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 OPENING BRIEF AND EXCERPT OF RECORD

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

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JACK L. ORCHARD, Jr #721888
AMY HEVERLY, #
Ball Janik LLP
101 SW Main Street, Suite 1100
Portland, OR 97204
Telephone: (503) 228-2525
Fax: (503) 295-1058
jorchard@balljanik.com

Of Attorneys for Plaintiff-Respondent
OAKMONT, LLC

ELLEN F. ROSENBLUM, #753239
Attorney General
MELISSE S. CUNNINGHAM, #972457
Senior Assistant Attorney General
DANIEL PAUL, #140309
Assistant Attorney General
Department of Justice
1162 Court Street NE
Salem, OR 97301
Telephone: (503) 947-4530
Fax: (503) 378-3784
melisse.s.cunningham@state.or.us
daniel.paul@state.or.us

Of Attorneys for Defendant-Appellant
DEPARTMENT OF REVENUE,
State of Oregon

KATHLEEN J. RASTETTER, #931145
Office of Clackamas County Counsel
2051 Kaen Road
Oregon City, Oregon 97045
Telephone: (503) 655-8362
Fax: (503) 742-5397
kathleenras@co.clackamas.or.us

Of Attorneys for Defendant-Appellant
CLACKAMAS COUNTY

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STATEMENT OF THE CASE

Nature of the Action or Proceeding

In this tax case, Oakmont LLC (Oakmont) petitioned the Department of Revenue (the department) to exercise its discretionary supervisory authority under ORS 306.115 to change the assessment and tax roll value of certain property. The department determined Oakmont's petition did not satisfy the requirements under OAR 150-306.115 for the department to exercise its supervisory authority. On review, the Tax Court determined—on cross-motions for summary judgment—that the department had abused its discretion and therefore remanded the case for the department to hold a merits hearing under ORS 306.115 and OAR 150-306.115. The department appeals from that decision, asking this court to reverse the Tax Court's rulings on the parties' cross-motions for summary judgment.

Nature of the Judgment

The Tax Court entered a judgment in favor of Oakmont and remanding the matter to the department to hold a merits hearing on Oakmont's petition for relief under ORS 306.115 for the 2008-09 tax year.

Statutory Basis of Appellate Jurisdiction

This court has jurisdiction pursuant to ORS 305.445.

Entry of Judgment and Timely-Filed Notice of Appeal

The Tax Court entered its judgment on May 15, 2014, and the department's

Notice of Appeal was served and filed on June 10, 2014, within the statutory time period for appeal.

Question Presented on Appeal

Under OAR 150-306.115(4)(b)(A), the department may not exercise its supervisory jurisdiction to change or correct a property assessment on the property tax roll unless the department determines that there are agreed facts indicating that "an error on the roll is likely." Where a property was assessed on the tax roll without a reduction in value for a subsequently discovered defect in the property and where there is no agreement by the parties to facts about the condition of the property as of the assessment date, is it reasonable for the department to decline to exercise its discretionary supervisory authority to correct the tax roll?

Summary of the Argument

Based on defects in its property discovered in 2008 and later, Oakmont asked the department to exercise its supervisory authority, under ORS 306.115 and OAR 150-306.115, to lower the 2008-09 tax assessment on the property. Oakmont claimed that the department had jurisdiction to exercise that authority because the parties, Oakmont and the Clackamas County Assessor (the assessor), had agreed to facts—specifically, that the property contained a construction or design defect—that indicated a likely "error on the roll." The department, however, concluded that agreed facts about the condition of the property in tax years after 2008-09 did

not indicate a likely error on the roll on the assessment date for tax year 2008-09. The Tax Court reversed, reasoning that an error was likely because the agreed facts tended to show that a construction defect was existing on the assessment date for the 2008-09 tax year. But that conclusion rests on a misreading of OAR 150-306.115's use of the term "error on the roll." Under ORS 306.115 and OAR 150-306.115(4)(b)(A)—as interpreted by the department—a construction defect cannot give rise to an "error on the roll" unless that defect was both existing and *known* on the assessment date. At the very least, the department's reading of its own rule is plausible and entitled to deference. And because Oakmont identified no agreed facts establishing that any defects were existing and known as of the assessment date for 2008-09, the department did not abuse its discretion in concluding that the agreed facts demonstrated no likely error on the roll.

