

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

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APPELLANT CLACKAMAS COUNTY ASSESSOR'S OPENING BRIEF

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

Continued on next page

Filed January 8, 2015

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## **APPELLANT'S OPENING BRIEF**

### **I. STATEMENT OF THE CASE.**

#### **A. Nature of the Action and Relief Sought.**

Plaintiff/Respondent Oakmont LLC (Oakmont), the owner of a large apartment complex in Wilsonville, Oregon, appealed its real property taxes for the 2009-10 tax year.<sup>1</sup> Shortly before trial Oakmont and defendant/appellant Clackamas County Assessor (Assessor) settled the case, stipulating to a value for the property for that tax year, based in part on construction defects which became known sometime after January 1, 2008.<sup>2</sup> Oakmont then petitioned the Department of Revenue (DOR) asking it to exercise its discretion under Oregon Revised Statute 306.115 to correct the tax roll and reduce its property taxes for the 2008 tax year.

Under ORS 306.115(3) DOR has supervisory authority to change the tax roll when, in its discretion, it is necessary to conform the roll to applicable law. Oregon Administrative Rule (OAR) 150-306.115 (the Rule), limits DOR's jurisdiction to hear the merits of a petition to situations where the parties agree to facts indicating a likely error on the tax roll, or in

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<sup>1</sup> Tax Court case number 4981.

<sup>2</sup> The Assessor is required to assess the real market value of all taxable property as of January first of the taxable year, and place the value on the tax roll. ORS 308.210(1); ORS 308.007(1)(a) and ORS 308.205(1).

extraordinary circumstances. OAR 150-306.115 (3)(d) and (4)(b)(A).

Oakmont based its petition on the agreement to facts standard.

The Hearings Officer determined that there was no agreement to facts regarding the condition of the property as of the valuation date, thus DOR lacked jurisdiction to hold a merits hearing.

Oakmont appealed DOR's decision to the Magistrate Division of the Oregon Tax Court, which held that there was no agreement of facts, and therefore DOR did not abuse its discretion under ORS 306.115. Oakmont appealed that decision to the Regular Division of the Tax Court (the Tax Court.)<sup>3</sup> The parties filed cross-motions for summary judgment on the issue of whether DOR abused its discretion in declining to exercise its jurisdiction. The Tax Court granted summary judgment in favor of Oakmont, holding that DOR abused its discretion by issuing a decision that was clearly wrong. This appeal follows. The Assessor asks that the court reverse the decision of the Tax Court and dismiss Oakmont's petition.

### **B. Nature of the Judgment.**

The parties filed cross-motions for summary judgment. The Tax Court entered judgment on May 15, 2014. (ER 25-26.) The Tax Court's ruling was

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<sup>3</sup> The Department of Revenue was a party in both cases.



provided in its written order to the parties' motions, which was incorporated into its judgment. (ER 18-24.)

### **C. Basis of Supreme Court Jurisdiction.**

This appeal is taken pursuant to ORS 305.445.

### **D. Dates of Entry of Judgment and Filing of Notice of Appeal.**

Judgment was entered May 15, 2014. Notice of appeal was timely filed by the Assessor on June 11, 2014, and an Amended Notice of Appeal was filed on June 16, 2014.

### **E. Questions on Appeal.**

The issues on appeal are: (1) Did the Tax Court err when it determined that DOR abused its broad discretion under ORS 306.115; (2) Did the Tax Court improperly substitute its own view of the facts for that of DOR, contrary to the limited standard of review; (3) Did the Tax Court apply the incorrect legal standard by using after-acquired facts to establish an error on the tax roll for the prior year; and (4) Did DOR correctly exercise its discretion in compliance with the purpose of the statute?

### **F. Summary of Arguments.**

The Legislature granted DOR broad discretion to exercise its supervisory powers under ORS 306.115 to correct property tax rolls in limited circumstances, to address issues of tax policy with state-wide

implications. Review of DOR's decision whether to exercise its authority is limited to determining whether the decision was arbitrary, capricious or clearly wrong.

