IN THE SUPREME COURT OF THE STATE OF OREGON

OAKMONT, LLC AN OREGON LIMITED LIABILITY COMPANY, Plaintiff-Respondent, v. DEPARTMENT OF REVENUE, State of Oregon; and CLACKAMAS COUNTY ASSESSOR, Defendant-Appellants.	Tax Court No. 5178 Supreme Court No. S062342

APPELLANT DEPARTMENT OF REVENUE'S REPLY BRIEF

Appeal from the Judgment of the Oregon Tax Court
The Honorable Henry C. Breithaupt, Judge

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REPLY BRIEF OF APPELLANT DEPARTMENT OF REVENUE

The Department of Revenue (the department) files this reply brief for the purpose of pointing out that (1) the department preserved its arguments for reversal; (2) the department reasonably exercised its discretion when it declined to exercise supervisory jurisdiction; and (3) this court should defer to the department's interpretation of its own rule.

A. The Department of Revenue did not abuse its discretion in declining to accept supervisory jurisdiction of Oakmont's petition.

In its answering brief, Oakmont repeatedly misstates the department's position. Oakmont describes the department's argument as one that would require that an "agreement" between the parties exist as of the January 1, 2008, assessment date. And then, after erecting this straw man, Oakmont knocks it down by pointing out its absurdity. The issue is whether the *facts* about the condition or real market value (RMV) of the property that are agreed to are facts that were existing and known to the market as of the January 1, 2008, assessment date. Because the facts regarding any defects in the property were unknown as of January 1, 2008, the department did not abuse its discretion when it refused to exercise its supervisory authority based on its finding that there was no agreement to facts about the condition or value of its property that would indicate a likely error on the 2008-09 tax roll.

1. The assessor's agreement to settle for a lower RMV for later years is not a fact indicating a likely error on the roll for 2008-09.

The fact that the assessor agreed to settle with it on a reduced value for the subject property for tax years 2009-10 and 2010-11 does not establish the requisite "agreed facts" to support Oakmont's assertion of a likely error on the roll for 2008-09. The only factual "agreement" identified by Oakmont in the supervisory petition it filed with the department was an agreement that "the tax roll values for 2009-10 and 2010-11 were incorrect based on substantive physical deficiencies affecting the subject improvements." (SER-35). Even assuming these settled-for values could be considered factual agreements about the condition and value of the property in tax years 2009-10 and 2010-11, they do not constitute a factual agreement about the condition or value of the property as of January 1, 2008. Hence, the department did not abuse its discretion in declining to accept jurisdiction to hold a merits hearing on Oakmont's petition.

Under long-standing Oregon precedent, a real market value determination for property in one tax year is not determinative of the value of that property in another year. *Lethin v. Dept. of Revenue*, 278 Or 201, 206, 563 P2d 687 (1977); *ESCO Corp. v. Dept. of Rev.,* 307 Or 639, 646, 772 P2d 413 (1989). An agreed upon market value of a property for a particular tax year does not indicate a higher value

on the roll for a prior year is in error.[1] In a 2007 decision, the Tax Court acknowledged this to be true. *ADC Kentrox v. Dept. of Rev.,* 19 OTR 340, 348 (2007) (stipulated lower value for subsequent tax year was "not conclusive on the question of whether an error existed on the roll" for a prior year). Thus, it was error for the Tax Court to rely on settled-for values for subsequent tax years in concluding that there was a likely error in the value of Oakmont's property on the roll for a prior year.

2. The Tax Court erred in substituting its judgment for that of the department.

The department's determination that there were no agreed facts as to the condition or value of Oakmont's property as of January 1, 2008, was within the agency's discretion and not clearly wrong. An agency decision is not "clearly wrong" if it is based on facts in the record from which its conclusion could reasonably be drawn. *Bay v. State Board of Education,* 233 Or 601, 605, 378 P2d 558 (1963) (citation omitted). "[T]he reviewing court is not granted the power to

[1] Oakmont claims that the assessor's settlement that reduced the real market value of the property for tax years 2009-10 and 2010-11 was "[b]ased solely" on the defects in its property due to "design, construction, and materials used." (Answering Br at 2, 31). However, there is no evidence in the record that this was the county assessor's "sole" motivation in agreeing to settle for a reduced value in those tax years. In fact, there is no evidence in the record at all as to what the assessor's motivation was in settling. Thus, contrary to Oakmont's assertions, no conclusion can be drawn from the evidence in the record about what the assessor's motivations were in settling for tax years 2009-10 and 2010-11.

weigh the evidence and substitute its judgment as to the preponderance thereof for that of the agency." *Id*. The Tax Court agrees: "The court will not substitute its judgment for the judgment of the agency." *Kaufman v. Dept. of Rev.,* 20 OTR 159, 162 (2010) (citing *Rogue River Packing Corp. v. Dept. of Rev.*, 6 OTR 293, 301 (1976)). Yet that is exactly what the Tax Court did in this case.