Summary of Facts[1]

The subject of this case is the 2008-09 property tax assessment—based on a January 1, 2008, valuation date—on a 266-unit apartment complex that was built in 1996. (ER-3). Oakmont did not appeal that assessment. (ER-3). Oakmont did, however, timely appeal the assessment on the property for the subsequent tax year, 2009-10, which ultimately resulted in a settlement regarding the property's

[1] The department supplements this summary of facts in its argument.

assessed real market value as of January 1, 2009. (ER-4). In that settlement, the assessor agreed to reduce the assessed value of the property to approximately 40 percent of the original assessed value for that year. (ER-4).

Oakmont then filed a petition requesting that the department exercise its discretionary supervisory authority under ORS 306.115[2] and OAR 150-306.115[3] to

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[2] ORS 306.115 provides, in relevant part:

> "(3) The department may order a change or correction applicable to a separate assessment of property to the assessment or tax roll for the current tax year and for either of the two tax years immediately preceding the current tax year if for the year to which the change or correction is applicable the department discovers reason to correct the roll which, in its discretion, it deems necessary to conform the roll to applicable law without regard to any failure to exercise a right of appeal."

[3] OAR 150-306.115 provides, in relevant part:

> "(3) Before the department will consider the substantive issue in a petition (for example, value of the property, qualification for exemption, etc.), the petitioner has the burden of showing that the requirements for supervisory jurisdiction, as stated in ORS 306.115 and section (4) of this rule, have been met. The department will base its determination on the record before it.
>
> * * * * *
>
> (4) The department will consider the substantive issue in the petition only when:
>
> (a) The assessor or taxpayer has no remaining statutory right of appeal; and
>
> (b) The department determines that an error on the roll is likely as indicated by at least one of the following standards:
>
> (A) The parties to the petition agree to facts indicating likely error; or

correct the tax roll by lowering the 2008-09 real market value for the property. (ER-34-35). Oakmont's petition claimed that Oakmont and the assessor agreed to facts that indicate a likely error on the roll for the 2008-09 tax year; that is, Oakmont asserted that that the requirements for supervisory jurisdiction had been met under OAR 150-306.115(4)(b)(A). (ER-34, 35). The department held a conference to determine whether it would exercise its jurisdiction to consider the merits of the petition for a tax roll correction. (ER-4).

Ultimately, the department concluded that it did "not have jurisdiction to review the substantive issues of [Oakmont's] appeal" because the parties had not agreed that the defects were both existing and known prior to the valuation date:

> "The only relevant agreement * * * does not account for conditions that *existed* at the date of value with sufficient specificity to indicate a likely error on the roll. The record indicates knowledge and the extent of the condition of the property was *not known* * * * as of the January 1, 2008 valuation date."

(ER-30) (emphases added). Under those circumstances, the department concluded the agreed facts did not establish a likely error on the roll, and the requirements for supervisory jurisdiction had not been met under OAR 150-306.115(4)(b)(A). (ER-30).

Oakmont appealed the department's supervisory decision to the Magistrate

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> (B) There is an extraordinary circumstance indicating a likely error."

