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Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

DEPARTMENT OF REVENUE, State of Oregon, and DESCHUTES COUNTY ASSESSOR, Plaintiffs-Appellants, vs. RIVER'S EDGE INVESTMENTS, LLC, Defendant-Respondent.	Tax Court No. 4962 Supreme Court No. S062829

RESPONDENT'S ANSWERING BRIEF

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

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STATEMENT OF THE CASE

Respondent River's Edge Investments, LLC ("Defendant") accepts the Statement of the Case presented by appellants Department of Revenue and Deschutes County Assessor (collectively, the "Department"), except as provided herein.

I. Nature of the Action or Proceeding

The issue before the Tax Court was the real market value of Defendant's fee simple interest in the subject property for the 2008-2009 tax year. At the Magistrate Division, each party submitted valuations using both the cost and income approaches. (SER 1-18.) On appeal to the Regular Division, the County, through the Department, contended for the first time that the subject property is an "especial property" with no immediate market value and that, as such, its real market value is the amount required to justly compensate Defendant for loss of the property as determined by the cost approach. Applying only the cost approach, the Department's appraiser concluded that the subject property's real market value for the 2008-2009 tax year was $16,700,000. The appraiser for Defendant applied both cost and income approaches to valuation, ultimately concluding that the income approach is the best method for determining value of the subject property. The appraiser for Defendant concluded that the subject property's real market value for the 2008-2009 tax year was $2,668,000.

Following a three and one-half day trial, the Tax Court rejected entirely the Department's appraisal and held, accepting as reasonable the value conclusion of Defendant's appraiser, that the real market value of the subject property for the 2008-2009 tax year was $2,668,000.[1]

II. Questions Presented on Appeal

The Department's statement of the questions presented on appeal mischaracterizes and unnecessarily complicates the issue before this Court--that is, did the Tax Court err in rejecting the Department's appraisal? It follows that the first two questions presented on appeal are more accurately stated as follows:

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[1] Curiously, the Department attacks in its footnote nos. 6, 14, and 16 the income-approach valuation employed by Defendant's appraiser. The Department did not assign as error the Tax Court's acceptance of Defendant's appraiser's value conclusion. Although the Department's arguments in this regard in no way advance its position as to the limited issues before this Court on appeal, it is of note that the $2,668,000 valuation by Defendant's appraiser--a value less than the bare land value calculated by Defendant's appraiser as part of his cost approach--reflects the legal constraints imposed by Defendant's negotiated development agreement with the City of Bend regarding the subject property. So constrained, the highest and best use of the subject property as vacant was not the same as the highest and best use of the subject property as developed. The highest and best use of the subject property was its continued use as a convention center because that is the only use permitted under the terms of the Development Agreement. *See* ORS 308.205(2)(d) ("If the property is subject to governmental restriction as to use on the assessment date under applicable law or regulation, real market value shall not be based upon sales that reflect for the property a value that the property would have if the use of the property were not subject to the restriction unless adjustments in value are made reflecting the effect of the restrictions.") But for the Development Agreement, a convention center would not be the subject property's highest and best use. (Ex L.)

1. Did the Tax Court err in rejecting the Department's appraisal on the basis that Measure 50 requires that the real property in one tax account be determined without consideration of property in another tax account?

2. Did the Tax Court err in rejecting the Department's appraisal because the Department's appraiser failed to adequately justify his decision not to develop an income indicator of value for the subject property?

Additionally, the Department's first question presented on appeal is argumentative insofar as it states that the convention center and hotel are "part of the same unit of property." As explained below, that is not accurate.

Defendant accepts the Department's statement of the third question presented on appeal.

III. Summary of Argument

First, the Tax Court did not err in interpreting Measure 50. The court properly held that Measure 50 requires that the real market value of property in one tax account be determined without consideration of property in another tax account. In addition, the Tax Court properly held that, even if Measure 50 does not compel separate consideration of the convention center and hotel, basic valuation principles would. An increase in income to the hotel attributable to the convention center would increase the net operating income of the hotel property, and that increase would be reflected in the income indicator of value for the hotel. It follows that the department's valuation would result in

impermissible double counting.

Even if the Court agrees with the Department that the Tax Court erred in its interpretation and application of Measure 50, the decision of the Tax Court should be affirmed nonetheless on the alternative basis that the subject property is not an "especial property." Although the convention center and hotel benefit from each other, there is no evidence that either the convention center property or the hotel property would have been rendered "almost valueless" if separately owned. Rather, the evidence presented at trial demonstrates that there existed an immediate market value for the convention center as a stand-alone entity and that the subject property was beneficial to more than one particular user. Accordingly, the subject property must be valued independently of the hotel property.

Second, the Tax Court did not err in its interpretation of OAR 150-308.205-(A)(3). The Department mischaracterizes the Tax Court's ruling in this regard. The court properly held that OAR 150-308.205-(A)(3) directs consideration of both income and cost approaches to valuation, not that an appraiser must employ both methods in every case. The court rejected the Department's appraisal not because the appraiser failed to conduct an income approach valuation, but because he was unable to offer any valid reason as to why he chose not to do so.