The department reasonably decided that the discovery, investigation and determination of the existence of construction defects, all of which occurred after the January 1, 2008, assessment date, are not facts indicating a likely error on the roll for the 2008-09 tax year. (Conf Rec at 4). Accordingly, the department reasonably exercised its discretion when it declined to review the substantive merits of Oakmont's petition. *Id.* at 4-5.

B. Cases cited by Oakmont fail to support its argument.

On pages 21-22 of its response brief, Oakmont points for support to a Court of Appeals decision in a condemnation action involving contaminated property, but that case does not apply to property tax valuation nor does it consider or involve the department's valuation statutes, rules or supervisory authority. *State ex rel Dept. of Transportation v. Hughes*, 162 Or App 414, 986 P2d 700 (1999) is inapposite because it involves condemnation, not property tax, and has no

precedential value here.[2]

This court's recent decision in *Willamette Estates II, LLC v. Dept of Rev,* 357 Or 113, __ P3d __ (2015), does not aid Oakmont either. In *Willamette Estates* the court held, in part, that a stipulation made in a prior case regarding the value of the subject property was an "agreed fact" indicating a likely error on the roll under ORS 306.115 and OAR 150-306.115. *Id.* at 115, 121. However, *Willamette Estates* primarily involved whether the county assessor could seek a correction of the tax roll under OAR 150-306.115, which is not an issue in this appeal, and it did not involve any question about undiscovered defects or property conditions as of the assessment date. *Id.* at 117. Moreover, the stipulation in *Willamette Estates* was an agreement by the parties about the value of the property *for the tax year at issue* in the supervisory petition, which the court rightly concluded indicated a likely error on the roll for that tax year. *Id.* at 115. Here, there is no stipulation or

[2] In holding that evidence of the contamination and whether it could have been discovered by a prospective buyer, the court followed prior case law applicable to condemnation cases that required the court to take into account "all considerations that might fairly be brought forward and reasonably be given substantial weight in negotiations between the owner and a prospective purchaser." *Id.* at 421 (citations omitted). But this is a standard that does not apply to property tax valuations. Thus, *Hughes* is inapplicable to the issue in this case. This inapplicability is demonstrated by the fact that the department's administrative rule on valuation of contaminated property, OAR 150-308.205-(E), requires that there be an apparent or officially recognized contamination of the property as of the assessment date. This rule is consistent with the department's position that, for property tax valuation purposes, unlike in *Hughes*, the relevant facts are those that are both existing and known to the market as of the assessment date.

agreement between the assessor and Oakmont as to the value or the condition of the property for tax year 2008-09, so *Willamette Estates* does not apply.

Oakmont also erroneously relies on *Coos County Assessor v. Dept of Rev et al,* 18 OTR-MD 334 (2004), which it refers to as the "*Pony Village*" case, in support of its contention that the department has taken "inconsistent" positions.[3] But, in addition to the fact that this Tax Court Magistrate Division decision has no precedential value in this court, it also involves a very different factual context.

"*Pony Village*" involved several issues, only one of which was whether the department properly accepted supervisory jurisdiction based on the parties' agreement that there had been a subsequent sale of the subject property at a value that was only 60 percent of the roll value. *Id.* at 349-350. The magistrate, relying on this court's decision in *Sabin v. Dept. of Rev.,* 270 Or 422, 528 P2d 69 (1974), held that the department's decision to accept supervisory jurisdiction based on the agreement of the parties that there had been a "recent" sale of the subject property in a subsequent year for a reduced amount was not an abuse of discretion. *Coos County Assessor v. Dept of Rev et al,* 18 OTR-MD at 352.

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[3] Another case erroneously relied on by Oakmont is *Ghazi-Moghaddam v. Dept of Rev,* 20 OTR 288 (2011). In *Ghazi-Moghaddam*, the Tax Court held that the department did not abuse its discretion when it declined to accept supervisory jurisdiction where the "error" on the roll asserted by the taxpayer had occurred in a tax year over which the department had no authority to make corrections to the roll under ORS 306.115. *Id.* at 294. That Tax Court decision is inapposite here.