Division of the Oregon Tax Court. The magistrate granted summary judgment in favor of the department and the assessor. Oakmont appealed to the Regular Division. The parties filed motions for summary judgment on the issue of whether the department had abused its discretion in determining that it lacked jurisdiction to exercise its supervisory authority. The Tax Court ruled in favor of Oakmont. In so ruling, the Tax Court concluded that the agreed facts established the existence of defects in the property prior to January 1, 2008, and that such existence was sufficient, standing alone, to establish a likely error on the roll:

> "The [assessor] clearly agreed that construction and design defects existed and affected value as of January 1, 2009. The [assessor] also implicitly, if not explicitly, agreed that *the defects dated from the time of construction in 1996*. This much more than likely indicates that there was an error in the roll value and RMV as of January 1, 2008—a roll value that did not take into account or reflect any reduction in value attributable to the construction or design defects affecting the subject property."

(ER-8) (emphasis added). The court explained that design and construction defects "would have occurred at or about the time of the construction of the property, that is in 1996." (ER-7). The Tax Court also concluded:

> "[N]othing in the department's rule requires that parties agree on facts that were *known* or even knowable as of a valuation date."

(ER-7) (emphasis added).

The Tax Court granted Oakmont's motion for summary judgment, denied those of the department and the assessor, and remanded for the department to hold

a merits hearing regarding a correction to the tax roll. (ER-8). This appeal followed.

Significant Motions

On July 21, 2014, Oakmont filed a motion to dismiss the appeal in which it argued that this court lacked jurisdiction to decide the appeal because the Tax Court judgment was not a final, appealable judgment under ORS 305.445 and ORS 19.205. The department filed a response on August 6, 2014, asserting that jurisdiction was proper, because the Tax Court judgment was an appealable judgment. On October 2, 2014, the court denied Oakmont's motion to dismiss.

ASSIGNMENT OF ERROR

The Tax Court misinterpreted the meaning of what constitutes an "error on the roll" under OAR 150-306.115(4)(b)(A) and erred in substituting its own judgment for the department's where the parties did not agree that there were existing and known defects in the subject property as of the January 1, 2008, assessment date.

Preservation of Error

The department filed a cross-motion for summary judgment with the Tax Court in which it argued that the department did not abuse its discretion when it declined, pursuant to its administrative rules and applicable case law, to exercise its jurisdiction to review the substantive issues of Oakmont's supervisory petition.

(Trial Court File (TCF) 37-62). In that motion, the department argued that the denial of Oakmont's petition was proper due to the lack of agreement to facts indicating a likely error on the roll. The department argued that any defects in the subject property, which were discovered sometime after the assessment date, were not relevant under ORS 308.205 and cases such as *Sabin v. Dept. of Rev.*, 270 Or 422, 528 P2d 69 (1974), to a determination of the real market value of the property as of January 1, 2008. (TCF 41-42, 51). The department properly preserved the error assigned.

Standard of Review

This court reviews decisions of the Oregon Tax Court for "errors or questions of law or lack of substantial evidence in the record to support the tax court's decision." ORS 305.445. Because the department's decisions under ORS 306.115 are discretionary, this court reviews whether the Tax Court properly determined as a matter of law that the department abused its discretion by acting arbitrarily or capriciously or arriving at a decision that was clearly wrong. *National Metallurgical Corp. v. Dept. of Rev.*, 282 Or 317, 321, 577 P2d 941 (1978) (citing *Martin Bros. v. Tax Commission*, 252 Or 331, 338, 449 P2d 430 (1969)).

ARGUMENT

Based on defects in its property discovered in 2008 and later, Oakmont asked the department to exercise its supervisory authority, under ORS 306.115 and OAR 150-306.115(4)(b)(A), to lower the 2008-09 assessment on the property. Oakmont claimed that the department had jurisdiction to exercise that authority because Oakmont and the assessor had agreed to facts—specifically, that the property contained a construction or design defect—that indicated a likely "error on the roll." The department, however, concluded that the agreed facts about the condition of the property for tax years after 2008-09 did not indicate a likely error on the roll. The Tax Court reversed, reasoning that an error was likely because the agreed facts tended to show that a construction defect was existing on the assessment date for the 2008-09 tax year. But that conclusion rests on a misreading of OAR 150-306.115(4)(b)'s use of the term "error on the roll."