Finally, the Tax Court did not abuse its discretion in awarding attorney fees, costs, and expenses, because the Department's especial property assertion and failure to even prepare an income approach valuation under the facts of this case were not objectively reasonable. The Department's expert was unable to come up with any valid reason why he chose not to pursue an income approach, ultimately conceding during trial questioning that he should have completed one.

IV. Summary of Facts

The summary of facts presented by the Department is argumentative in several respects. Defendant therefore provides the following.

Prior to constructing the subject property, Defendant owned and operated the Riverhouse Hotel (the "hotel"), which included and still includes its own convention facilities. (Tr 1, 198; 19-25, 199; 1-5; Ex 1 at 15, 34.) The hotel is located on a separate tax lot across a public arterial to the north of the subject property. *Id.* The hotel has been in business since the 1970s. (Tr 47; 12.) The Riverhouse Convention Center (the "convention center"), located on the subject property, opened for business in 2006. (Ex 1 at 6, 19; Ed A at 5, 30.)

In valuing the subject property, the Department's appraiser chose not to conduct an income approach, testifying initially that he did not have sufficient information "to break out or to estimate the percentage of * * * revenues * * * from the convention center activities" as reflected in the hotel's financial

statements, which were provided to him at his request. (Tr 1072-1074.) When questioned by the Department's counsel and the Tax Court, however, the Department's appraiser acknowledged that "[i]t would have been possible" to conduct a "combined valuation that included both the convention center and the hotel" using an income approach and that he "had all the information necessary to do that" and "could have" done it. (Tr 1074-1075.) Sharra Tisiot, the County's appraiser at the Magistrate Division, completed an appraisal using the income approach. (SER 1-18.) In response to questioning by the Tax Court regarding his failure to conduct an income-based approach, the Department's appraiser stated, "I can tell you now, I wish I had." (Tr 1077; 10.)

Defendant's appraiser conducted both an income and cost approach, ultimately determining that the income approach is the best method for determining value in this case because the subject property is income-producing and because the income approach accounts for obsolescence. (Ex A at 65.) Grant Norling, Senior Valuation Services Director for Colliers International and MAI appraiser with 13 years of valuation experience, explained that the difference in value between Defendant's appraiser's cost and income approaches was attributable to economic and functional obsolescence. (Tr 712; 20-25; Exs K, L.)

Several witnesses testified at trial regarding this economic and functional obsolescence.

First, as established at trial, the convention center was "superadequate" for its purpose, resulting in a large amount of functional obsolescence. At 16,552 square feet, the Cascade Ballroom is the largest meeting room in the City and can accommodate 1,600 people seated theater-style or 1,000 people for a sit-down meal. (Tr 195; 14-20; Ex A at 31.) As Wayne Purcell, managing member of Riverhouse, LLC, which managed the convention center, and a member of River's Edge Investments, LLC, which owned it, explained, the City wanted a larger facility to provide community-wide benefit. (Tr 185; 7-8; Ex 26 at 4-5, 12-13.) Oran Teater, mayor of Bend at the time that Defendant was negotiating its development agreement, testified that the City wanted a facility that would accommodate 1,000 people. (Tr 959; 2-25, 960; 1-13, 961; 13-25, 962; 1-7.) Mr. Purcell testified that the convention center "was designed to be a smaller building that we could add on to and could grow over time as the business picked up." (Tr. vol. 1, 185; 1-3.) But "it was important for [the City] that it be bigger" and "[t]he community really wanted it[,] * * * so we went ahead and did it even though the [cost] numbers had changed pretty significantly," moving from six and one half to ten million, and despite the fact that "there would probably be a negative cash flow for some period of time." (Tr 184; 16-20, 185, 186; 1-6.)

Second, as recognized by the Tax Court, the subject property "came onto the scene at one of the worst times in American economic history," resulting in

a large amount of economic obsolescence. (ER-15.) In other words, as established at trial, the economics of the convention center (revenues less expenses) do not provide adequate return to justify the costs to build. (Tr 775; 12-13, 941; 7-16; Ex K.)

ANSWER TO FIRST ASSIGNMENT OF ERROR

The Tax Court did not err in rejecting the Department's real market value appraisal based on its interpretation and application of Measure 50.

I. Preservation of Error

In its Opening Brief, the Department asserts that the question of how Measure 50 affects the determination of highest and best use of property was not raised at trial and first arose in the Tax Court's written opinion. Therefore, according to the Department, ordinary preservation rules do not apply.

As the Department acknowledges, however, the determination of highest and best use is a necessary first step in addressing a property's real market value. At trial, the issue of how Measure 50 affects determination of real market value was discussed several times. Just before breaking for lunch on the second day of trial, for example, the Tax Court advised counsel as follows:

> "JUDGE BREITHAUPT: * * * I would like either witnesses or lawyers [to be ready to address] the legal structure we have in the state of Oregon on taxation. * * * And one of the concerns I have is this. * * * [W]e've got two tax accounts. We've got the hotel over

> in one tax account and the convention center in another."

