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.	)	**Tax Court No. 5178** **Supreme Court No. S062342**

RESPONDENT OAKMONT LLC'S ANSWERING BRIEF TO OPENING BRIEFS OF DEPARTMENT OF REVENUE AND CLACKAMAS COUNTY ASSESSOR AND SUPPLEMENTAL EXCERPT OF RECORD

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

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I. STATEMENT OF THE CASE

A. Nature of the Action and Relief Sought

The Department of Revenue (DOR) and Clackamas County Assessor (the County) appeal from a grant of summary judgment in Oakmont LLC's (Oakmont) favor. Oakmont petitioned DOR to exercise supervisory authority under ORS 306.115 to correct the tax roll for the 2008-2009 tax year. DOR denied the petition, finding it had no jurisdiction for supervisory authority. On cross-motions for summary judgment, the Tax Court reversed that determination and found that Oakmont and the County "agree to facts indicating likely error" on the 2008-2009 tax roll. OAR 150-306.115(4)(b)(A). The Tax Court remanded the petition to DOR for a hearing on the merits. Defendants ask the Court to reverse the rulings on the cross-motions for summary judgment and grant summary judgment in their favor.

B. Nature of the Judgment

The Tax Court entered a Judgment remanding the Petition for a merits hearing under ORS 306.115.

C. Statutory Basis for Appellate Jurisdiction

DOR and the County assert that this Court has jurisdiction pursuant to ORS 305.445. Oakmont does not agree that this issue is ripe for appellate review under ORS 305.445. Although Oakmont recognizes that its Motion to Dismiss was denied, it re-incorporates those arguments here by reference.

D. Timeliness of Appeal

Oakmont agrees the appeal was timely filed.

E. Question Presented on Appeal

Where OAR 150-306.115, in defining the framework for DOR to administer supervisory authority under ORS 306.115, requires parties to "agree" to facts indicating an error on the tax roll is likely, must there be actual agreement to those facts by, or on, the assessment date—or is an agreement to facts existing on, or as of, the assessment date sufficient?

II. SUMMARY OF ARGUMENT

Oakmont owns a large apartment complex, Berkshire Court, in Wilsonville, Oregon (the Property). The Property suffered from serious defects arising out of the design, construction, and materials used. Based solely on those defects and the resulting damage to the Property, the County agreed to a 60 percent reduction in the Property's real market value (RMV) on the tax roll for the 2009-2010 tax year and a nearly 70 percent reduction (compared to the 2008-2009 roll value) for the 2010-2011 tax year. These were the two years immediately following the tax year at issue in this appeal. Following these stipulations, Oakmont petitioned DOR under the ORS 306.115/OAR 150-306.115 supervisory authority process to correct the 2008-2009 tax roll by reducing the Property's RMV. The petition was premised upon the agreed existence of the defects and the County's resulting agreed

reduction in value for the two following years. Those facts are "agreed facts" which, under ORS 306.115 and OAR 150-306.115, evidence a likely error on the roll for the 2008-2009 tax year.

The supervisory authority process is a two-step procedure. The initial step is establishing that the County and Oakmont agreed to facts indicating a likely error on the 2008-2009 tax roll was present. OAR 150-306.115(3). The Tax Court found, over DOR's and the County's contrary claims, that such agreed facts existed for two basic reasons: (a) the County agreed that the Property was profoundly impacted by the defects, which existed as of January 1, 2008 (and even earlier); and (b) the County agreed that large reductions in value for the two immediately following tax years were warranted solely because of the defects' existence. These agreed facts triggered supervisory authority, warranting a merits hearing (the second step in the process under OAR 150-306.115) to determine the extent to which a correction in the tax roll is justified.

DOR and the County's arguments that "agreed facts" must have been actually agreed to on the date of valuation is inconsistent with the text of OAR 150-306.115, with the legislative intent in authorizing the supervisory authority process, and with DOR's own history of administering and litigating supervisory authority matters under OAR 150-306.115. The Tax Court's remand to

complete the supervisory authority process should be affirmed under the legal and factual circumstances of this case.

III. STATEMENT OF FACTS

Oakmont purchased the Property—a 266-unit, 26-building apartment complex—in 2003. DOR-152.[1] In February 2008, believing the Property was unusually deteriorating, Oakmont hired forensic construction experts to evaluate the Property's condition. Both visual examinations and invasive testing of the buildings' exterior and interior components occurred. SER-1-4. The resulting findings were that every one of the 26 buildings had significant exterior construction defects requiring extensive reconstruction work. SER-23; SER-14-15 The main defects included improper installation of exterior cladding components, which in turn had allowed water intrusion to occur at siding, decks, and window areas. SER-14-15. The initial evaluation, documented in a February 26, 2008 letter, found the need for "structural repairs and microbial growth remediation" and described "extensive rot in the structure framing and sheathing." SER-2. The final conclusion was that all cladding needed to be replaced on the exterior of the buildings. SER 14-15.

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[1] Oakmont will refer to pages in the record from the DOR proceeding under the same convention that DOR does, using DOR-001-226.

A subsequent forensic investigation, in Spring/Summer 2008, revealed more interior design and construction defects, which, in turn, warranted further inspection of the kitchen hoods, bathroom, and laundry area spaces in individual units. Subsequent inspections of those interior areas confirmed that the original ductwork had been improperly installed and ceiling spaces improperly designed. These defects had likewise allowed moisture to travel into the interior of the units, resulting in an array of needed corrective measures, including mold remediation. This work required removing walls and ceilings. SER-4-16. To do so, units needed to be taken out of service on a rolling basis. SER-24

In November 2008, Oakmont initiated litigation against various contractors and design professionals for damages arising out of the identified design and construction defects. The damages were estimated to be $8 million. SER-19.

