IN THE SUPREME COURT OF THE STATE OF OREGON

OAKMONT LLC, Plaintiff/Respondent, v. DEPARTMENT OF REVENUE, State of Oregon, and CLACKAMAS COUNTY ASSESSOR, Defendants/Appellants.	TC 5178 Supreme Court No. S062342

APPELLANT CLACKAMAS COUNTY ASSESSOR'S REPLY BRIEF

Direct Appeal from the judgment of the Oregon Tax Court

The Honorable Henry C. Breithaupt.

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I. Summary of Argument.

Oakmont LLC (Oakmont) opposes this appeal on two grounds: (1) it reframes the question on appeal as whether the parties must actually agree to facts on or by the date of valuation; and (2) argues that appellants have not preserved their arguments on appeal. Both arguments are wrong.[1]

The question on appeal is whether the Department of Revenue (DOR) abused its authority in finding nothing in the record to show an agreement to facts regarding the condition of the property as of the date of valuation (DOV). There was no evidence in the record before DOR or the Tax Court to establish when the defects arose, or that they existed as of the 1/1/08 DOV. Under both ORS 308.205(1) and case law property value is measured as of the date of valuation; facts acquired in hindsight do not affect the market value of the property at an earlier time.

Oakmont incorrectly argues that the Tax Court applied the correct review standard because the county agreed to facts in the record regarding the defects. There is no evidence in the record which shows the defects existed as of the DOV, or that the county agreed to facts regarding the

[1] Oakmont also renews its arguments from its Motion to Dismiss on the ripeness of this appeal. The Assessor incorporates its filings in response to Oakmont's motion.

condition of the property as of that date. The Tax Court erred in substituting its own view of when the defects arose for DOR's fact finding.

Oakmont also errs in asserting that the Clackamas County Assessor (The Assessor) did not preserve his fourth assignment of error. The legislature intended the supervisory hearing process to be used only in "extraordinary circumstances", and not as an end-run around the normal appeals process.

II. The Department of Revenue did not abuse its broad authority in declining to exercise jurisdiction because there was no agreement to facts regarding the condition of the property as of the assessment date.

Oakmont does not squarely address the merits of appellants' arguments that DOR did not abuse its broad authority to act. Instead, Oakmont misstates the question on appeal as whether there must be an "actual agreement to facts by, or on, the assessment date." *See* Oakmont's Answering Brief (Answering Brief) at pp. 2 & 3.

The question on appeal is whether DOR abused its discretion in finding no agreement to facts regarding the existence of defects as of the DOV, thus potentially affecting the value of the property at that time (to show there is a likely error on the tax roll.) The timing of the agreement is not at issue. Rather, the hearing officer had to decide whether the record

showed agreed-to facts to show the existence of defects in the property as of the DOV.

Oakmont cherry picks the facts in the record and erroneously states that the facts and the existence of defects as of the valuation date were not in dispute. *See* Answering Brief at pp. 3, 7 & 30-31. This ignores the evidence in record, which shows the Assessor questioned the timing, nature and extent of defects.

The Assessor's experts reviewed Oakmont's own documents which showed the property was in good condition, and that income from rentals remained strong through 2009. This caused the experts to conclude that any defects had minimal impact on Oakmont's earnings. ER 11-12. The experts cited Oakmont's allegations regarding the property and determined what effect the defects "may" have had on the value of the property for the 2009-10 tax year. ER 11-12. Importantly, the experts stated that even in 2011 the "**exact extent of potential damage and deficiencies is unknown**." ER 12 (Emphasis added.) Contrary to Oakmont's assertion, the facts were in dispute, but were not resolved due to the parties' settlement shortly before trial.[2] There was no evidence in the hearing record regarding

[2] Oakmont erroneously asserts that the Assessor agreed that certain facts existed on the 1/1/08 valuation date. *See* Oakmont's Answering Brief at p. 32. This is incorrect; the record before the hearing officer and the Tax Court

the condition of the property as of the 1/1/08 date of valuation. The Assessor confirmed this at the December 15, 2011 conference. ER 3-4.

DOR reviewed the entire record and found no evidence in the record to show an agreement to facts regarding the condition of the property as of the date of value, 1/1/08. That conclusion is not "clearly wrong" or an abuse of DOR"s discretion under 306.115.

III. The Tax Court failed to adhere to the standard of review.

The Tax Court wrongly concluded that "[t]he county also implicitly, if not explicitly, agreed that the defects dated from the time of construction in 1996". ER 2. This conclusion improperly replaced the court's view of the facts for the fact finding of the hearings officer.