(Tr 418; 15-25, 419; 1.) Following the break, the Tax Court followed up on its earlier comments:

> "JUDGE BREITHAUPT: And again, let me go back to the opening comment I think I made[.] * * * Obviously the dirty little secret here is Measure 50. The dirty little secret is that real market value may not in fact matter. But that doesn't change where we start with these cases. We always deal with these case, am I not correct, with real market value. Everything else is derivative from that. So if we double count real market value, we['ve] got a real problem potentially."

(Tr 516; 18-25, 517; 1-3.) Therefore, Defendant contends that ordinary preservation rules do apply, and that, in failing to address the impact of Measure 50 at trial or in its closing brief to the Tax Court, the Department failed to properly preserve for appellate review its First Assignment of Error.

II. Standard of Review

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

ARGUMENT

I. Measure 50 prohibits consideration of characteristics of property outside the tax account under appeal in determining the property's real market value.

The Tax Court did not misinterpret the provisions of Measure 50, or the effect of those provisions on ORS 308.205, when it held that the highest and best use and real market value of property must be determined without reference to any property outside of the tax account under appeal. As explained in the written opinion of the Tax Court, Measure 50 requires that any determination of the assessed value of property be determined independently of consideration of property in another property tax account. (ER-10.) It follows that the Department's consideration of the hotel property in determining the highest and best use and real market value of the subject property is inconsistent with the account focus of Measure 50, and, as such, impermissible, as explained below.

Measure 50 and the legislation implementing it dictate that assessed value equals the lesser of the real market value or the maximum assessed value of "property." ORS 308.146(2). "Property," for these purposes, is defined as "[a]ll property included within a single property tax account." ORS 308.142(1)(a). In other words, to determine assessed value, the Oregon Constitution requires a comparison of the real market value of "[a]ll property included within a single property tax account" with that property's maximum

assessed value. *Id.* It follows that consideration of property in another tax account in determining a property's highest and best use--a necessary first step in determining real market value--is not constitutionally permitted. The Tax Court thus properly rejected the Department's argument that income to the hotel attributable to the presence of the convention center should be considered in determining the subject property's real market value, including its determination that its highest and best use was to operate in conjunction with the hotel property. Such a conclusion is inconsistent with the account focus of Measure 50.

II. Consideration of characteristics of property outside the tax account under appeal in determining the property's real market value would result in impermissible "double-counting."

Moreover, as stated by the Tax Court, even if Measure 50 does not compel separate consideration of the convention center and hotel, basic valuation principles would. (ER 11-12.) This is because any hotel income attributable to the presence of the convention center would necessarily result in increased net operating income for the hotel, thereby increasing the income indicator of value for the hotel property. It follows that consideration of increased hotel revenue in valuing the convention center would result in an increase in the assessed value of both properties, or, as described by the Tax Court, impermissible "double-counting." (ER 11-12.)

As the Tax Court correctly pointed out at trial, consideration of increased

hotel room revenues attributable to the convention center in valuing the subject property, even if both properties are owned by the same principals, would amount to double taxation--that is, it would result in "capturing * * * the full value on the convention center side of the ledger and [also capturing] the increased value from the rental of rooms in the hotel over on the hotel side." (Tr 513; 21-25, 514; 1-8.) Such a result, this court noted, would be "a real problem." (Tr 517; 1.) See Article I, section 32, and Article IX, section 1, of the Oregon Constitution, which command that the legislature shall provide by law for uniform and equal rates of assessment and taxation, and that all taxation shall be equal and uniform.[2]

Furthermore, the Department's consideration of characteristics of property outside the tax account under appeal in determining the subject property's real market value begs the question--where does it stop? That is, and as recognized by the Tax Court in a question to the Department's appraiser, "If the especial property reg lets you do that for the hotel and convention center,

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[2] Article I, section 32, of the Oregon Constitution provides, "Taxes and duties; uniformity of taxation. No tax or duty shall be imposed without the consent of the people or their representatives in the Legislative Assembly; and all taxation shall be uniform on the same class of subjects within the territorial limits of the authority levying the tax."

Article IX, section 1, of the Oregon Constitution provides, "Assessment and taxation; uniform rules; uniformity of operation of laws. The Legislative Assembly shall, and the people through the initiative may, provide by law uniform rules of assessment and taxation. All taxes shall be levied and collected under general laws operating uniformly throughout the State."

why doesn't it let you do that with the * * * hotel convention center and the golf course?"

III. The subject property is not an "especial property."

Even if the Court agrees with the Department that the Tax Court erred in its interpretation and application of Measure 50, the decision of the Tax Court should be affirmed nonetheless on the alternative basis that the subject property is not an "especial property." As the Tax Court stated in its Order Granting Defendant's Application for Attorney Fees, Costs, and Disbursements, "[T]he department did not show the presence of elements it has stated must be present for the especial property rule to apply." (ER-26.) It follows that the Department's highest and best use and real market value determinations were in error, and, accordingly, the Tax Court did not err in rejecting the Department's appraisal.