In 2009, Oakmont appealed the Property's Real Market Value (RMV) for the 2009-2010 tax year. It asserted that the tax roll RMV of $21,726,425 was too high, given the Property's confirmed, seriously defective condition. Following the appeal's filing, the County concluded that, based in part on discussions with one of the contractors' counsel, the RMV should be lowered by several million dollars. SER-19. However, the parties disputed whether this was a sufficient reduction. While the parties were litigating the 2009-2010 RMV before the Tax Court, Oakmont also appealed the Property's 2010-2011 RMV. In 2011, the County's

appraisers prepared an extensive appraisal for Tax Court trial purposes, following their on-site inspection and review of defect-related information. The appraisal contained a "stabilized market value" (defect-free) and "as is" (defect-affected) analysis. SER-22-23. The County appraisal concluded, based on the defects present, that a reduction of some $8,000,000 over the 2008-2009 tax roll value was warranted, concluding that the 2009-2010 RMV of the Property was no more than $13,065,000. SER-27.

Oakmont also had its own appraisal performed, which, citing the value impairment from the defects, concluded an even lower RMV. Following the appraisals' exchange, the parties stipulated to a RMV of $8,500,000 for 2009-2010 (SER-28) and, concurrently, $6,800,000 for 2010-2011 (SER-29).

As a result of the County's stipulations for the 2009-2010 and 2010-2011 tax years, Oakmont petitioned DOR to exercise its supervisory authority to correct the roll for the 2008-2009 tax year. This was based upon the Property's admittedly defective state and the County's evaluation and appraisal of the Property in its defect-laden condition.

At DOR's administrative hearing on Oakmont's supervisory authority petition, the County's representative, Mr. Honl, stated:

> "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. There wasn't a timely appeal so we just stand by that." DOR Tr. 14.

The County offered no new information and did not question or contradict the hearing documentation submitted by Oakmont, which all came from the County's own investigations, appraisal, and stipulations.

The DOR Conference Officer found that DOR lacked jurisdiction over Oakmont's petition, concluding:

> "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 date. * * * Plaintiff's claims that the parties agreed to facts known prior to the valuation date that the subject property's value was diminished due to its condition are not substantiated by the evidence presented." ER-30.

Oakmont appealed DOR's decision to the Tax Court. The Conference Officer's decision was affirmed by the Magistrate Division. Before the Tax Court Regular Division, utilizing only the record before the Conference Officer, the parties filed cross-motions for summary judgment.

The Tax Court granted Oakmont's motion for summary judgment and remanded the case to DOR for a hearing on the merits. ER-3-9. The Tax Court's findings and conclusions are provided below:

> "The approach and conclusion of the hearing officer was clearly wrong. In the record before him there was an appraisal of the 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.

"Moreover, the hearing officer had in his record a stipulated judgment to which the county agreed and which set the value of the property as of January 1, 2009, at a 60 percent discount from the roll value of the property. The record before the hearing officer indicated no reason for such a discount, other than the effects of construction or design defects that had occurred years before not only the 2009-10 year but also years before the 2008-09 year.

"The county's attempt to vitiate that agreement by saying that it did not, at the supervisory hearing, agree to facts misses the point. As taxpayer has argued, the county had already agreed to critical facts. The appraisal was prepared and submitted to this court and the stipulated judgment was issued long before the supervisory hearing.

"Nor are the acknowledgments or agreements equivocal. They were contained in an appraisal report submitted to this court by two people purporting to be appraisal experts submitting a report for the purpose of helping this court reach a determination of value. Although it is the case that the litigation was as to the immediately subsequent year (2009-10), the relevant fact was the existence of design or construction defects for a property constructed several years before the 2008-09 year.

"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. The requirement is that there be agreed upon facts indicating

> a likelihood of an error existing on the roll. OAR 150-306.116(4)(b). The agreement to which the rule makes reference can occur, and often does occur, after a valuation date has passed.
>
> "The county clearly agreed that construction and design defects existed and affected value as of January 1, 2009. The county 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.
>
> "Nor is there anything in the record that would suggest that a 60 percent reduction in value of the subject property from the 2008-09 year to the 2009-10 year was the product of general market changes or other factors. Nor is this is a case where the value differences are minor.
>
> "The conclusion reached by the hearing officer was clearly wrong and the product of an abuse of discretion. It is much more than likely that the roll value for the property for the 2008-09 year was in error. The question of the extent of that error is a question to be addressed in a merits hearing on the matter by the department." ER-6-ER-9

Defendants appeal from the Judgment entered based on the above ruling. ER-1-2.

IV. RESPONSE TO DOR'S ASSIGNMENT OF ERROR

A. Preservation of Error

Oakmont agrees that DOR filed a cross-motion for summary judgment in the Tax Court and argued that DOR had no jurisdiction under its supervisory authority function to consider Oakmont's petition.

However, for the first time on appeal, DOR asserts that this is a matter of interpretation of an administrative rule and that its own interpretation of OAR 150-360.115 is entitled to deference. DOR's Opening Brief, p. 3, p. 9, p. 14, p. 14 n 7. That argument was not made to the Tax Court and was not preserved.

B. Standard of Review

This Court reviews the Tax Court's decisions for "error or questions of law or lack of substantial evidence in the record to support the Tax Court's decision." ORS 305.445.