Under ORS 306.115 and OAR 150-306.115(4)(b)(A)—as interpreted by the department—a construction defect cannot give rise to an "error on the roll" unless that defect was both existing and *known* on the assessment date. At the very least, the department's reading of its own rule is plausible and entitled to deference. And because Oakmont identified no agreed facts establishing that any defects were existing and known as of the assessment date for 2008-09, the department did not

abuse its discretion in concluding that the agreed facts demonstrated no likely error on the roll.

A. Under the relevant statutes and rules, the department may exercise its supervisory authority only when agreed facts indicate "an error on the roll is likely."

Under ORS 306.115(3):

> "The department may order a change or correction applicable to a separate assessment of property to the assessment or tax roll * * * if for the year to which the change or correction is applicable the department discovers reason to correct the roll which, in its discretion, it deems necessary to conform the roll to applicable law * * *."

To implement that statute, the department has promulgated rules to govern when the department will exercise its discretionary supervisory jurisdiction to consider the merits of a petition to order a correction to the tax roll. Under those rules, the department will not consider such petitions unless the petitioner has established that the requirements for the exercise of that supervisory jurisdiction have been met:

> "Before the department will consider the substantive issue in a petition (for example, value of the property, qualification for exemption, etc.), the petitioner has the burden of showing that the requirements for supervisory jurisdiction, as stated in ORS 306.115 and section (4) of this rule, have been met."

OAR 150-306.115(3). And, as relevant here, one of the requirements for supervisory jurisdiction is a finding that there are agreed facts indicating a likely error on the tax roll. Specifically, OAR 150-306.115(4)(b)(A) provides that "[t]he department will consider the substantive issue in the petition *only* when * * * [t]he

department determines that an *error on the roll is likely* as indicated" by the fact that "[t]he parties to the petition agree to facts indicating likely error."[4] (Emphases added.)

In short, Oakmont bore the burden of establishing, in the hearing before the department, agreed facts indicating that the January 1, 2008, valuation was likely erroneous, and it failed to do so.

B. There is no likely "error on the tax roll" where a defect was unknown at the time of valuation.

Under ORS 306.115, the department possesses discretionary supervisory authority to make changes or corrections to a tax roll only "to conform the roll to applicable law." ORS 306.115(3). Thus, an "error on the roll" for the purposes of OAR 150-306.115(4)(b) must mean some inconsistency between a property tax assessment and the applicable Oregon law governing the appraisal or assessment of property. Where, as here, the claimed error is in the property's valuation, an "error on the roll" must be interpreted in view of the definition of "real market value" contained in ORS 308.205 and applicable statutes and case law.

Under that applicable law, county assessors are required by law to value on the roll all taxable real property in the county each year based on the property's

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[4] Although the rule also allows the department to consider the substantive issue when an "extraordinary circumstance indicat[es] a likely error," OAR 150-306.115 (4)(b)(B), no party has claimed that alternative basis for jurisdiction in this case.

real market value as of the assessment date for the tax year. ORS 308.007 (defining "assessment date"); ORS 308.205 (defining "real market value"); ORS 308.210 (setting forth annual assessment procedures); *see also Portland Canning Co. v. Tax Com.*, 241 Or 109, 113, 404 P2d 236 (1965) ("[V]alue is to be ascertained in accordance with market value."). The assessment date for property tax purposes is the January 1 immediately prior to the July 1 commencing the property tax year. ORS 308.007, ORS 308.210. The definition of "real market value" is what an informed buyer and seller would reasonably pay for the property in an arms-length transaction on the assessment date for the tax year. ORS 308.205(1).