The Department cites ORS 308.205(2)(c) and OAR 150-308.205(A) in support of its "especial property" argument. ORS 308.205(2)(c) provides, "If [a] property has no immediate market value, its real market value is the amount of money that would justly compensate the owner for loss of the property." To implement ORS 308.205(2)(c), the Department adopted OAR 150-308.205-(A)(3), which states:

> "Especial property is property specially designed, equipped, and used for a specific operation or use that is beneficial to only one particular user. This may occur because the especial property is part of a larger total operation or because of the specific nature of

> the operation or use. In either case, the improvement's usefulness is designed without concern for marketability. Because a general market for the property does not exist, the property has no apparent immediate market value. Real market value must be determined by estimating just compensation for loss to the owner of the unit of property through either the cost or income approaches, whichever is applicable, or a combination of both."

Relying primarily on *STC Submarine, Inc. v. Dep't of Rev.*, 320 Or 589, 890 P2d 1370 (1995)[3], the Department argues that the highest and best use of the subject property for the tax year at issue was as a convention center operated in conjunction with the hotel property. In support of that argument, it quotes in its Opening Brief the following passage from *STC Submarine*:

> "In determining 'highest and best use' of taxpayer's building and structures, the department properly considered the continued viability of taxpayer's entire operation. The following example from Professor Bonbright's treatise, I *The Valuation of Property* (1937), illustrates the point. Suppose that a prosperous water company has its reservoir in one county and its purifying plant and offices in another county. One may have little value without the other. As Professor Bonbright explains: '**Like one glove or half of a fountain pen, each part alone may be almost valueless**. So, too, though our water company is a valuable business organism, the sum of what would be received from separate sales of the

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[3] The facts of *STC Submarine* are distinguishable from this case. The Tax Court found that the facility at issue in that case was an "especial property" because (1) its product was not sold on the market to consumers, but, rather, manufactured solely for use by a larger enterprise; (2) the facility was designed to meet the taxpayer's specific needs, not for the marketplace; and, (3) there was no evidence of any sales or offers to sell such a property and thus no "immediate market" for it. *STC Submarine v. Dep't of Revenue*, 13 Or Tax 14, 15 (1994). As explained below, unlike the manufacturing facility at issue in *STC Submarine*, there is an immediate market for the subject property as a stand-alone, income-producing convention center, and the convention center was designed to benefit the community at large, not to meet the specific needs of defendant.

> assets on each side of the county line would be ridiculously small.'"

Id. at 594 n 6 (emphasis added).

The Department's quoted authority defeats its own argument. As explained below, although the convention center and the neighboring hotel benefit each other, there is no evidence whatsoever that either the convention center property or the hotel property would have been rendered "almost valueless" or would "have little value" if separately owned. Rather, the virtually unrebutted evidence presented at trial demonstrates that there existed an immediate market value for the convention center as a stand-alone entity that could have been purchased and beneficially used by any number of users unaffiliated with the hotel. And it is not in dispute that the hotel existed and operated without the convention center during the 30+ years before the convention center was constructed.

David Perkins, a certified public accountant and former registered appraiser for the Department with more than ten years of experience in valuing complex properties, including more than 50 Oregon "especial" properties, testified that "it's not going to kill the hotel if the conference center is not there" and that "the hotel clearly had value before the conference center was there." (Tr 910; 5-25, 911; 23-25, 912; 1-8, 20-25, 913; 1-19, 915; 5-17, 933; 5-10, 22-23.) According to Mr. Perkins, the convention center "certainly would have value in the hands of a different owner." (Tr 933; 20-22.)

Mr. Perkins further testified that especial "properties have some type of integrated nature such that if you were to remove a portion of that property, or the properties that are integrated together, then it would render it without any value whatsoever." (Tr 927; 11-21, 971; 15-25, 972; 1.) In other words, the removal would have a "material" impact. (Tr. 971; 22-25, 972; 1.) To remove part of an especial property, he explained, would be to "render the rest of it *** effectively inadequate or dysfunctional or unfunctional to complete the purpose for [which] it was designed." (Tr 928; 1-9.) In the case of the subject property, according to Mr. Perkins, removing the convention center might very well have some detrimental effect on the hotel, but it would not render it without value. (Tr 934; 9-25.) Nor would separating the convention center from the hotel render the convention center without value, because the convention center would continue to host local and out-of-area business. (Tr 197; 4-15, 430; 7-13, 438; 15-25, 439; 1-8, 771; 25, 772; 1-6, 1029; 17-22.) The hotel and convention center, Mr. Perkins testified, are "capable of" separate ownership and operation. (Tr 933; 1-5.) Mr. Perkins further testified he had never seen one piece of an especial property rented or leased out, as is the case with the subject property. (Tr 936; 4-8, 18-25, 937; 1-3.) Accordingly, he concluded, the subject property is not an especial property. (Tr 927; 8-25, 928; 1-9, 929; 8-25, 930; 1-24, 931; 23-25, 932-34, 936; 18-25, 937; 1-3; Ex L.)