C. Argument

Courts defer to an agency's plausible interpretation of its own rule—including an interpretation made in the course of applying the rule—but only if that interpretation is consistent with the wording of the rule, its context, or any other source of law. *Don't Waste Oregon Com. v. Energy Facility Siting*, 320 Or 132, 142, 881 P2d 119 (1994). Here, the Tax Court's interpretation of OAR 150-306.115 is the only plausible interpretation of the rule. Moreover, as described below, the interpretation of OAR 150-360.115 urged by DOR is inconsistent with

the text and context of the rule and with DOR's position before the Tax Court, in this, and other cases.

DOR argues that "a construction defect cannot give rise to an 'error on the roll' unless that defect was both existing and *known* on the assessment date." DOR's Opening brief, p. 9 (emphasis original). DOR asserts that this follows from the definition of RMV as being what an informed buyer would pay for a property in an arm's-length transaction on the assessment date. Thus, DOR contends that "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 used to value the property." DOR's Opening brief, p. 12. According to DOR, "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." DOR's Opening brief, p. 13. Thus, DOR apparently contends that an "error on the roll" is only an error committed by the assessor on the valuation date.

As described below, this interpretation of OAR 150-306.115, now posited by DOR, is not plausible and is incorrect as a matter of law. The text and context of the rule indicate that the agreed facts need not have been actually known on the assessment date. Additionally, years of case law confirm that assessors may use information learned after the assessment date (*e.g.*, actual sales of the property or

similar property occurring after the assessment date) in determining RMV. Furthermore, a review of cases in which DOR has used its supervisory authority in the past confirms this principle. Finally, the interpretation of the rule that DOR asserts in its Opening brief is different from the interpretation it asserted before the Tax Court in this matter and different than the interpretation it has asserted in other supervisory authority matters. Accordingly, that interpretation deserves no deference. The Tax Court's decision should be affirmed, because, as discussed below, the Tax Court's interpretation is the only plausible interpretation, as a matter of law.

1) OAR 150.306.115(4)(a) does not limit "agreed facts" to facts known on the date of valuation.

To determine the meaning of an administrative rule, a court will apply the same analytical framework used to discern the meaning of a statute. *Abu-Adas v. Employment Dept.*, 325 Or 480, 485, 940 P3d 1219 (1997). The judiciary's role is "to determine the meaning of the words used, giving effect to the intent of the enacting body." *Id.* at 485. A court will not insert what has been omitted or omit what has been inserted, consistent with the interpretation of Oregon statutes. *City of Klamath Falls v. Environmental Quality Comm.*, 318 Or 532, 543, 870 P2d 825 (1994) (quoting ORS 174.010). These principles are discussed as follows:

a) The text of the rule does not support DOR's proposed interpretation.

OAR 150-306.115(4) provides, in relevant part:

> "The department will consider the substantive issue in the petition only when: * * * [t]he assessor or taxpayer has no remaining statutory right of appeal; and * * * [t]he department determines that an error on the roll is likely as indicated by[:] * * * [t]he parties to the petition agree to facts indicating likely error[.]"

Thus, as summarized by this Court:

> "The rule does not require that an agreement be 'unequivocal.' Likewise, the rule does not require all parties to agree that an error existed in the tax roll. What the rule requires is evidence that the parties agreed to 'facts' and that the facts they agreed to are ones 'indicating likely error.'" *Willamette Estates II, LLC v. Dept. of Rev.*, 357 Or 113, 121, __ P3d __ (2015).

As the Tax Court observed: "[T]he agreement [under OAR 150-306.115(4)] is in the present tense. It is not required that it be shown that the parties agreed in the past." ER-6. Therefore, the rule's text does not state that facts must have been agreed to on the assessment date in question, nor at, or by, any specific date.

Defendants' proffered interpretation of OAR 150-306.115 would require the Court to insert what has been omitted in the rule: a time limitation on when the agreement to facts must have occurred. The rule neither specifies the manner nor the time by which agreed facts must have been accepted by the relevant parties. The rule merely requires that agreement to facts exist.

While DOR claims it has made an interpretation of the rule, it has not. Rather, under the guise of interpretation, DOR has attempted to add entirely new text to the rule. Because courts are not permitted to insert what has been omitted to interpret administrative rules, the Tax Court was correct in not doing so. *Klamath Falls*, 318 Or at 543. Defendants' argument should fail based on the text of the rule.

b) The context of the rule confirms that it "facts" may be agreed upon after the assessment date.

Other provisions of the rule also confirm the Tax Court's application of it. Supervisory authority can be used to correct: "clerical errors and errors in property value, classification, and exemption." OAR 150-306.115 (2). If "agreed facts" were limited to facts known by the assessor on the date of valuation, then the only explanation for an error on the tax roll would be a ministerial error, *i.e.*, the assessor's failure to consider all relevant information known on the date of valuation. However, the rule clearly allows for correction of a wide variety errors, including "value." As *Willamette Estates II* clarifies, supervisory authority can be invoked by a petition filed either by a taxpayer or the assessor.[2]

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[2] The limitations imposed by the rule and the statute in this instance are two-fold: (a) only two immediately consecutive years prior to the year of a supervisory authority petition can be considered, ORS 306.115, and (b) there must exist agreed facts indicating the likelihood of an error on the roll for the year or years at issue. This is hardly opening the floodgates to taxpayers or a form of backdoor appeal.

In fact, if the assessor actually knew on the assessment date of facts reflecting an error, the assessor would have been remiss in not correctly valuing the Property when it finalized the tax roll. The rule's very words connote the concept of a retrospective look at what occurred; the proverbial, "if we'd known then, what we know now" analysis. That is why the focus is an agreement to facts, not an agreement to an error.