Oakmont argues that "the facts all emanated from the County", thus the Tax Court did not abuse the standard of review. *See* Answering Brief at p. 30. This misstates the evidence in the record, and fails to address the proper standard of review. As noted above, the record before the hearing officer contained evidence that the nature and extent

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contains no evidence regarding the condition of the property as of 1/1/08. All evidence in the record relates to the condition of the property for the 1/1/09 tax year, and it is undisputed that the defects were not even preliminarily identified until February 26, 2008. SER 2 (DOR 221.) *See also* ER 1-2 and 9 (listing the documents provided by Oakmont regarding problems.) It is also undisputed that the existence of defects was not known in 2003, when Oakmont purchased the property for $17,100,000.

of any defects was contested, and there was no evidence in the record to show that the defects existed as of 1/1/08. In fact, there was no evidence in the record to establish exactly when the defects arose, or their actual cause. ER pp. 1-2; p. 9, and pp. 16-17 (citing design defects, poor workmanship and/or material defects as possible causes.) Moreover, the defects were not apparent in 2003 when Oakmont purchased the property.

The Tax Court erred in substituting its own view of the facts by concluding that the defects must have existed since the buildings were constructed (facts not in evidence). This is contrary to the limited standard of review. *Martin Bros. v. Tax Comm'n,* 252 Or 331, 338 (1969).

IV. Real market value is determined by ORS 308.205(1) which looks to facts known to the market as of the assessment date.

Oakmont argues that facts discovered after the assessment date can form an agreement as to the real market value of the property for a prior DOV, since they are "close in time." *See* Oakmont's Brief at pp. 16-17. The standard for measuring real market value has always been what an

informed buyer would pay for the property as of the DOV, not value gained through hindsight. ORS 308.205(1)[3] and ORS 308.232.[4]

This court noted as much in *Sabin v. Dept. of Revenue,* 270 Or 422, 427 n11 (1974) and *STC Submarine v. Dept. of Revenue,* 320 Or 589, 591 (1995) (citing ORS 305.208(1) and (2)). Further, the Tax Court has long held that an agreement to reduce value for a subsequent tax year is not a "fact" which establishes the condition of the property (value) for a prior tax year. *ADC Kentrox v. Dept. of Revenue,* 19 OTR 340, 348 (2007). That principle comports with this Court's conclusion that each tax year stands alone. *Esco Corp. v. Dept. of Revenue,* 307 Or 639, 646 (1989).

Facts which are not known to the market cannot "inform" a buyer or seller, thus such facts do not affect the real market value of a property. This is why ORS 308.205(1) measures the real market value as of the assessment date.

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[3] ORS 308.205(1) provides: "Real market value of all property, real and personal, means the amount in cash that could reasonably be expected to be paid by an informed buyer to an informed seller, each acting without compulsion in an arm's-length transaction occurring **as of the assessment date** for the tax year." Emphasis added.

[4] ORS 308.232 provides: "All real or personal property within each county not exempt from ad valorem property taxation or subject to special assessment shall be valued at 100% of its real market value."

Oakmont argues that the administrative rule does not limit "agreed facts" to facts known on the DOV, and argues that this court cannot insert a time limitation into the rule. *See* Answering Brief at pp. 12-13. However, the supervisory hearing statute authorizes DOR to take any action "necessary in the administration of the property tax laws so that all properties are taxed […] according to the statutes and Constitutions of the State of Oregon and of the United States." ORS 306.115(1).[5] DOR is bound to apply the methods for valuing real property in ORS 308.205(1) and case law, which measure market value as of the "assessment date." Oakmont's own actions show why this is the standard. The defect must both exist **and** be known, otherwise Oakmont would not have paid $17,100,000 to buy the property in 2003. The same is true for the 1/1/08 DOV – unless there is evidence the defects existed and were known, they could not affect the market value of the property as of that assessment date.

Oakmont also argues that appellants "ignore" the differences between property tax valuation and the supervisory process, which Oakmont uses to support its view that later-discovered facts can affect the real market value of a property. *See* Oakmont's brief at p. 16. Neither the statutes nor case

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[5] Subsection (3) of this statute further provides that DOR may order a change to the tax roll if, in its discretion, it deems it necessary to "conform the roll to **applicable law**". Emphasis added.

law governing Oregon property taxation support Oakmont's view that a different method of valuation is used depending on the procedural arena. Such a rule would violate ORS 308.205 for determining the real market value of property.

All of the cases cited by Oakmont do not apply to the issues in this case, and none of them stand for the proposition that facts not known to the market or parties can affect value for an earlier assessment date.