Furthermore, the subject property fails the "especial property" test set forth in OAR 150-308.205-(A)(3) because, among other reasons, and contrary to the Department's position, it had an immediate market value as of January 1, 2008.

Brian Fratzke, a CCIM real estate broker with ten years of experience in selling and leasing commercial properties, testified that, on January 1, 2008, he could have marketed and sold the subject property "as a separate property." (Tr 981; 17-25, 982; 1-13, 984; 1-2.) Grant Norling, Senior Valuation Services Director for Colliers International and MAI appraiser with 13 years of valuation experience, testified that the subject property "is marketable on its own" because "[i]t is an income-producing property that would stand alone on its own and if presented to the market there would be willing buyers and sellers of the asset." (Tr 703; 6-10, 15-25, 704; 1-6, 23-25, 705; 1-2; Ex K.) Don Palmer, an MAI appraiser and consultant specializing in non-residential properties who has worked in the real estate appraisal industry since 1971, testified that there is a market for the subject property as a standalone convention center "as long as there's income being generated." (Tr 767; 10-25, 768, 769; 1-9, 779; 12-15.)

Defendant's appraiser testified that, based on his finding of comparable properties that had sold before and after January 1, 2008, a general market existed as of the valuation date for the subject property. (Tr 590; 13-17, 597; 7-21; Ex J.) He explained that those sales were useful in confirming marketability

as of the date of valuation because they evidence "an ongoing market" and that a sale occurring after the retrospective date of valuation "confirm[ed] what [an educated buyer and seller] would have seen" at the beginning of the recession. (Tr 597; 19-25, 598; 1-7; 894; 3-15.) "[U]sing only historical data," he explained, "would [effect] the overvaluing of the property. People would be looking forward. So we used some information that happened after January 1st, 2008, to confirm that trend." (Tr 894; 16-19.) Even the Department's appraiser acknowledged that "any property will sell for some price." (Tr 413; 24-25, 414; 1.)

Finally, the subject property fails the "especial property" test because it is beneficial to more than one particular user. As the Tax Court explained in its Order regarding attorney fees:

> "The premise of the department's case was that the convention center property was especial property that was beneficial to only one user, namely the owner of the hotel located on the adjacent[4] tax lot. * * *
>
> "That position had no basis in fact in the record made by the department. While there may have been few if any market sales of properties comparable to the subject as of the assessment date, the department made no showing that the convention center was a property beneficial to only one user."

(ER-25.)

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[4] As noted above, the subject property is not technically "adjacent" to the hotel property; the properties are separated by a public arterial right-of-way.

The evidence presented at trial supports the court's conclusion. According to Mr. Perkins, the subject property is not beneficial to only one particular user and "certainly would have value * * * in the hands of a different owner." (Tr 933; 20-22, 935; 14-23.) The property, he testified, "could be owned by somebody else and used by somebody else as a conference center without a question." (Tr 936; 14-16.) Mr. Fratzke testified that there were "likely folks out there that I think would have been intrigued by owning the convention center" at that time, including the City, the owners of Eagle Crest and Pronghorn, the Bend Ameritel, and other large hotel chains with existing properties, and Lowes Destination Resorts, which owned Sunriver. (Tr 986; 13-25, 987; 1-7.)

Brett Evert, a former Central Oregon Visitor Association board member involved in the hotel business for 35 years, and the owner of three hotels at the time of trial, testified that "every business in Bend" benefits from the convention center, including hotels, restaurants, landscapers, supply companies, welders, and the housing and tourism industries more generally. (Tr 438; 15-25, 439; 1-8.)

Even the testimony of the Department's own appraiser directly contradicts the Department's assertion that the subject property is an "especial property." On cross-examination, the Department's appraiser testified that the convention center can stand alone physically, produces income on its own, and

is "beneficial to more than just one particular user," (Tr 482; 22-25, 483; 1-21, 496; 14-23.)

It follows that the subject property is not an "especial property." Absent "especial property" status, the Department's appraiser had no legal basis to consider the neighboring hotel property in determining the highest and best use and real market value of the subject property.

In conclusion, for each of the above three independently sufficient reasons, the Tax Court did not err in rejecting the Department's appraisal on the basis that the highest and best use and real market value of property must be determined without reference to any property outside of the tax account under appeal.

ANSWER TO SECOND ASSIGNMENT OF ERROR

The Tax Court did not err in rejecting the Department's real market value appraisal based on its interpretation and application of OAR 150-308.205-(A)(3).

I. Preservation of Error

Defendant acknowledges that the Department timely and properly raised this second assignment of error in its closing brief.