Describing the context of the rule, the Tax Court observed that "[t]he agreement to which the rule makes reference can occur, and often does occur, after a valuation date has passed." ER-7. Thus, DOR's view is clearly novel to the Tax Court, where supervisory authority cases are litigated and a body of law, regularly used by DOR, was developed. *See* Tr. 3 (Judge Breithaupt opened the hearing by noting, "I've read your papers and understand that we have a, what I'll call—when I say 'classic,' I don't mean to overdo it, but a fairly standard, in many ways, question regarding supervisory jurisdiction of the department under ORS 306.115.").

That context is confirmed by looking to cases in which DOR has exercised and defended its use of supervisory authority, like *Coos County Assessor v. Dept of Rev.*, 18 OTR 334 (2004) (discussed in greater detail below, pp. 25-27), where DOR ordered a merits hearing based on facts agreed to by the parties and discovered long after the valuation date. The context is also supported by this

Court's very recent decision in *Willamette Estates II*, 357 Or at 113, which also involved the use of post-assessment-date information.

2) Evidence of construction defects, discovered in February 2008, is relevant to determining the RMV on January 1, 2008.

Perhaps aware of the weakness of the textual argument made to the Tax Court regarding OAR 150-306.115, DOR and the County now focus on cases defining RMV, *outside of the supervisory authority context*, in order to argue that, as a matter of law, the Assessor and DOR cannot consider the Property's defects in determining whether the 2008 roll value was likely erroneous.

DOR and the County's positions ignore the fundamental differences between the annual property tax valuation process and the supervisory authority process. The former is a statutory undertaking according to Oregon law. The latter is a remedial fact-specific procedure, employed to rectify errors in the annual process, outside of the property tax appeal system.

DOR and the County gloss over the reality of how the Oregon property tax system works. The January 1 assessment (valuation) date is a benchmark date; nothing actually occurs on January 1. The tax roll is not actually required to be finalized until September 25 of the assessment year, reaching values "as of" January 1. ORS 308.242(1); ORS 308.201(1). This permits the assessor to factor in relevant post-January 1 information. The assessor is not limited to only that

information existing and known on January 1, if other information, later discovered, illuminates the RMV as of January 1. *Truit Brothers, Inc., v. Dept. of Rev.*, 302 Or 603, 609, 732 P2d 497 (1987) (concluding that an appraisal properly considered sale of a similar facility 15 months after the assessment date). Yet, DOR and the County argue in this case that the January 1 date is rigid and exclusionary to post-January-1 information. According to them, such later-acquired information cannot be used and referenced for the January 1 valuation.[3]

As *Truit Brothers* demonstrates, such post-January-1information can be highly relevant to the January 1 value. The present case is an example of the permitted practice of using later-acquired information to retrospectively determine what an arm's-length transaction would have looked like on the assessment date. The reports of the condition of the Property, generated in February 2008 and July 2008 (SER-1-16), are close in time to the assessment date and highly relevant to the Property's value (as the assessor conceded for the 2009-2010 and 2010-2011 RMVs). In short, the assessor can utilize information obtained after January 1 in reaching an RMV "as of" January 1. Therefore, the "actual knowledge on January 1" standard, which DOR and the County contend must dictate OAR 150-306.115's use, finds no basis in the Oregon property tax system.

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[3] DOR asserts that later sales can be distinguished from other later-discovered information. DOR Opening brief, p. 12 n 5. However, DOR provides no basis for that distinction. It receives no mention in any statute or rule applicable to this case.

DOR argues that there is no "error on the roll" if the RMV on the roll represents the facts as understood by the Assessor on the valuation date. However, as further discussed below, the premise that after-acquired knowledge cannot be used to determine the RMV on the valuation date is incorrect. Even using DOR's notion of an informed buyer, it is reasonable in this instance to assume that such a buyer in performing due diligence coincident with a January 1, 2008 purchase of the Property would have discovered evidence of defects at that time. The County's own appraisers conceded that the Property was profoundly defective, fully embracing the 2008 forensic reports showing the defects' long time presence. Accordingly, it was appropriate for DOR to consider the facts concerning the defects in determining whether the 2008-2009 RMV on the tax roll is an accurate reflection of what an informed buyer would have paid for the Property as of January 1, 2008.

To support their argument, Defendants rely primarily on *Sabin v. Dept. of Rev.*, 270 Or 422, 528 P2d 69 (1974). In *Sabin*, the property owner appealed the valuation of the subject property for the 1971 tax year. This Court focused on whether a November 1972 sale of a portion of the property was proper evidence of the value of the property on January 1, 1971. This Court determined that because the underlying conditions affecting value were the same at the time of the sale as they were in 1971, the 1972 sale price was admissible evidence of value. *Id.* at

427-28.[4] This Court specifically rejected the concept that evidence of events subsequent to the assessment date is "impermissible hindsight." *Id.* at 426.

To supplement their argument in this case, the County's and DOR's also cite *ESCO Corp. v. Dept. of Rev.*, 307 Or 639, 772 P2d 413 (1989). *ESCO* is a procedural case. In *ESCO*, the issue was when, and what kind of notice, the taxpayer needed to give DOR in order to invoke supervisory authority jurisdiction. This Court determined that filing an appeal for the 1985 tax year was not sufficient to invoke supervisory authority for the 1983 tax year. *Id.* at 646-67. *ESCO* holds that "An alleged gross error for one year does not *automatically give notice* of a gross valuation error for a prior year." *Id.* at 646 (emphasis added). Hence, the failure to file a supervisory authority petition defeated the taxpayer's 1983 claim for relief.