In contrast, the current appeal does not involve a sale of the subject property, recent or otherwise, so the "*Pony Village*" decision does not apply here. Moreover, as the department has already noted, this court held in *Sabin* that a recent sale of the subject property is distinguishable from the more general rule that "hindsight acquired by a later discovery of [facts unknown on the assessment date] should not be employed to change the valuation found on the assessment date." *Sabin,* 270 Or at 427, n 11.[4]

Under this court's decisions, as well as decisions of the Tax Court, the fact that the assessor settled for a reduced value for the property in subsequent tax years does not prove an error on the prior year's roll. There is no agreement in this case about the condition or value of Oakmont's property as of the assessment date for 2008-09, which means that the department's decision to decline supervisory jurisdiction was not clearly wrong.

C. The Tax Court should have deferred to the department's interpretation of its rule.

1. The department's interpretation is plausible and consistent with the law governing property valuation.

Under ORS 306.115, the department's discretionary supervisory authority is

[4] The Tax Court has noted that a subsequent sale of the property is only relevant to verify an opinion of value *based on facts known as of the assessment date*, and only if the market conditions have not changed between the assessment date and the sale date. *Truitt Bros., Inc. v. Dept of Rev.*, 10 OTR 111, 115-116 (1985), *aff'd* 302 Or 603, 732 P2d 497 (1987).

limited to changes to the tax roll "to conform the roll to applicable law." ORS 306.115(3). An agreement about facts indicating a likely "error on the roll" for the purposes of OAR 150-306.115(4)(b) necessarily requires agreement about facts showing some inconsistency between a property tax assessment and the applicable Oregon law governing the appraisal or assessment of property. The department relies on the valuation principle, embodied in ORS 308.205 and acknowledged by this court that "hindsight acquired by a later discovery of [facts unknown on the assessment date] should not be employed to change the valuation found on the assessment date." *Sabin,* 270 Or at 427, n 11. The department's reading of "error on the roll"— which requires market knowledge of a defect before such an error can be established—is entitled to deference. *Don't Waste Oregon Com. v. Energy Facility Siting*, 320 Or 132, 142, 881 P2d 119 (1994).

2. The department properly preserved its arguments in support of its interpretation of the rule.

Oakmont asserts that the department did not properly preserve its argument that the court should defer to the department's interpretation of OAR 150-306.115. (Answering Br at 10, 22-28). That assertion has no basis in law or fact.[5]

[5] Oakmont also erroneously asserts that the department's argument here regarding its interpretation of OAR 150-306.115 is inconsistent with its position in other cases. (Answering Br at 23). This is based on Oakmont's misstatement of the department's position as requiring an agreement between the parties be existing as of the assessment date. As noted above, this is not the department's argument.

The department consistently argued throughout its briefing in the Tax Court that, under the department's rule, Oakmont had failed to meet its burden to demonstrate an agreement to facts by the parties that indicated a likely error on the roll, as required by OAR 150-306.115(4)(b)(A). (*See, e.g.,* TCF 39-53). In addition, the department argued that there was no agreement by the county assessor as to the condition of the property as of January 1, 2008, that the settled-for values as to the 2009-10 and 2010-11 tax years were not facts indicating a likely error on the roll for a prior year, that the *Sabin* decision and valuation statutes and principles prevented consideration of property conditions discovered after the assessment date, and that Oakmont did not meet the criteria in the rule for the department to exercise its supervisory jurisdiction. (TCF 39, 41-43, 47, 51-53, 57).

Likewise, the department argued that the Tax Court should defer to the department's determination to decline to exercise its supervisory jurisdiction under OAR 150-306.115. The department argued that its rules promulgated under ORS 306.115 "are a valid exercise of the department's discretion." (TCF 56). And the department also argued that "deference must be extended to the department in review of its discretionary determinations." (TCF 39, 110). Thus, the department properly preserved its arguments below.

As the department has consistently argued, it properly declined supervisory jurisdiction in this case because any defects in Oakmont's property were

discovered only after the January 1, 2008, assessment date and there was no agreement by the assessor that such defects were existing and known to the market as of the assessment date. Consequently, the department did not abuse its discretion under ORS 306.115 and its rule in concluding that Oakmont had failed to carry its burden to show that an error on the roll was likely.

Conclusion

The Tax Court's judgment should be reversed.

DATED this 8th day of May 2015.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH ORAP 5.05(2)(d)

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 2,484 words.

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I certify that the size of this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(g).

Dated this 8th day of May, 2015.

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CERTIFICATE OF SERVICE

I certify that on May 8, 2015, I directed the original APPELLANT'S REPLY BRIEF to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Amy Heverly, Attorney for Plaintiff-Respondent, and Kathleen J. Rastetter, Attorney for Clackamas County, using the court's electronic filing system. Also upon Jack L. Orchard, Attorney for Plaintiff-Respondent, via United States Postal Service addressed as follows:

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