Under those principles, after-acquired facts about the condition of property should not be used to determine the market value of the property on an earlier assessment date. *See Sabin*, 270 Or at 427-28 n 11.[5] That is, the legal standard for valuing property considers only the facts actually known to the market at the time of assessment, and facts that are not known to the market as of that date cannot be

[5] As noted in *Sabin,* this principle is distinguishable from one allowing the use of a subsequent sale of the subject property to corroborate the appraiser's conclusion of the property's value on the assessment date, even when such a sale had not occurred on that date, so long as the sale occurred soon after that date. *Id. See also Truitt Brothers, Inc. v. Dept. of Rev.*, 10 OTR 111, 115-16, 116 n 3 (1985), *aff'd*, 302 Or 603, 732 P2d 497 (1987) (same conclusion with regard to comparable sales of other properties).

used to value the property:

> "Where facts relating to the value of the assessed property are not known at the time of the assessment, and if known at that time would have affected the market value of the property (as, for example, where it is later discovered that the property contains valuable minerals), hindsight acquired by a later discovery of such facts should not be employed to change the valuation found on the assessment date."

Id. at 428 n 11.

Put simply, an "error on the roll" cannot be established by facts showing a defect existing but not known at the time of valuation. If the market would not have had knowledge of a defect on the assessment date, the law does not permit the assessor to consider that unknown defect when determining the real market value as of that date. That rule burdens both taxpayers and tax assessors alike: just as a property owner cannot support a reduction in assessed value by relying on a defect that was existing but unknown at the time of valuation, an assessor[6] cannot support an increase in assessed value by relying on valuable minerals that were present but unknown at the time of valuation. Because an assessor cannot, on the date of valuation, account for facts which are unknown, that assessor commits no error by ignoring such unknown facts when determining value on that date. Under that principle, Oakmont bore the burden of establishing, in the hearing before the

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[6] Under OAR 150-306.115-(A)(1)(c), an assessor as well as a taxpayer may file a petition seeking a correction under the department's ORS 306.115 supervisory authority.

department, agreed facts indicating that the January 1, 2008, valuation failed to account for defects that were both existing and *known* as of the valuation date.

For those reasons, the Tax Court's conclusion rests on a faulty reading of OAR 150-306.115(4)(b)(A). As explained above, the Tax Court held that "nothing in the department's rule requires that parties agree on facts that were known or even knowable as of a valuation date." (ER-7). And the Tax Court concluded that an "error on the roll" was likely simply because the facts implied that a defect was more than likely existing at the time of valuation. (ER-8). That is, the Tax Court concluded that an "error on the roll" was likely without regard to whether the alleged defect was known at the time of valuation. In so doing, it misinterpreted OAR 150-306.115(4)(b)'s use of the phrase "error on the roll" and issued a ruling necessarily resting on that misinterpretation.[7]

Moreover, as explained below, the record contains no agreed facts as to knowledge of any defects as of the valuation date. Thus, the department did not

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[7] Even if the Tax Court's reading of "error on the roll" is not patently incorrect as a matter of law, that court still erred by failing to defer to the department's contrary and plausible reading of its own rule. For the reasons outlined above, the department's reading of "error on the roll"— which requires knowledge of the defect before such an error can be established—is "plausible" and is not "inconsistent with the wording of the rule itself, or with the rule's context, or with any other source of law." *Don't Waste Oregon Com. v. Energy Facility Siting*, 320 Or 132, 142, 881 P2d 119 (1994). Under that circumstance, the Tax Court should have deferred to the agency's interpretation. *See id.*

abuse its discretion in concluding that Oakmont had not carried its burden of establishing that an error on the roll was likely.

C. The record contains no agreed facts establishing that any defects in the property were known as of the assessment date.