In this case, unlike *ESCO*, there is no allegation that Oakmont failed to institute a timely supervisory authority proceeding. Moreover, Oakmont does not

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[4] The Court did state in *Sabin* that "hindsight acquired by a later discovery * * * should not be employed to change the valuation found on the assessment date." *Id.* at 427-28 n 11. However, that statement is both *dicta* and specifically applicable to the original roll valuation, as recognized by the Tax Court, *Wilcox, LLC v. Multnomah County Assessor*, 2000 WL 33225434 (Or. Tax Ct. Mag. Div. 2000). Accordingly, it does not have precedential value. *Engweiler v. Persson/Dept. of Corrections*, 354 Or 549, 557, 316 P3d 264 (2013). Furthermore, *Sabin* was not a supervisory authority case. It was decided nine years before ORS 306.115 was enacted or OAR 150-306.115 was promulgated.

contend (nor did the Tax Court decide) that DOR must correct the roll for 2008 *automatically* because Oakmont was successful in its 2009 and 2010 appeals. Rather, Oakmont pointed to the agreed facts stipulated to in the 2009 and 2010 appeals as relevant to the value of the Property for 2008, based on the Property's defective condition. That is, DOR and the County agreed to facts indicating that the 2008 roll RMV is likely inaccurate. The Tax Court concurred in this analysis, not solely or automatically because of the reduced numerical values, but because of the agreed reasons (the defects) for the significantly reduced 2009 and 2010 values.

In its own way, *Sabin* addresses whether evidence of reduced value discovered between the dates of valuation and supervisory authority petition can be considered in determining the value of the property on the date of valuation.

> "A sale of property within a reasonable time of the assessment date while not conclusive, is very persuasive of market value. Whether a transaction is so recent as to be persuasive of present value will depend upon the similarity of conditions affecting value at the time of the transaction and conditions affecting value at the time of the assessment. * * * These principles apply equally to transactions in the assessed property before and after valuation date." 270 Or at 426-27 (footnotes omitted).

Sabin's circumstances mirror those in this case. In *Sabin*, this Court remanded the case to determine what effect a subsequent year's sale (contended to be "impermissible hindsight") had on the earlier year's valuation. In Oakmont's case, the Tax Court correctly considered the County's stipulated, major reduction

in value in 2009—and the underlying reasons for it—as likely reflecting on the Property's 2008 value. Similar to the *Sabin* remand, the Tax Court, in this case, remanded the taxpayer's case to DOR for a merits hearing to determine the extent that the Property's circumstances affected the 2008 RMV.[5]

In the closely allied condemnation context, the Court of Appeals has also determined that such after-discovered evidence is relevant. In *State ex rel Dept. of Trans. v. Hughes*, 162 Or App 414, 986 P2d 700 (1999), the parties discovered serious environmental contamination of the property in the time between the date of valuation and the trial. The property owner argued that such evidence was not relevant or admissible because it had not been discovered at the time of valuation—*i.e.*, the time of the filing of the condemnation complaint. The condemning authority argued that the evidence was admissible, because the contamination existed and may have been discovered by a potential buyer on the date of valuation. *Id.* at 418-19. The Court determined that the evidence of contamination was relevant to determining the value of the property on the date of valuation:

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[5] The Legislature has defined circumstances where a property defect exists. ORS 701.560(2) ("'Defect' means a deficiency, an inadequacy or an insufficiency arising out of or relating to the construction, alteration or repair of a residence. 'Defect' includes a deficiency, an inadequacy or an insufficiency in a system, component or material incorporated into a residence."). This is in contrast to episodic or casualty damage.

> "[T]he fact that the specific parties here did not have information regarding contamination that existed on the property at the time of the filing of the condemnation action should not, as a matter of law, preclude the introduction of evidence about the contamination that could fairly have been brought forward at the that time by a potential buyer of the property." *Id.* at 421.

Similarly here, a potential buyer on or as of January 1, 2008, would likely have done inspections to evaluate the market value of the Property. Such inspections, as borne out by the reports the County accepted and incorporated in its appraisal, would have disclosed the defects.

In the merits hearing, DOR can determine what the Property's RMV was on January 1, 2008, taking those agreed facts into account. DOR's inter-mingling of market value analysis into a supervisory authority context does not aid DOR's position. Rather, it supports the Tax Court's.

3) The Tax Court did not err in failing to give deference to DOR's interpretation of OAR 150-306.115, because DOR did not actually interpret its own rule in the manner now asserted.

DOR acknowledges in its brief that the County did agree, at some point after January 1, 2008, that there were serious defects existing in 2008 at the Property, which affected the Property's value.[6] Before this Court, DOR argues that DOR has interpreted OAR 150-306.115 to require "knowledge of the defect before such an

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[6] In order for the County to reduce the tax roll by 60 percent as of January 1, 2009 based on the Property's defective condition, the defects logically needed to exist prior to that date, *i.e.*, in 2008.

error can be established" and that that interpretation is "plausible and entitled to deference." DOR's Opening Brief, p. 14 n 7, p.9. On that basis, DOR contends that the Tax Court erred in failing to give DOR's interpretation deference under *Don't Waste Oregon Com. v. Energy Facility Siting*, 320 Or 132, 142, 881 P2d 119 (1994). Oakmont described above why that interpretation is substantively incorrect as a matter of law. Moreover, this argument was not preserved below and is inconsistent with DOR's position in other cases. Accordingly, this argument is also procedurally defective.