The Tax Court erred as a matter of law in deciding that DOR's decision was "clearly wrong" and thus an abuse of discretion. The Hearings Officer decided that there was no agreement of facts regarding the condition of the property as of January 1, 2008. That conclusion was based on the record, which lacked evidence that the parties agreed that the construction defects were known as of that date. DOR's decision was based on the record before it, and was not an abuse of discretion.

The Tax Court also erred as a matter of law by substituting its own facts for those in the record, contrary to the standard of review. In reviewing DOR's exercise of discretion in ORS 306.115 the court may not substitute its own judgment. The Tax Court concluded that a defect in the property must have been present since the building was constructed, injecting its view of the facts into the record on review.

In addition, the Tax Court's decision is contrary to the established standard for valuing property. Facts which are not known to the market at the time of valuation are not used to establish value. *Sabin v Dept. of Revenue*, 270 Or 422, 427 n.11 (1974). Despite this well-settled standard,

the Tax Court used facts not known to the market to find an agreement to facts.

Finally, DOR properly exercised its discretion not to use its supervisory powers, which are exercised only in “extraordinary circumstances” on matters of tax policy with state-wide implications. *Esco Corp. v. Dept. of Revenue*, 307 Or 639 (1989). The Tax Court erred as a matter of law by forcing DOR to exercise its authority to permit a single taxpayer to obtain relief, contrary to that standard.

#### **G. Statement of Material Facts.**

Oakmont built a 266-unit apartment complex in 1996. (DOR 029.)<sup>4</sup> Oakmont appealed its real property taxes for the 2009-10 tax year in case number TC 4981. The parties exchanged expert reports before trial, and settled the case by stipulating to a decreased value for that tax year based on reports of defects. (DOR 028.)<sup>5</sup> The full extent of the structural damage or defects was unknown, even in 2011. (ER 9.) Oakmont then petitioned DOR to exercise its supervisory authority under ORS 306.115 to reduce its

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<sup>4</sup> In support of its Summary Judgment Motion Oakmont submitted the written record from the 12/15/11 conference hearing with DOR, which is marked DOR 000001-000226 (DOR.) Only the last three numbers will be used here. Oakmont also submitted a transcription of the conference hearing, portions of which are included in the Excerpt of Record.

<sup>5</sup> Oakmont submitted the Assessor’s appraisal report for the 2009-10 tax year to DOR. (DOR 066-167.)

property taxes for the prior tax year, 2008-09. (ER 13.) The Assessor objected to the petition, arguing DOR lacked jurisdiction because there was no agreement to facts regarding the condition of the property as of January 1, 2008. (ER 3-4; ER 6. *See also* DOR 012-014.)

Oakmont asserted that the Assessor agreed that the property was substantially and materially impacted by construction defects which predated January 1, 2008. (DOR 016.) This assertion was based on two comments in the Assessor's appraisal which noted that "[b]ased on documents provided by the owner, by 2007, several construction defects were **discovered** which resulted in extensive investigation into the structural condition of the subject property." (ER 9.) (Emphasis added.) The appraisers also noted "[i]n 2007 several construction defects were **discovered** which resulted in extensive investigation regarding the condition of the subject property." (ER 10.) (Emphasis added.)

The entire record before DOR contained documents which showed that the defects were not discovered until sometime later in 2008. (ER 11; DOR 043-047; 149-151; 169; 176-225; 226.) In addition, Oakmont's owner testified at the hearing that some defects were first discovered around February 2008, though the full extent of the damage was not known until later. (ER 1-2; ER 16 lines 24-25 to ER 17 lines 1-25.)

The conference record included the Assessor's appraisal report for the 2009-10 tax appeal. (DOR 066-167.) The appraisers questioned the timing and nature of the defects, noting that the annual inspection reports for the property failed to mention any damage or repairs, and that July 2007 and March 2008 reports described the property as being in good or "excellent" condition. (ER 9; ER 11.) The appraisers also noted that the defects had minimal impact on the income earnings of the property as of January 1, 2009. (ER 12.) The appraisers noted Oakmont's November 2008 lawsuit alleging defects, and concluded that the defects likely affected the value of the property for the 2009-10 tax year. (ER 9; ER 11-12.) Thus, the Assessor stipulated to a lower value for the property for the 2009-10 tax year. The appraisal did not address the condition of the property or its value as of January 1, 2008.

