involves an involuntary taking from an owner. Under eminent domain, the condemning authority unilaterally takes the property, unilaterally sets the time of the taking and, therefore, unilaterally establishes the circumstances with respect to environmental cleanup at the time of taking. If the condemning authority may so provide itself a cost free cleanup at the time of taking and, at the same time, receive a discount for the very cost of the cleanup, there will be a windfall to the condemning authority. It is inconceivable that a seller having such a cost free cleanup in place would willingly give such a discount. This result would hardly leave the property owner as well off as if the taking had not occurred, as the law requires. See *United States v. 564.54 Acres of Land*, 441 U.S. 506,

511–12, 99 S. Ct. 1854, 60 L. Ed. 2d 435 (1979).

¹ I do agree with the majority that factors of stigma, delay and difficulty in a cleanup, and reimbursement, if present in this case, may also affect fair market value.