Before the Tax Court, DOR focused its argument regarding the interpretation of the rule's use of "agree," rather than the words "error on the roll." SER30-31, DOR's Cross-Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment, p. 7-8. Because DOR did not make the argument to the Tax Court that it should accept DOR's "plausible" interpretation of the rule, this Court should not consider this argument, nor reverse the Tax Court's decision on that basis.

As Oakmont pointed out to the Tax Court, DOR also has not previously interpreted the rule to require the Assessor to actually know of the "agreed facts" on the assessment date. Not only did DOR fail to raise this argument, but the Tax Court stated:

"Nothing in the department's [DOR] rule requires that

> parties agree on facts that were known or even knowable as of a valuation date. The requirement is that there be agreed upon facts indicating a likelihood of an error existing on the roll. OAR 150-306.116(4)(b). The agreement to which the rule makes reference can occur, and often does occur, after a valuation date has passed." ER-7.

In other cases, DOR has actually interpreted the rule in the same way that the rule was applied by the Tax Court—retrospectively discovered information, agreed to by the assessor, as a basis for supervisory authority.

Most recently, this Court and DOR considered "agreed facts" in the context of an assessor's use of the supervisory authority process. The agreed facts in *Willamette Estates II, LLC v. Dept. of Rev.*, 357 Or 113, 121, __ P3d __ (2015) were found to be a stipulation made later about the total value of the property in question, following the tax-payer's challenge to only the 2008 improvements value, not the land value. *Id.* at 115. The improvement value was reduced as a result of the direct appeal of the valuation; the assessor later petitioned DOR to exercise supervisory authority to increase the land value on the tax roll in order to reach the stipulated total value. *Id.* at 116. The taxpayer strenuously objected to this petition, because no appeal of the land value had occurred and the taxpayer had "accepted" the land's 2008 roll value, which was 20 percent of the value the assessor later claimed should be corrected in the supervisory authority proceedings. *Id.*

Despite the taxpayer's contentions that no "agreed facts" existed, this Court found they did, noting that it was unnecessary that the parties agreed that an error on the roll existed, but merely that they agreed to facts, indicative of a likely error on the roll. The stipulation to the total value was an operative "agreed fact," notwithstanding that it was agreed to after the 2008 valuation date, and only during subsequent litigation. *Id.* at 121.

Using DOR's and the County's logic in this case, the supervisory authority rule would not have allowed the assessor in *Willamette Estates II* to correct the roll because the information came to light well after the valuation date. It was not "known" on January 1, 2008.

The assessor and DOR relied exclusively, in *Willamette Estate II,* on information which was neither known in January 2008 nor even present in January 2008. The assessor, according to the roll value, had believed that the land value was worth $1 million in January 2008. The assessor later revised this position. Notably, there was no argument by DOR that under OAR 150-306.115 that the assessor needed to have agreed to facts on the date of valuation in order to utilize supervisory authority

Other cases before the Tax Court also indicate that DOR has not consistently interpreted OAR 150-306.115 in the way it now advocates. In *Coos County Assessor v. Dept of Rev.*, 18 OTR 334 (2004) (known as the "*Pony Village*" case,

because the property at issue was the Pony Village Motor Lodge), DOR utilized the facts of a later-in-time sale as the basis for exercising supervisory authority. In the *Pony Village* case, the 1998-1999 and 1999-2000 tax years were the subjects of the supervisory authority petitions by the taxpayer. For both years, the property's RMV on the roll was $2,140,207. 18 OTR at 336. The property was sold in March 2000 for $1,275,000. *Id.* at 350. For the 2000-2001 tax year, the RMV was reduced to $1,275,000. *Id.* The taxpayer petitioned for supervisory authority, which DOR granted and corrected (lowered) the RMV on the roll. *Id.*

Before the Tax Court, Coos County claimed that agreed facts did not indicate a likely error on the roll, notwithstanding the import of the March 2000 sale. *Pony Village*, 18 OTR at 349. With DOR's concurrence, the Tax Court specifically found that the 2000 sale, even though it occurred 15 and 27 months after the relevant assessment dates, was sufficient evidence of error on the roll to move the case forward in the supervisory authority process. The Tax Court concluded:

> "[T]he department ought to hold a merits hearing to consider the substantive issue in the petition where there is a great disparity between the roll value and the sale price to determine if the sale is persuasive of value." 18 OTR at 352.

Unmistakenly, DOR's interpretation of OAR 150-306.115 in *Pony Village* did not require the Assessor to have known of the "agreed facts" on the valuation

date. In that case, because the facts came to light only through a later sale of the property, the operative agreed facts were after-discovered facts.

Contrasting *Pony Village* and this case demonstrates the incongruity of DOR's position before this Court. In *Pony Village*, the March 2000 sale had no specific connection to the property's circumstances in 1998 and 1999, except as a retrospective indicator of value. In Oakmont's case, the effect the defects had on the RMV in 2009 and 2010, as agreed by the County, indicated that there is likely an error on the roll for the 2008-2009 RMV. DOR's use of post-dated evidence of value in *Pony Village* is inconsistent with its position here. Here, defendants argue there was no "error" because "an assessor cannot, on the date of valuation, account for facts which are unknown." DOR's Opening brief, p. 13. In *Pony Village*, the assessor could not have accounted for the March 2000 sale in initially determining the 1998 and 1999 RMVs. Nonetheless, DOR determined that it could exercise supervisory authority based on a later year's valuation, premised on a later year's sale.