DOR reviewed the documents and testimony in the record, and concluded that the parties did not agree to facts regarding the condition of the property or to the existence and extent of any defects, as of the January 1, 2008 assessment date. (ER 13-15.) DOR specifically examined Oakmont's three assertions of agreed facts, and concluded that none of them showed an agreement as to the condition of the property as of the assessment date. (ER 14.) Thus, DOR concluded that it lacked jurisdiction

to hear the merits of Oakmont's appeal, and dismissed the petition. (ER 14.) Oakmont appealed that decision to the Magistrate Division, which found no agreement to facts, thus no abuse of discretion by DOR.

Oakmont appealed the Magistrate's opinion to the Tax Court, which reversed, finding that DOR abused its discretion by coming to a conclusion that was "clearly wrong." (ER 16-22.)

## **II. ASSIGNMENTS OF ERROR.**

### **A. First Assignment of Error.**

The Tax Court erred as a matter of law because DOR properly exercised its broad discretion under ORS 306.115 when it found no agreement to facts, which under OAR 150-306.115(4)(b)(A) is a prerequisite for DOR's exercise of authority.

#### **1. Preservation of Error.**

The Assessor filed a cross-motion for summary judgment regarding DOR's exercise of discretion under ORS 306.115, raising the proper standard of review.

#### **2. Standard of Review.**

The court reviews the Tax Court's decision for "errors or questions of law or lack of substantial evidence in the record to support the Tax Court's decision or order." ORS 305.445. DOR's decision is reviewed for an abuse

of discretion. *Nat'l Metallurgical Corp. v. Dept. of Revenue*, 282 Or 317, 321 (1978), citing *Martin Bros. v. Tax Comm'n*, 252 Or 331, 338 (1969); *ADC Kentrox v Dept. of Revenue*, 19 OTR 91 (2006) (Kentrox I).

### **3. Argument.**

#### **a) The Legislature granted DOR broad discretion to exercise its Supervisory Power under ORS 306.115.**

DOR did not abuse its discretion under ORS 306.115 and the Rule because the legislature granted the department broad authority to determine the appropriate circumstances in which it should exercise its supervisory authority.

There are two methods to correct value for a property: the normal appeals process, and DOR's supervisory authority under ORS 306.115 to correct the property tax roll. *Esco*, 307 Or at 643. Under ORS 306.115 DOR has general supervision and authority over the state's property tax system. *Id.* n. 2. That authority is limited to matters of statewide concern, and is an "extraordinary remedy" to be used sparingly outside of the normal appeals process, to ensure the consistent application of the Oregon property tax system. *Id.* at 643 n. 2 and n. 3; 645 n. 5 and n.6. See also ORS 306.115(1); OAR 150-306.115; *Kentrox I*, 19 OTR at 100-01.

ORS 306.115 provides:

“(1) The Department of Revenue shall exercise general supervision and control over the system of property taxation throughout the state. The department **may** do any act or give any order [...] that the department deems 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. Among other acts or orders deemed necessary by the department in exercising its supervisory powers, the department **may** order the correction of clerical errors, errors in valuation or the correction of any other kind of error or omission in an assessment or tax roll as provided under subsections (2) to (4) of this section.

[...]

(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 [...] 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.

(4) Before ordering a change or correction to the assessment or tax roll under subsection (3) of this section the department **may** determine whether any of the conditions specified in subsection (3) of this section exist in a particular case. [...].”

(Emphasis added.) (APP 1-2.)

The legislature intended that DOR limit the use of its supervisory powers under ORS 306.115. *Esco*, 307 Or at 645 (citations omitted.)