II. Standard of Review

This court reviews decisions of the Oregon Tax Court for "errors or questions of law or lack of substantial evidence in the record to support the Tax

Court's decision." ORS 305.445.

ARGUMENT

The Tax Court did not misinterpret OAR 150-308.205-(A)(3) when it chose to place no reliance on the appraisal of the Department's expert witness. The court rejected the Department's appraisal not because the appraiser failed to use an income approach, but because the appraiser was unable to offer any reasonable explanation as to why he chose not to use an income approach. Additionally, it is clear that the Tax Court rejected the Department's appraisal for the additional reason that the court simply did not find the report credible. As the court told the Department's appraiser during trial,

> "I'll just tell you, I find your testimony and your report to be completely and utterly incomprehensible at this point. * * * And [a]t this point I don't find you credible."

(Tr 508-509.)

Despite the Department's assertions to the contrary, the Tax Court did not state that appraisers always must use both the income and cost approaches. Rather, the Tax Court stated,

> "The department's own rule directs consideration of both the income and cost indicators of value, even if a property is 'especial' or to be valued in order to arrive at just compensation. And yet, the department's expert witness did not develop an income indicator. That is a serious departure from appraisal practice. Appraisal Institute, *The Appraisal of Real Estate* 130 (13th ed 2008). **If not adequately justified**, it would lead the court to place no reliance on the appraisal of the expert who took the departure."

(ER-11 (emphasis added).) The Tax Court then evaluated the "justification

given by the appraiser," ultimately concluding such justification "deficient" because of the risk of "double-counting" revenue and the flawed assumption by the Department's appraiser that "the convention center and the hotel were, and will continue to be, owned by the same owner," among other reasons. (ER 11-12.) Only because the Department's appraiser failed to provide adequate justification for his departure from appraisal practice, a departure the appraiser himself ultimately acknowledged was incorrect, did the Tax Court choose to place "no reliance on his conclusion of value." (ER-14; Tr 1077;10.)

As the Tax Court explained in its Opinion, the Department's insistence on its approach to valuation--an approach that the Tax Court characterizes as a "departure" from "fundamental appraisal principles"--is an obvious attempt by the Department to avoid the "unpleasant" result of Measure 50. (ER 13-14.) That unpleasant result, of course, is "the fact that the [maximum assessed value] for property in the account in which the hotel is located is at a level such that increases in [real market value] of the hotel produced by the increased revenue attributable to the presence of the convention center will not produce additional property tax revenue." (ER-13.) The Department's appraiser chose the valuation method that would allow him to arrive at the value conclusion most favorable to the Department, not the valuation that most accurately reflects the real market value of the subject property.

The Tax Court ultimately concluded that it considered "the income indicator to be the most reliable indicator of value in this situation," and the only income valuation performed was provided by Defendant's appraiser. (ER-15.) The Tax Court held that the Department did not meet its burden stating, "[T]he department has not established that the elements employed by the witness for the taxpayer were unreasonable." *Id.*

THIRD ASSIGNMENT OF ERROR

The Tax Court did not abuse its discretion when it awarded attorney fees, costs, and expenses to Defendant taxpayer, the prevailing party.

I. Preservation of Error

Defendant acknowledges that the Department filed an objection to Defendant's request for attorney fees, costs, and expenses.

II. Standard of Review

This court reviews an award of attorney fees pursuant to ORS 305.490 for an abuse of discretion. *Clackamas County Assessor v. Village at Main Street Phase II, LLC*, 352 Or 144, 151, 282 P3d 814 (2012).

ARGUMENT

The Tax Court did not abuse its discretion when it awarded attorney fees, costs, and expenses to Defendant.

First, the Department's position was not objectively reasonable. Contrary to the Department's characterization of the Tax Court's ruling, the Tax Court

did reject the Department's determination that there was no immediate value for the subject property and that it should therefore be valued as an "especial property" pursuant to OAR 150-308.205-(A)(3). A review of the totality of the Tax Court's opinion demonstrates its conclusion in this regard:

> "The department argues * * * that the relationship between the convention center and the hotel, together with the common ownership of both, makes the convention center "especial property." **Even if** that argument, based on the department's rule OAR 150-308.205-(A)(3), was correct, it could not produce a result inconsistent with the constitution, statutes, and the decision in *Flavorland.*"
>
> "Even within those limits, it is not clear what characterization of the convention center as "especial property" accomplishes. The rule itself simply states that where such property is involved, there will, by definition, be no market indicator of value. Rather, reliance will have to be placed on the income or cost indicators of value."

(ER-10 (emphasis added).) Additionally, in its Order Granting Defendant's Application for Attorney Fees, Costs & Disbursements, the Tax Court stated,

> "In this case, however[,] the problem with the department case was not in construction of a statute, or even of its rule. The problem was that the department did not show the presence of elements it has stated must be present for the especial property rule to apply."

(ER-26.) For example, according to the Tax Court, the Department "made no showing that the convention center was a property beneficial to only one user." (ER-25.) The Tax Court rejected the Department's "especial property" argument as objectively unreasonable, and it did not abuse its discretion in awarding fees.