Ghazi-Moghaddam v. Dept. of Rev., 20 OTR 288 (2011) provides another example of DOR interpreting OAR 150-306.115 differently than it does here. In that case, the parties stipulated that the assessor made an error in 2000 in calculating the subject property's maximum assessed value (MAV) based on a mistake about the property's size. 20 OTR at 289. In 2008, the taxpayer petitioned

DOR to correct the error on the roll under its supervisory authority. Notably, DOR did not deny the petition on the grounds that there was no error on the roll based on the wrong square footage used on the date of valuation. Instead, DOR denied the petition and argued before the Tax Court that the MAV could not be changed because the error occurred in the 2000-2001 tax year (although DOR did not know that it was an error in that year). *Id.* at 293. DOR further concluded that it did not have the authority to correct the error in the 2000-2001 tax year, because it was too late. The Tax Court agreed. *Id.* at 294. Thus, in that case, where it suited DOR to indicate there that the error pre-dated the assessor's knowledge of relevant facts, it did so, by arguing that the error occurred in 2000 (a date too far back to exercise supervisory authority over).

Because DOR has not consistently interpreted OAR 150-306.115(4)(a) to require the parties to have agreed to facts on the date of valuation (the assessment date), DOR should not be permitted to argue that its interpretation deserves deference here. In administering the property tax system, DOR has not consistently interpreted its rules to exclude any information that was unknown on the assessment date; in fact, it has used information that was unavailable on the

assessment date. Accordingly, DOR should not be allowed to now tie the Court's hands by asserting deferential status to its interpretation.[7]

V. RESPONSE TO THE COUNTY'S FIRST AND THIRD ASSIGNMENTS OF ERROR

A. Preservation of Error

Oakmont agrees that the County filed a cross-motion for summary judgment in the Tax Court and argued, generally, that Oakmont was not entitled to an exercise of supervisory authority.

B. Standard of Review

This Court reviews the Tax Court's decisions for "error or questions of law or lack of substantial evidence in the record to support the tax Court's decision." ORS 305.445.

C. Argument

The County's arguments in its First and Third Assignments of Error, like DOR's argument, are premised on the assumption that the parties need to agree to facts that were known on January 1, 2008. *See* County's Opening Brief, p. 16-17, p. 22. Accordingly, Oakmont incorporates the arguments made in response to DOR's Assignment of Error in response to those arguments. The Tax Court

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[7] Again, DOR's position starts with an incorrect premise—that it actually interpreted OAR 150-306.115. As discussed above, DOR seeks deference to its interpretation of a rule, which in this appeal, it has rewritten, added-to, and applied inconsistently with the rule's prior use by DOR.

applied the rule as DOR has written and used it. This is buttressed by the Tax Court's observation that the Conference Officer failed to correctly utilize the undisputed record before him.

VI. RESPONSE TO THE COUNTY'S SECOND ASSIGNMENT OF ERROR

A. Preservation of Error

Oakmont agrees that the County filed a cross-motion for summary judgment in the Tax Court and argued, generally, that Oakmont was not entitled to an exercise of supervisory authority.

B. Standard of Review

This Court reviews the Tax Court's decisions for "error or questions of law or lack of substantial evidence in the record to support the tax Court's decision." ORS 305.445.

C. Argument

In its Second Assignment of Error, the County asserts that the Tax Court did not apply the correct standard of review. The County asserts that the Tax Court substituted its own judgment for that of DOR and found facts differently from the Conference Officer. The County ignores the reality, as stated by the Tax Court, that the facts all emanated from the County, itself. The County appraisers could have rejected or found different information from what is now in the record. They did not. The record is replete with County documentation that the Property was

riddled with defects to the degree that a precipitous decline in value had, in fact, occurred, and the County was fully aware that every building in the complex was materially affected. SER19; SER-23-27. Even as late as the Conference Officer hearing, the County could have contradicted, explained, or questioned the petition information offered by Oakmont. The County merely elected to let the record "stand." It now cavils at the Tax Court's revisitation of the obvious, despite having had ample opportunity to clarify or correct the record.

The Tax Court applied the correct standard of review—abuse of discretion. The Tax Court determined that the Conference Officer erred, as a matter of law, in assuming that agreed facts under OAR 150-306.115 required the County to agree to facts limited to only those known on the date of valuation. The Tax Court's factual findings are consistent with the record on review and do not incorporate any evidence outside of the record. Rather, as the Tax Court noted, the Conference Officer ignored two salient factual matters: (1) the County appraisal unquestionably accepted the defects' origin and source, and (2) the County's stipulations to values for the 2009-2010 and 2010-2011 tax years, both at a fraction of the 2008-2009 roll value, were based exclusively on those defects.

The County does not point to a single "fact" in the Tax Court's opinion that is not supported by the record. Accordingly, there is no argument for Oakmont to respond to based on the facts in the Tax Court opinion. As described above, the

Tax Court correctly interpreted OAR 150-306.115(4)(a) to apply to agreements made after the valuation date regarding facts that the County agreed *existed* on the valuation date.

VII. RESPONSE THE COUNTY'S FOURTH ASSIGNMENT OF ERROR

A. Preservation of Error

Oakmont agrees that the County filed a cross-motion for summary judgment in the Tax Court and argued, generally, that Oakmont was not entitled to an exercise of supervisory authority. However, the County failed to make this argument before the Conference Officer or the Tax Court. Therefore, error was not preserved.

B. Standard of Review

This Court reviews the Tax Court's decisions for "error or questions of law or lack of substantial evidence in the record to support the tax Court's decision." ORS 305.445.