Accordingly, the legislature gave DOR broad discretion to decide whether to act. DOR “may” order a change in the tax roll if it decides, “in its



discretion” that a change is necessary. ORS 306.115(1), (3) and (4). See *Doyle v. City of Medford*, 347 Or 564, 570-72 (2010) (use of “may” indicates the legislature intended to create only the authority or discretion to act, rather than an obligation.)

The legislature also gave DOR broad rulemaking authority. ORS 305.100. Pursuant to that authority DOR adopted OAR 150-306.115. Oakmont did not challenge the validity of the Rule or DOR’s rulemaking authority.

The Rule sets out the narrow circumstances under which DOR will, in its discretion, exercise its supervisory powers under ORS 306.115. The Rule’s jurisdictional requirement is consistent with the legislature’s intent that DOR’s supervisory power be used judiciously.

The Rule provides:

“(1) ORS 306.115 is an extraordinary remedy that gives the Department of Revenue authority to order a change or correction to a separate assessment of property [...].

(2) The department **may** correct any errors or omissions in the assessment or tax roll under ORS 306.115 (2) through (4), including but not limited to clerical errors and errors in property value, classification, or exemption.

(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.

[...]

(d) If the department determines that it has the authority under ORS 306.115(3) to consider the substantive issue in the petition, it will hold a merits conference, if necessary, to consider the substantive issue. If the department determines that it does not have the authority to consider the substantive issue in the petition, the petition **will** be denied.

(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

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

[...]

(7) The remedies provided by ORS 306.115 should not be viewed as substitutes for the ordinary appeal remedies provided by other sections or the provisions of 305.288."

OAR 150-306.115. (Emphasis added.) (APP 3-5.)

The Rule requires DOR to first determine whether it has jurisdiction over the matter. OAR 150-306.115(3)(d). If there is no agreement to facts, DOR lacks jurisdiction and must decline to hold a merits hearing on value.

OAR 150-306.115 (3)(d) and (4.) Oakmont has the burden of proving that the requirements for supervisory jurisdiction are met. OAR 150-306.115 (3). Oakmont based jurisdiction only on OAR 150-306.115(4)(b)(A), an agreement to facts. (ER 14.)

Where an agency is charged with administration and enforcement of a statute and adopts an interpretation which is plausible and reasonable, the court gives that interpretation “careful consideration”. *Knapp v. City of North Bend*, 304 Or 34, 41 (1987). See also *Crystal Comm., Inc. v. Dept. of Revenue*, 353 Or 300, 311 (2013) (court defers to agency’s interpretation of its rule so long as it is plausible, and not inconsistent with the rule, its context or any other source of law.)

Here, DOR had discretion to determine its jurisdiction, *i.e.* whether there is an agreement to facts. Deference to that exercise of discretion is especially important because the legislature intended DOR’s exercise of its supervisory authority be limited to special circumstances, and thus granted DOR broad discretion to decide whether to act. *Esco*, 307 Or at 645. Accordingly, the Tax Court requires that an agreement to facts be clear and “unequivocal”. *Eyler v. Dept. of Revenue*, 14 OTR 160, 162-63 (1997) (agreement to facts must be unequivocal and cannot be established by “inferences and innuendos.”)

Where the legislature grants the department discretion, DOR's exercise of that discretion receives limited review by the Tax Court and this court. *Nat'l Metallurgical Corp.*, 282 Or at 321. Review is limited to deciding whether DOR abused its discretion by acting arbitrarily or capriciously, or came to a decision which is "clearly wrong". *Martin Bros.*, 252 Or at 338.

**b) DOR properly exercised its broad discretion in finding no agreement to facts upon which to base jurisdiction.**

DOR concluded that there was no agreement to facts as to the condition of the property as of January 1, 2008. DOR's interpretation of its rule should be given substantial deference because of DOR's expertise in tax matters, and due to the role that the legislature granted to DOR to regulate property tax policy in Oregon. *Esco*, 307 Or at 643 n. 2. Moreover, its decision is not arbitrary or clearly wrong because the record lacked facts to conclude that the market or the parties knew of the construction defects as of the date of valuation, or that the parties agreed that defects affected value as of that date.