Nor did the Tax Court abuse its discretion in concluding that the Department's position was objectively unreasonable because "the department had no basis in fact or law for disregarding entirely an income indicator of value for the convention center itself, separate and apart from the hotel." (ER-25.) The department's argument that its "determination that the best indicator of value was the cost approach was based on objectively reasonable criteria" is directly controverted by the department's own expert witness, who acknowledged upon questioning by this Court that he should have completed an income approach valuation. Further, the expert for the department was unable to come up with any valid reason why he and the department chose not to pursue an income approach.[5] Nothing was provided that remotely suggested that such decision was objectively reasonable. Just a sampling of the questioning by the Court of the Department's appraiser includes the following:

"JUDGE BREITHAUPT:	* * * Assuming it's especial property, it says 'then you must determine real market value by estimating just compensation through either the cost or income approaches, whichever is applicable, or combination.' Correct?
"THE WITNESS:	Correct.
"* * * * *	

[5] As noted above, the Magistrate Division, Deschutes County's appraiser, Sharra Tisiot, presented both a cost and income approach to valuation of the subject property. (SER 1-18.)

"JUDGE BREITHAUPT: * * * Now, what in this rule do you think justified you in throwing out the income analysis completely? * * *

"* * * * *

"JUDGE BREITHAUPT: So why didn't you do it?

"THE WITNESS: (No audible response.)

"JUDGE BREITHAUPT: Did it ever occur to you to do it?

"THE WITNESS: (No audible response.)

"* * * * *

"JUDGE BREITHAUPT: You had the information. You testified to that. Why didn't you do the exercise?

"THE WITNESS: "Why didn't I -- okay. I didn't do the entire hotel and convention center. I didn't --

"JUDGE BREITHAUPT: I know you didn't. My question is why didn't you?

"THE WITNESS: Because I was -- my understanding of the 308.205, especial use property, I didn't feel like the income approach was a proper approach.

"JUDGE BREITHAUPT: Why? Other than a bald conclusion with no support, why? Just because you didn't feel that way, it won't do it for me.

"THE WITNESS: Well, I -- that's my thinking at the time. I can tell you now I wish I

had. But that was my thinking at the time that this is especial use property and in order to --

"JUDGE BREITHAUPT: But especial use property contemplates property that's part of a larger total operation; right?

"THE WITNESS: That's correct.

"JUDGE BREITHAUPT: More than one property perhaps.

"THE WITNESS: Correct.

"JUDGE BREITHAUPT: That's what we have here. And you've testified that in other circumstances, you started down that road and I told you to stop. But in other circumstances you've actually done that package and allocation process, haven't you?

"THE WITNESS: Yes.

"JUDGE BREITHAUPT: So the only reason you didn't do it here is because you didn't do it here?

"THE WITNESS: That and just compensation, the portion that requires just compensation.

"JUDGE BREITHAUPT: Well, just a moment. Total package right there in just compensation reg. When you did the package and allocation was that an especial use property or not especial use property?

"THE WITNESS: It was -- it was -- oh, the -- in the past --

"JUDGE BREITHAUPT: Yeah.

"THE WITNESS: -- or this time? In the past they were retirement facilities with cottages. I wouldn't call them particularly --

"JUDGE BREITHAUPT: So you think somehow the just compensation – just compensation's still supposed to get us to fair market value; right?

"THE WITNESS: Right.

"JUDGE BREITHAUPT: So the ultimate goal is exactly the same; right?

"THE WITNESS: Right.

"JUDGE BREITHAUPT: Okay."

(Tr 1066-1078.)

Second, because the Department had no reasonable basis in fact or law for attempting to treat the subject property as an especial property or for relying solely on the cost approach, as demonstrated above, the Tax Court did not abuse its discretion in concluding,

> "This court is of the opinion that the claims and defenses of the Department and the presentation of those should be deterred. By doing so, assertion of appropriate claims and defenses will not be deterred.
>
> "Likewise, if no award is made in this case, other taxpayers with legitimate objections to such actions of the department as were taken here will be unlikely to resist, given the cost of adequate resistance."

(ER-26.)

Third, as the Tax Court acknowledged,

> "[Defendant] has demonstrated that at important stages of this proceeding it offered to settle this case at or near the valuations ultimately found, without any receipt of a payment of attorney fees. Those offers did not receive a counter offer from the department."

(ER-27.) As previously noted, the Magistrate determined that the value of the subject property was $3,538,000. By letter dated December 8, 2012, the department offered to settle the case at $11,000,000. (SER 28.) By letter dated January 17, 2013, taxpayer offered to settle the case for $3,538,000, the value determined by the Magistrate[6], despite taxpayer's stated belief that the property should be valued at approximately $2,670,000. *Id.* The department refused to counter taxpayer's settlement offer. By letter dated April 15, 2013, Defendant offered to settle the case for $2,670,000 and waive its rights to $75,882 in statutory interest and waive its rights to any potential attorney fees. *Id.* The department again refused to counter taxpayer's settlement offer. This Court ultimately determined the correct value to be $2,668,000. Thus, other than its 2012 offer which was nearly four times more than the ultimate valuation, the Department refused to pursue settlement at all despite attempts by Defendant to do so. For this additional reason, the Tax Court did not abuse its discretion.