While the Tax Court's conclusion may be correct that the agreed facts imply that there were *existing* defects as early as 1996, nothing about those agreed facts establishes that the defects were *known* prior to the relevant valuation date of January 1, 2008. For that reason alone, the department correctly determined that Oakmont had not carried its burden of establishing agreed facts showing that an error in the roll was likely.[8]

Indeed, Oakmont's own witness—Ted Pflueger, one of Oakmont's two owners and managing members—testified under oath at the department's supervisory conference that February 2008 was the time of the "initial discovery of

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[8] In addition, the Tax Court erred in relying upon the value reduction settled upon by Oakmont and the assessor for a subsequent tax year as an indication of a likely error in the value for the 2008-09 tax year. (ER-7, 8). Under Oregon's property tax system each year stands on its own, and a 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) (value determined in a given year, whether by appraisal, settlement, or otherwise, is generally not directly related to or dependent on the value in any other year); *ESCO Corp. v. Dept. of Rev.*, 307 Or 639, 646, 772 P2d 413 (1989) ("[E]ach tax year stands on its own. An alleged gross valuation error for one year does not automatically give notice of a gross valuation error for a prior year, * * *."). *See also ADC Kentrox v. Dept. of Revenue,* 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 prior year).

what [Oakmont] believed to be a problem behind one of the belly bands of the back side of one of our 27 buildings." (TCF 132). Pflueger further testified that Oakmont "didn't have any estimates [of the extent or cost to repair the damage] back in 2008 because we were just beginning to uncover the horror story that * * * unfolded in front of our eyes over the course of the next 12 months." (TCF 131).

And Oakmont's actions with respect to the property suggest that it was unaware of the defects prior to February 2008. Oakmont did not engage architectural experts to investigate the issue until after that date. (TCF 132, Conference Record (Conf. Rec.) at 43).[9] The extent of the problems and related costs of repair were not determined until late 2009 through 2011. (TCF 131). Oakmont waited until November 2008 to file a civil negligence lawsuit seeking damages from the original builders or contractors of the property. (Conf. Rec. at 41). Finally, Oakmont did not appeal the 2008-09 property tax assessment, which it could have timely appealed as late as December 31, 2008. ORS 309.100(2) (appeal to local Board of Property Tax Appeals must be filed by December 31 of

[9] Reference to the "Conference Record" is to the record of documents in the supervisory conference before the department. A copy of which was marked as Bates numbers DOR 000001-000226 and submitted to the court by Oakmont on November 7, 2013, in connection with its Motion for Summary Judgment in Tax Court case no. 5178. The department references the Bates numbered pages as Conference Record pages 1-226, because they were not numbered as part of the trial court file numbering.

property tax year).

Furthermore, the assessor's appraisal of the subject property for 2009-10 included the assertion that "the full extent of structural issues and damage [was] unknown," annual inspection reports for the property prepared for the property's mortgage holder made "no mention of structural issues or damages," "[r]eports dated 2005 through 2009 describe all exterior and interior as excellent to good condition; no items rated fair or poor," and the report for 2007 noted the property was "'in overall excellent condition.'" (Conf. Rec. at 82, 138). The assessor's 2009-10 tax year appraisal also noted that the subject property had continued to achieve market rents through 2007, 2008 and 2009, and so possessed good marketability. (Conf. Rec. at 139). Those facts tend to show that any defects went unnoticed long after they came into existence. Indeed, Oakmont does not appear to have discovered the defects when it purchased the property—without diminution in value, for a purchase price of over 17 million dollars—in 2003, well after any construction defects would have come into existence. (TCF 132; Conf. Rec. at 29, 41).

Given all those agreed facts establishing that the defects were discovered after the January 1, 2008, valuation date, the department acted within its discretion and was not "clearly wrong" in concluding that Oakmont had failed to carry its burden of establishing agreed facts showing that an error on the roll was likely. For

that reason, the Tax Court should have denied Oakmont's motion for summary judgment and instead granted summary judgment in favor of the department.[10]