Oakmont identified three agreements to facts that could show a likely error on the roll. (ER 14.) The Hearing Officer rejected all three based on the record.

First, the Hearings Officer found that while the county appraiser recognized that construction defects likely affected the value of the property for the subsequent 2009-10 tax year (which led to the county's stipulation of a lower value for that year) "the statements do not specify the nature or extent of the construction defects". (ER 14.) He found the appraisers only agreed that "an investigation was conducted." *Id.* The Hearings Officer further noted:

"The only relevant agreement is an ambiguous statement in a county appraisal prepared three years (February 11, 2011) after the date of value for the tax year in question. That statement 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 for the tax year in question as of the January 1, 2008 valuation date."

(ER 14.)

DOR rejected Oakmont's second and third arguments about agreed facts because they were after the date of valuation, thus they could not show a likely error on the roll as of January 1, 2008. (ER 14.)

DOR's conclusion is not arbitrary or clearly wrong because it was based on careful review of the evidence in the record. *Bay v. State Board of Education*, 233 Or 601, 605 (1963) (whether or not Board was clearly wrong depends upon whether review of the entire record discloses any facts from which the conclusion drawn by the Board could be reached by

reasonable minds.) (Citation omitted.)

Oakmont relied on the statements in the Assessor's appraisal for the 2009-10 tax year to show an agreement to facts regarding the condition of the property as of January 1, 2008. The appraisers' statements that the defects were discovered in 2007 are obviously erroneous. The appraisal lists the documents referring to defects, all of which are dated after the valuation date (ER 11), and the appraisers relied on Oakmont's assertions regarding the existence and nature of any defects. (ER 7-8.) The only documents that the appraisers relied on which existed prior to the valuation date show that the property was "in overall excellent condition" and made no mention of structural issues or damages. (ER 11, citing the July 2007 and March 2008 inspection reports for the property.)

Oakmont's documents and testimony show the defects were not discovered until after the date of valuation; neither the market nor the parties knew of the existence of defects on January 1, 2008. In fact, the exact nature of the problems and the full extent of the defects were not known until 2010-2011.

Oakmont failed to present any evidence to establish that the defects were known **as of January 1, 2008**, or more importantly, that the parties agreed to this fact. This is critical because, as discussed *infra*, the legal

standard for valuing property looks to the facts *actually* known to the market at the time. *Sabin*, 270 Or at 427 n. 11. Facts which are not known to the market as of the date of valuation cannot be used to value the property because such facts can have no effect on value. *Id.* Thus, there is no “likely” error on the roll for a tax year if the facts indicating such an error are not known until after the valuation date.

DOR concluded that the appraisal and statements relied on by Oakmont failed to establish an agreement to facts as to the condition of the property as of the assessment date, or that the defects were known as of that date. DOR did not abuse its discretion in finding the weight of the evidence showed no agreement to facts, thus DOR did not come to a decision that is “clearly wrong.”

DOR’s conclusion is also consistent with Tax Court precedent, which holds that the fact that a party stipulates to a lower value for a subsequent tax year does not establish an error on the tax roll for a prior year. *ADC Kentrox v. Dept. of Revenue*, 19 OTR 340, 348 (2007) (Kentrox II). This court rejected a similar argument in *Esco* because “each tax year stands on its own.” *Esco*, 307 Or at 646. See also OAR 150-306.115(5) (petition for supervisory review must meet requirements for each year for which a

correction is desired.) (APP 5.) The Tax Court erred as a matter of law in finding an abuse of discretion on this record.

## **B. Second Assignment of Error.**

The Tax Court erred in applying the limited standard of review by substituting its own fact-finding for that of DOR.

### **1. Preservation of Error.**

The Assessor filed a cross-motion for summary judgment raising the proper standard of review.

### **2. Standard of Review.**

The court reviews the Tax Court's decision for "errors or questions of law or lack of substantial evidence in the record to support the Tax Court's decision or order." ORS 305.445.