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[6] It is undisputed that, in arriving at a value of $3,538,000, the Magistrate Judge inadvertently included furniture, fixtures, and equipment totaling $868,000. As such, Defendant's offer was significantly more generous that it appears.

Fourth, as the Tax Court concluded,

> "The court is aware that in other recent cases the department has asserted that the especial property rule is applicable to support valuations that are highly contested. The court considers a fee award in this case to be an appropriate deterrent in respect of assertion of the rule done without attention to what the rule requires to be shown for the rule to be applicable."

(ER 26.) Thus, the dispute at issue is not one that "involves a dispute that is 'primarily a dispute of legal or economic significance only for the parties to the suit.'" *Allen v. Dept. of Rev. and Clackamas County*, 17 OTR 427, 435-36 (2004). The especial property issue asserted by the department is a matter of significance to many Oregonians who own multiple contiguous or nearby parcels, especially when those parcels have overlapping interests.

Finally, contrary to the Department's implication in footnote 2 of its Opening Brief, there can be no question that the Department is responsible for attorney fees at the Magistrate Division despite the fact that the Department did not take an active role in that proceeding. As cited by Defendant in its Post-Trial Brief to the Tax Court, *McKee v. Dept. of Rev. and Lincoln County Assessor*, 18 OTR 58, 64 (2004), makes clear that "[T]he statutory responsibility of the department under ORS 305.490 to pay fee and expense awards is absolute and "[n]o condition is stated that those awards accrue only when the department has statutory assessment responsibility or only when the

department has in fact exercised its rights to participate in cases." The Department's footnote should be ignored.

In conclusion, the department chose to pursue especial property status in this case despite having no objectively reasonable facts or law to justify doing so. The only expert witness that testified for the department was determined by the court to not be credible in this instance. The Tax Court thus did not abuse its discretion in awarding fees and costs incurred by the tax payer because (1) the department's claim was not objectively reasonable; (2) an attorney fee award will deter the department from asserting meritless claims in the future; (3) an attorney fee award will not deter the department from asserting legitimate claims in the future, (4); the department was unreasonable in its settlement negotiations; and (5) the matter is not primarily a dispute only for the parties to the suit. ORS 20.075.

CONCLUSION

The Tax Court did not err in interpreting Measure 50, which requires that the real market value of property in one tax account be determined without consideration of property in another tax account. In addition, the Tax Court properly held that, even if Measure 50 does not compel separate consideration of the convention center and hotel, basic valuation principles would. An increase in income to the hotel attributable to the convention center would increase the net operating income of the hotel property, and that increase would

be reflected in the income indicator of value for the hotel. It follows that the department's valuation would result in impermissible double taxation.

Even if the Court agrees with the Department that the Tax Court erred in its interpretation and application of Measure 50, the decision of the Tax Court should be affirmed nonetheless on the alternative basis that the subject property is not an "especial property." Although the convention center and the neighboring hotel benefit from each other, there is absolutely no evidence that either the convention center property or the hotel property would have been rendered "almost valueless" if separately owned. Rather, the evidence presented at trial demonstrates that there existed an immediate market value for the convention center as a stand-alone entity and that the convention center was beneficial to more than one particular user. Accordingly, the subject property must be valued independently of the hotel property.

Nor did the Tax Court err in its interpretation of OAR 150-308.205-(A)(3). The court rejected the Department's appraisal not because the appraiser failed to conduct an income approach valuation, but because the Department's expert was unable to come up with any valid reason why he chose not to pursue an income approach, ultimately conceding during questioning at trial that he should have completed one.

Finally, the Tax Court did not abuse its discretion in awarding attorney fees, costs, and expenses, because, among other reasons, the Department's

especial property assertion and failure to even prepare an income approach valuation under the facts of this case were not objectively reasonable.

Dated this 17th day of July 2015

BRYANT, LOVLIEN & JARVIS, P.C.

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CERTIFICATE OF COMPLIANCE

WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief Length

I certify that (1) Respondent's Corrected Answering Brief complies with the word-count limitation in ORAP 5.05(2)(b), and (2) the word count of Respondent's Corrected Answering Brief [as described in ORAP 5.05(2)(a)] is 8,269 words.

Type Size

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

DATED: July 17, 2015

/s/ Mark G. Reinecke

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CERTIFICATE OF FILING

I hereby certify that on July 17, 2015, I filed the foregoing RESPONDENT'S ANSWERING BRIEF with the Appellate Court Administrator via the Court's eFiling system:

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I hereby certify that on July 17, 2015, I served the foregoing RESPONDENT'S ANSWERING BRIEF on the following by eService:

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