Oakmont argues that an agreement to facts can come after the valuation date, relying on *Willamette Estates II, LLC v. Dept. of Revenue,* 357 Or 113 (2015). *See* Answering brief at 25. Again, this misses the point. In *Willamette* the parties agreed to the real market value of the property **as of** the assessment date for the year at issue. *Id.* at p.121. Here, there is no agreement regarding the condition or value of the property as of the valuation date.

Oakmont cites *Ghazi-Moghaddam v. Dept. of Revenue,* 20 OTR 288 (2011) for the same theory, but the case actually supports the principle that there must be agreement to facts for the valuation date at issue. The court held that there was no abuse of discretion by DOR because the facts showed no error by the Assessor in determining the maximum assessed value for the tax years at issue. *Id.* at 294.

In *Sabin v. Dept. of Revenue,* 270 Or 422 (1974)*,* this Court said that a later sale can be relevant evidence of real market value **if** the party offering the sale shows that the underlying condition affecting value is the same. *Id.* at 426-27. The Tax Court agreed in *Truitt Bros., Inc. v. Dept. of Revenue,* 10 OTR 111, 115-16(1985), *aff'd* 302 Or 603 (1987). In this case, there is no evidence in the record to show the same condition existed, i.e. the existence of defects or their effect on value as of 1/1/108.

Oakmont also cites a condemnation case to support its view of how property should be valued for purposes of taxation. *State ex rel. Dept. of Transp. v. Hughes,* 162 Or App 414 (1999). Even if a condemnation case can set the standard for valuing property for taxation, the existence of the contamination **at the time of the valuation** in *Hughes* appears to have been uncontested. *Id.* at p. 421. Here, there is nothing in the hearing record to show the defects existed or affected value as of 1/1/08, and the Assessor contested the condition of the property as of that date.

Finally, Oakmont relies on a Magistrate decision which has no precedential value.[6] In *Coos County Assessor v. DOR,* 18 OTR 334 (2004) (referred to as *Pony Village)* the Magistrate found that a county employee's

[6] Magistrate cases have no binding precedence since the Magistrate Division is not a court of record and does not follow the rules of evidence. *See* ORS 305.501(4)(a); ORS 305.430(1).

statement that the tax roll was "likely" high for the year at issue was an agreed fact in the record which showed that the roll value for that tax year was likely in error. As noted, no such agreement exists for the valuation date here.

V. The legislature intended DOR's supervisory authority to be exercised judiciously, in "extraordinary circumstances".

Oakmont incorrectly argues that the Assessor failed to preserve his Fourth Assignment of Error. *See* Oakmont's Answering Brief at p. 32. The Assessor raised this argument at pp. 10-11 of his Memorandum in Support of his Cross-Motion for Summary Judgment filed December 9, 2013.

The legislature granted DOR broad discretion to decide when to exercise its supervisory authority, which is exercised under "extraordinary circumstances". ORS 306.115(1); OAR 150-306.115(1). *See also* OAR 150-306.115(7) which provides: "[t]he remedies provided by ORS 306.115 should not be viewed as substitutes for the ordinary appeal remedies provided by other sections […]". The Tax Court acknowledges this authority is not meant to give taxpayers an end run around the appeals process. *See ADC Kentrox,* 19 OTR at 101 (supervisory discretion granted the department is not intended to provide the taxpayer with a "second bit at the apple of tax appeals … If it were, extraordinary actions would become ordinary and the limits on ordinary appeals would become meaningless.")

(internal citations omitted); *Ohio State Life Ins. Co. v. Dept. of Revenue,* 12 OTR 423, 425 (1993).

Oakmont could have filed an appeal of its property value for the 2008 year; it sued numerous parties in November, 2008, for design and construction defects. SER 19. The Tax Court's opinion ignores the legislature's view that DOR should exercise its supervisory authority only in "extraordinary circumstances".

VI. CONCLUSION

The DOR did not abuse its broad authority in finding no agreement to facts regarding the condition of the property as of the date of valuation, and the Tax Court failed to abide by the standard of review in substituting its own view of the facts for DOR's fact finding. In addition, the legislature intended the Supervisory Hearing process in ORS 306.115 to be used in extraordinary circumstances, not as an end run around the usual appeal process.

For all these reasons the Assessor respectfully asks this court to reverse the Tax Court's judgment and dismiss Oakmont's petition for supervisory hearing.[7]

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[7] The Assessor respectfully asks that the Court dismiss the petition rather than remand the case, to avoid any confusion regarding the Court's intended results.

Respectfully submitted this 11th day of May, 2015.

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CERTIFICATE OF COMPLIANCE

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 2262 words.

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

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that on this date I served the foregoing APPELLANT CLACKAMAS COUNTY ASSESSOR'S REPLY BRIEF on the attorneys of record for Respondent and Appellant Department of Revenue by notification of eFiling to:

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