C. Argument

In its Fourth Assignment of Error, the County asserts that the Tax Court erred in remanding Oakmont's petition for a merits hearing, because, according to the County, the Legislature did not intend for DOR to use its supervisory authority for issues without "state-wide implication." County's Opening Brief, p. 28. The County further persists in its view that supervisory authority is unavailable to those taxpayers who failed to appeal.

The County provides no support for these assertions. These concepts are utterly absent from OAR 150-306.115. They are notions` never advocated by DOR in this, or any other, supervisory authority proceeding. This would add a significant threshold to the rule.

ORS 306.115 provides, in 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.*
>
> "(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. If the department determines that one of the conditions specified does exist, the department shall hold a conference to determine whether to order a change or correction in the roll."

(Emphasis Added.) Thus, as the statute states, failure to appeal the 2008 tax year does not mean that supervisory authority is unavailable. In fact, if Oakmont had the right to appeal the 2008 tax year, supervisory authority would not be available. OAR 150-306.115(4)(a). As described by this Court in *Esco Corp. v. Dept. of Rev.*, 307 Or 639, 644 n 5, 772 P2d 413 (1989), the Legislature intended this remedy to

apply when "'the individual has no other recourse.'" *Id.* (quoting the Staff Measure Analysis of Senate Bill (SB) 68 (1983).

In reviewing the history of ORS 306.115, it is clear that the legislators were concerned with DOR's authority to correct the roll for individual taxpayers where there was an error in valuation. As described by Senator Hanlon:

> "What we want to do is halt the careless, if that is what it is, on the part of the taxpayer, that for some reason try to bypass the Board of Equalization and throw it all at the Department of Revenue, at the same time, we want to make sure we are not cutting off some genuine need of the taxpayer for further appeal." Tape Recording, Senate Revenue Committee, SB 68, March 10, 1983, Tape 52, Side A (statement of Senator Hanlon).

In fact, the original version of SB 68 only provided for DOR to exercise supervisory authority when the taxpayer showed good and sufficient cause for missing the deadline to file their appeal. The Senate Committee requested an amendment to also provide for corrections of gross valuation errors. Senate Revenue Committee, Work Session SB 68, March 10, 1983. *See* Minutes, Senate Committee on Revenue, March 10, 1983, p. 2 ("Amendments are also to be drafted reflecting the 'gross error' in assessment issue."). Thus, the legislative history indicates that the legislature did have the interests of individual taxpayers in mind in codifying the supervisory authority process.

At another hearing, Rick Peterson, legislative counsel, gave the following summary of SB 68 to the House Committee on Revenue and School Finance:

> "What is SB 68?
>
> "SB 68 consolidates the statutory language that describes the Department of Revenue supervisory responsibility over the property tax system, and that is Section 1 in the Bill, there. Basically it says the Department can order public officers and employees of their department to see that all the property tax laws are followed and to correct errors, clerical errors, errors in valuation and other kinds of errors that could crop up and it deals, *most of it deals with a particular problem with petitions by property owners that have no further right of appeal remaining.* Under current law, an individual claims and excessive valuation of five percent or $2,000, whichever is greater, the Department of Revenue is required to hear the appeal. This is the interpretation of a recent court decision that the Department of Revenue failed prior to this, that they had some discretion, that if someone no longer had a right of appeal and they came up with a petition that said they had excessive valuation of five percent or $2,000 that the Department had some discretion in deciding whether or not to hear the case, and the recent court interpretation is that they don't have discretion there. So what specifically sent 068 to us is that says that the Department can hear such cases if there is good and sufficient cause for failure to pursue the normal statutory right of appeal. And also, the Senate was concerned this would leave some people out, so it put in a clause that said the Department can correct the roll to conform to applicable law without the regard to failure to exercise the right of appeal. That is, if they find some problem, they can go ahead and order a correction can be made. So, that's basically SB 68. We have someone from the Department of Revenue here."

Tape Recording, House Committee on Revenue and School Finance, SB 68, July 6, 1983, Tape 61, Side A (statement of Rick Peterson, legislative counsel) (emphasis added). As evidenced by this passage, issues of individual taxpayers were of concern of the Legislature in enacting SB 68.

The County's argument that the Legislature did not intend supervisory authority to be used to address issues without "state-wide implications" is simply unsupported from any source. Instead, the legislative history indicates that the Legislature intended DOR to have discretion to address issues related to individual taxpayers, and for DOR to promulgate rules to indicate how it would use that discretion. The intention was not to erect amorphous barriers for taxpayers' access.

DOR's administrative rules indicate how and when it will exercise its supervisory authority. Although DOR has broad discretion, it applies that discretion with the boundaries of those rules. Here, Oakmont met its initial burden to demonstrate that the parties agreed to facts indicating that an error on the roll is likely. OAR 150-306.115(4)(a). Accordingly, DOR should consider the substantive issues raised by Oakmont's Petition. OAR 150-306.115(4).

VIII. CONCLUSION

For the reasons described above, Oakmont respectfully requests that this Court affirm the Tax Court's grant of summary judgment and remand this case to DOR for a hearing on the merits.

Respectfully submitted: April 20, 2015.

By: _____

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

I certify that (1) this brief complies with the word-count limitation in the word count of this brief (as described in ORAP 5.05(2)(a)) is 8,796 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 footnotes as required by ORAP 5.05(4)(f).

DATED: April 20, 2014

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CERTIFICATE OF FILING AND PROOF OF SERVICE

I certify that on April 20, 2015, I filed the original of the foregoing **OAKMONT LLC'S ANSWERING BRIEF** using the electronic filing system provided by the Oregon Judicial Department. I further certify that, on the same day I used the electronic service function of that system to serve the same document on:

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