### **3. Argument.**

DOR reviewed the evidence before it and found there was no agreement by the parties as to the existence or extent of any defects as of January 1, 2008. The Tax Court erred as a matter of law when it failed to apply the limited standard of review, and substituted its own view of the facts for that of DOR.

The Tax Court held that DOR abused its discretion because the defects must have occurred at the time of construction in 1996.



The court held:

“The approach and conclusion of the hearing officer was clearly wrong. In the record before him there was an appraisal of property conducted by the county that acknowledged and premised its conclusion of value on the existence of very significant construction or design defects in the property. (DOR at 141.) While those were discussed in 2011, they constitute an agreement by the county that defects in design or construction had occurred. **Those defects would have occurred at or about the time of the construction of the property, that is in 1996.**”

(ER 19-20.) (Emphasis added.)

“**The county also implicitly, if not explicitly, agreed that the [construction] 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 21.) (Emphasis added.)

In reviewing whether DOR abused its discretion the court does not substitute its own opinion of the facts, but reviews DOR’s decision to determine whether the decision is arbitrary or clearly wrong. In *Martin Bros.*, this court noted:

“Even though the proceeding before the tax court is *de novo*, where the legislature has given the tax commission discretion to decide whether something is reasonable, we believe the function of the court is to decide whether there has been any abuse of discretion and not to retry the original determination of the commission.”

252 Or at 338. *See also Nat'l Metalurgical*, 282 Or at 321-22 (court does not substitute its judgment for DOR's fact-finding.) Similarly, Tax Court precedent requires the court to limit its review to the record, and prohibits the court from substituting its own judgment for that of DOR. *Resolution Trust Corp. v. Dept. of Revenue*, 13 OTR 276, 279 (1995)

The Tax Court failed to apply the limited standard of review. DOR concluded that the weight of the evidence showed no agreement to facts regarding when the defects arose, or agreement as to their nature and extent. DOR's decision was based on the evidence in the record, and should have been afforded deference. *Bay*, 233 Or at 605.

There is no evidence in the conference record to show that the construction defects existed since the buildings were constructed in 1996, or that the parties **agreed** to this fact. In fact, Oakmont conceded that the various problems may have been caused by design defects, poor workmanship, and/or material defects (ER 16-17); the dates which these various problems arose was not in the record before DOR. Despite this, the Tax Court improperly substituted its own facts regarding when the defects arose in place of DOR's fact-finding, contrary to the limited standard of review.

In addition the Tax Court ignored the other evidence in the record which shows that the Assessor did not agree that the defects were or must have been present as of January 1, 2008. At the hearing the Assessor's representative said "for 2008 there was not a timely appeal and as I stated the County's position in these cases is in fact, you know, we don't agree to facts for 2008, we didn't have any facts." (ER 4.) In addition, the appraisal report contested the timing and extent of the defects, noting property inspection reports stated the property as in excellent condition with no damage or defects noted. (ER 9; ER 11.)

The Tax Court failed to apply the limited standard of review, and improperly substituted its own facts to find that DOR abused its broad discretion based on facts not present in the conference record. That substitution of fact-finding is contrary to this court's precedent and the broad discretion vested in DOR to determine whether to exercise its supervisory authority. *Esco*, 307 Or 639. The Tax Court erred as a matter of law in substituting its own fact-finding for that of the department. *Nat'l Metalurgical*, 282 Or at 321-22.

**C. Third Assignment of Error.**

The Tax Court erred as a matter of law by considering after-acquired facts in violation of established legal precedent for valuing property.

### **1. Preservation of Error.**

The Assessor filed a cross-motion for summary judgment regarding DOR's exercise of authority under ORS 306.115 which addressed the proper legal standards.

### **2. Standard of Review.**

The court reviews the Tax Court's decision for "errors or questions of law or lack of substantial evidence in the record to support the Tax Court's decision or order." ORS 305.445.