The Tax Court's determination that the defects in Oakmont's property were in existence and knowable as of the January 1, 2008, assessment date and that such defects "more than likely" affected the value of the property prior to their earliest discovery in 2008 were not facts agreed upon by the county assessor at the hearing, nor were these facts agreed upon in the record presented to the department. The court instead relied on its own inference that a defect that existed as of the date of the property's construction necessarily affects the value of the property on every assessment date after that construction, whether it is actually known or not. (ER 6-7). But an inference drawn by the court is not a fact agreed to by the parties. The court improperly substituted its own judgment for that of the department.[11]

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[10] To be sure, the record does contain a statement in the assessor's 2011 appraisal suggesting that the defects were discovered in 2007. (*See* ER-30). However, that reference to 2007 appears to be an error because, as outlined in greater detail above, it conflicts with the testimony of Oakmont's co-owner and other evidence in the conference record. In fact, it conflicts with Oakmont's own motion for summary judgment filed in the Tax Court. (Memorandum in Support of Plaintiff's Motion for Summary Judgment (TC 5178) at 2). Those conflicts establish a lack of agreement as to the statement regarding discovery as early as 2007. Moreover, those conflicts support the department's discretion to conclude that—notwithstanding that single statement in a 2011 appraisal—Oakmont had failed to carry its burden of establishing agreed facts as to when the defects were discovered.

[11] Moreover, if it was appropriate for the Tax Court to make an inference here, which it was not, the opposite inference about the unknown defects in the property

The assessor did not agree to any facts about the condition of the subject property for the 2008-09 tax year in his preliminary submissions to the department and did not testify that there was agreement to any such facts during the conference. Just the opposite occurred. The assessor's response to Oakmont's supervisory petition stated "the county does not agree to any facts submitted after the regular appeal period has ended." (Conf. Rec. at 51). Mr. Honl, the Clackamas County Assessor's representative, appeared at the department conference and repeated the county's position. (TCF 128).

Since any defects in taxpayer's property were not discovered until February 2008 at the earliest, and were not fully known until much later, the assessor —by law—could not have taken the unknown defects into consideration in establishing the real market value as of the January 1, 2008, assessment date. As this court articulated in *Sabin,* the fact that defects were later discovered has no bearing on the value established for the 2008-09 tax year. Accordingly, the department was correct in concluding that agreement about defects that were discovered in the

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is also reasonable. In other words, it is just as reasonable to assume that any defects in the property would not necessarily have affected the value of the property prior to their discovery in 2008, as evidenced by the fact that when Oakmont purchased the property in 2003, after the alleged construction defects were already in existence, there does not appear to have been any discovery of the defects or any diminution in value of the property for which Oakmont paid over 17 million dollars. (TCF 132; Conf. Rec. at 29, 41).

property after January 1, 2008, was not a fact indicating a likely error on the roll for the 2008-09 property tax year. The department acted properly and within its discretion in declining to accept supervisory jurisdiction of Oakmont's petition.

Conclusion

The Tax Court's decision should be reversed.

DATED this 8th day of January 2015.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General

By: /s/ Melisse S. Cunningham
Melisse S. Cunningham, #972457
Daniel Paul, #140309
Of Attorneys for Department of Revenue,
State of Oregon, Defendant-Appellant
melisse.s.cunningham@state.or.us

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 4,952 words.

Type size

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 January, 2015.

By: /s/ Melisse S. Cunningham
Melisse S. Cunningham, #972457
Daniel Paul, #140309
Of Attorneys for Department of Revenue,
State of Oregon, Defendant-Appellant
melisse.s.cunningham@state.or.us

CERTIFICATE OF SERVICE

I certify that on January 8, 2015, I directed the original APPELLANT'S OPENING 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:

Jack L. Orchard
Ball Janik LLP
101 SW Main St Ste 1100
Portland, OR 97204

Dated this 8th day of January, 2015.

By: /s/ Melisse S. Cunningham
Melisse S. Cunningham, #972457
Daniel Paul, #140309
Of Attorneys for Department of Revenue,
State of Oregon, Defendant-Appellant
melisse.s.cunningham@state.or.us