### **3. Argument.**

The Tax Court erred as a matter of law by using facts not known at the time of the valuation to find an error on the tax roll, contrary to established law for valuing property in Oregon. Facts that are not known to the market at the time of valuation cannot be used to establish value. *Sabin*, 270 Or 422.

DOR found no agreement to facts regarding the condition of the property as of the valuation date, January 1, 2008. The Tax Court found that the construction defects for the property, which were discovered later, established an agreement to facts regarding the condition of the property as of January 1, 2008. Thus, the Tax Court decided that DOR was clearly wrong in finding no agreement to facts as of that date.

The Tax Court held “a fact that is agreed to, but which occurred either before or after the entry on the roll of the value in question is still a fact that can indicate a likely error.” (ER 19.) The court noted:

“The hearing officer concluded that knowledge of the extent of any defects must not have existed prior to January 1, 2008. (DOR at 4.) **However, nothing in the department’s rule requires that parties agree on facts that were known or even knowable as of a valuation date.**”

(ER 20.) (Emphasis added.)

However in *Sabin* this court noted:

“Where facts relating to the value of the assessed property are not known at the time of 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.**”

270 Or at 427 n.11. (Emphasis added.) This standard ensures that property is valued only based on facts actually known to the market as of the valuation date. The Tax Court’s decision allows the use of after-acquired evidence, which is not allowed to value property. ORS 308.205(1) (real market value defined as amount exchanged between informed buyer and informed seller, determined as of the assessment date); ORS 308.007(1)(a) (defining assessment date); ORS 308.210 (value assessed as of assessment date).

DOR is charged with applying Oregon property tax law consistently to achieve tax policy. ORS 306.115(1). It would be legal error for DOR to use after-acquired evidence to find an error on the roll in valuing the property.

In addition, an error on the tax roll in one tax year does not necessarily establish an agreement to facts (error on the tax roll) for a prior tax year to warrant an exercise of supervisory power under ORS 306.115. *Esco*, 307 Or at 645-46. As in this case, the taxpayer in *Esco* argued that DOR's agreement that a valuation error occurred for the 1985-86 tax year supported an error in the 1983-84 valuation. This court rejected that argument, noting that each tax year stands on its own. *Id.* See also *Sabin*, 270 Or 422; *Esco*, 307 Or 639. *Accord Kentrox II*, 19 OTR at 348 (stipulated judgment for one tax year does not establish an error on the roll under ORS 306.115 for a prior or subsequent year.)

Despite this precedent the Tax Court used facts discovered later to conclude that there must have been construction defects present in the buildings as of January 1, 2008. The Tax Court's conclusion misapplies the legal standard. The standard under *Sabin* and the statutes is whether the **market knew** of the construction defects as of January 1, 2008. This

standard makes sense because value cannot be affected on the assessment date if no one knows of problems with the property.<sup>6</sup>

Oakmont failed to provide evidence that construction defects were known to the owner or the market as of that date (other than the mistaken remarks in the appraisal.) Thus, DOR did not abuse its discretion in concluding that there was no agreement to facts regarding the condition of the property, i.e. indicating a likely error on the roll as of January 1, 2008. The Tax Court erred as a matter of law by failing to apply established legal precedent for valuing property in Oregon, and instead using after-acquired facts (evidence of construction defects) to support its inference that the defects must have existed as of the valuation date, January 1, 2008.

#### **D. Fourth Assignment of Error.**

DOR correctly exercised its discretion because the Legislature intended ORS 306.115 to provide DOR with authority to correct the tax roll where broad issues of state tax law policy are implicated.

##### **1. Preservation of Error.**

The Assessor filed a cross-motion for summary judgment regarding DOR's exercise of authority under ORS 306.115 which

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<sup>6</sup> That is why the owners paid \$17,100,000 for the property in 2003 – no one knew of the defects, so the defects did not affect the market value of the property. The same is true as of January 1, 2008.

addressed the proper standards under ORS 306.115 and the policy limitations on its exercise of authority.

## **2. Standard of Review.**

The court reviews the Tax Court's decision for "errors or questions of law or lack of substantial evidence in the record to support the Tax Court's decision or order." ORS 305.445.

## **3. Argument.**

Under ORS 306.115(1) DOR has general supervision and control over Oregon's property tax system. *Esco*, 307 Or at 643 n. 2. Its supervisory power is limited to matters of "statewide concern", and is exercised only under "extraordinary circumstances" to ensure the consistent application of the Oregon property tax system. ORS 306.115(1); OAR 150-306.115 (1). The legislative policy expressed in ORS 306.115 permits DOR to correct the property tax rolls when an issue has state-wide implications. Also, OAR 150-306.115(7) provides that "[t]he remedies provided by ORS 306.115 should not be viewed as substitutes for the ordinary appeal remedies provided by other sections [...]."

The supervisory discretion granted to the department is not intended to provide the taxpayer with a "second bite at the apple of tax appeals for those who fail to timely file an appeal in the first instance. If it were,



extraordinary actions would become ordinary and the limits on ordinary appeals would become meaningless.” *Kentrox I*, 19 OTR at 100-01(internal citations omitted.) Thus, a taxpayer who fails to appeal the value of the property in the regular course “cannot expect relief through ORS 306.115.” *Id.* at 100.

Recently the Tax Court recognized DOR’s broad discretion and acknowledged that a petition under ORS 306.115 is not a “remedy for a taxpayer” but rather, is a process by which DOR administers Oregon property tax laws. *Dept. of Revenue v. Rainsweet, Inc.*, 2014 Or Tax Lexis 164 at \*\* 5 & 7 (2014).

Here, the Tax Court’s decision gives Oakmont another chance to appeal, which was expressly condemned in *ADC Kentrox* and *Rainsweet*. It forces DOR to exercise its discretion to review a routine taxpayer appeal without state-wide implications, providing a single taxpayer with relief from its statutory obligation to pay taxes. Oakmont could have followed the usual statutory process set out in ORS 305.275 *et seq.* to appeal its property taxes for the 2008-09 tax year, but it did not file an appeal. Instead, Oakmont now asks DOR to exercise its authority to correct the property tax rolls in its favor. The legislature did not intend ORS 306.115 to have such a singular application, which is why it granted DOR broad discretion to decide

whether to exercise its power to change the tax roll. The Tax Court's decision is contrary to the legislature's intent that DOR's supervisory powers be an "extraordinary remedy" limited to issues with state-wide implication.

DOR properly exercised its discretion in concluding that these facts do not support an exercise of DOR's supervisory power. The Tax Court erred as a matter of law in construing ORS 306.115 to provide otherwise.

### **III. Conclusion.**

The legislature gave DOR broad discretion whether to use its powers under ORS 306.115 to change the tax rolls. DOR correctly determined that on this record there was no agreement to facts regarding the existence of defects, or to the nature and condition of the property as of the January 1, 2008 assessment date. DOR's decision was not clearly wrong. Thus DOR did not abuse its broad discretion in denying Oakmont's petition to change the assessed taxes. The Tax Court erred as a matter of law in failing to apply the limited standard of review, and by substituting its own view of the facts for that of the Hearings Officer. The court also erred by using after-acquired facts to find an agreement to facts as of the January 1, 2008 assessment date. Based on the above the Assessor respectfully requests

that the Court reverse the decision of the Tax Court, and dismiss  
Oakmont's petition.

Respectfully submitted this 8<sup>th</sup> day of January, 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 6,070 words.

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

Dated this 8<sup>th</sup> day of January, 2015.

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## **CERTIFICATE OF SERVICE**

I hereby certify that on this date I served the foregoing APPELLANT'S  
OPENING BRIEF, EXCERPT OF RECORD AND APPENDIX on the  
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I hereby certify that on this date I filed the foregoing APPELLANT  
CLACKAMAS COUNTY ASSESSOR'S BRIEF, EXCERPT OF RECORD  
AND APPENDIX by eFiling, to:

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Dated this 8<sup>th</sup> day of January, 2015.

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