IN THE OREGON TAX COURT
MAGISTRATE DIVISION
Property Tax

LYDON-ALBANY, LLC,	)	
	)	
Plaintiff,	)	TC-MD 040144F
	)	
v.	)	
	)	
LINN COUNTY ASSESSOR,	)	
	)	
Defendant.	)	**DECISION**

Plaintiff appeals the tax year 2003-04 real market value of property identified on the Linn County tax roll as Account 0073284. A telephone trial was held Monday, August 16, 2004. Plaintiff Lydon-Albany, LLC, (taxpayer) was represented by James C. Griggs, of Saalfeld Griggs, Salem. Arthur Lydon, Jr. testified for taxpayer. Brad Anderson, Civil Deputy District Attorney, argued the cause for Defendant (the county). Michael Lamb, Assessor, Linn County Assessors Office, testified for the county.

I. STATEMENT OF FACTS

The property at issue lies adjacent to the Willamette River in the City of Albany. (Stip Facts at 1.) It was formerly the site of the American Cemwood plant. (Ptf's Ex 2 at 1.) On January 1, 2001, the real market value of the real property of the site was set at $323,950 on the Linn County tax roll. (Def's Ex D at 1.) On August 30, 2001, the City of Albany had the site and several adjoining lots appraised; Herald S. Haskell, MAI, SRA found the fair market value of the property to be $439,000. (Stip Facts at 2.) On September 17, 2001, the property sold for the sum of $200,000. (Stip Facts at 1-2; Def's Ex C at 1.) After becoming aware of a potential zone change from industrial to mixed density residential, the new owner decided to sell the property.

(Stip Facts at 2; Def's Ex C at 1.) The City of Albany offered the new owner $325,000 for the property. (Stip Facts at 2.) Parties other than the City of Albany and taxpayer also expressed interest in the property. (Def's Ex C at 1.) Taxpayer paid $350,000 for the site on October 30, 2001.[1] (Stip Facts at 2.) Before making an offer on the property, taxpayer commissioned a "Level One Environmental Site Assessment" prepared by Capitol Environmental Consulting. (Ptf's Test at Trial; Ptf's Brief at 5; *see* Ptf's Ex 1.) That report indicated that "this assessment has revealed no evidence of recognized environmental conditions impacting the property." (Ptf's Ex 1 at 2.)

The real market value for the property for tax year 2002-03 was $813,510. (Stip Facts at 3.) For tax year 2003-04, the property's real market value was reduced to $791,670. (Stip Facts at 3.) When taxpayer originally purchased the property, with knowledge of the likely change in zoning, it planned to clear existing buildings from the site and build a residential complex. (Ptf's Brief at 5; Ptf's Test at Trial; Stip Facts at 2.) No activity took place on the property between taxpayer's date of purchase and commencement of clearing the site, as taxpayer was in the process of designing the residential complex. (Def's Ex D at 1; Ptf's Brief at 5.) However, when development of the property began in the latter part of January 2003, four underground storage tanks containing waste oil were uncovered. (Ptf's Test at Trial; Ptf's Ex 2 at 5.) Taxpayer hired Aspen Environmental Services, Inc. (AES) to supervise their removal and evaluate the site further. (Ptf's Test at Trial; Ptf's Ex 2 at 5.) As excavation continued, concrete

[1] The actual purchaser of the property was Lydon Construction Pension and Profit Sharing Plan, which, on April 9, 2003, conveyed the property to Lydon-Albany LLC to correct the name of the vested party. For ease of reference, both entities are referred to as "taxpayer." (Stip Facts at 2-3.)

retaining walls were discovered, with 55-gallon tanks of waste entombed within, as well as garbage pits filled with "[o]il-soaked concrete, wood, old 55-gallon drums, and miscellaneous garbage" – as well as, in some areas, a layer of "gassy gravel." (*Id.* at 5-6; Ptf's Test at Trial.)

On February 23, 2003 the property's zoning changed from industrial to mixed density residential, an event anticipated by both buyer and seller prior to taxpayer's purchase. (Stip Facts at 2.) The cleanup of the property continued throughout 2003. In the fall of 2003, taxpayer notified the Linn County Assessor's Office that it felt the real market value assessed to the property was excessive, presenting it with copies of the sale documents and proof of its cleanup costs. (Stip Facts at 3.) On October 22, 2003, Linn County lowered the property's real market value to $300,000 for tax year 2003-04. (Stip Facts at 3.) Taxpayer's subsequent appeal to the board of property tax appeals (the board) for the same tax year did not result in further reduction of the property's real market value. (Stip Facts at 3.) Taxpayer then filed this appeal with the Tax Court.

In its report dated July 31, 2003, AES described the property as "extremely contaminated" by waste oil, diesel, and gasoline. (Ptf's Ex 2 at 5-6, 8.) From February through July 2003, AES supervised the removal of 8,388.52 tons of contaminated soil from the property. (*Id.*) The AES report stated that both the soil and groundwater of the site had been impacted by "gasoline-range constituents," although not chlorinated solvents, and recommended that the Department of Environmental Quality (DEQ) be apprised of the situation. (*Id.* at 19, 22.) Taxpayer hired a second company, Geotech Explorations, Inc., that installed four wells around the main excavation on the site so that contamination of the site's groundwater could be monitored. (*Id.* at 7.) Taxpayer notified the DEQ of the contamination on February 4, 2003; the

property was listed as DEQ Project No. T6203600, under the site name of "Former American Cemwood Plant." (Def's Ex D at 2; Stip Facts at 3; *see* Def's Ex F at 1.)

Taxpayer has continued remediating the property, with the purpose of following its original plan of building a multi-family residential development, although, as of July 23, 2004, the DEQ had not received a progress report since July 31, 2003. (Ptf's Test at Trial; Def's Resp Brief, Ex A at 1.)

II. TAXPAYER'S OPINION OF VALUE

Taxpayer contends that its purchase of the property for $350,000 was without knowledge of the contamination or extensive costs that would be encountered in rehabilitating the property, and that it did so because it was misled by the environmental analysis conducted by Capitol Environmental Consulting, Inc. (Ptf's Brief at 5.)

Despite its own lack of knowledge, taxpayer asserts that knowledge of the property's contamination was a fact "readily discoverable by prudent market participants acting with knowledge and self-interest." (*Id.*) Because that fact could have been known by the parties to the transaction, and because the contamination existed on the assessment date for tax year 2003-04, taxpayer argues that case law and the correct application of ORS 308.205 require that the property's contamination be taken into account in determining its real market value for tax year 2003-04.[2] (Ptf's Brief at 5-6.) On that basis, taxpayer applies the procedures outlined in OAR 150-308.205-(E) for valuing contaminated property, which allow deduction of the cost to cure as a measure of functional obsolescence. OAR 150-308.205-(E)(3)(b). To that end,

[2] All references to the Oregon Revised Statutes (ORS) are to 2001.

taxpayer argues that the real market value on the tax roll of $300,000 should be reduced to zero for tax year 2003-04 – a time period during which taxpayer asserts it spent more than $300,000 in cleaning up the property. (Ptf's Reply Brief at 9.)

To demonstrate its expenditures, taxpayer initially submitted invoices that show its costs for cleanup during 2003, to be $510,137.64. (*See* Ptf's Ex 3.) That amount included $330,948.25 paid to environmental consultants; $2,428.82 to engineers; $155,541.11 to contractors; $21,011.01 for attorney fees; and $208.45 paid to the Oregon DEQ. (*Id.*) For the first part of 2004, taxpayer submitted invoices totaling $24,303.25 – an amount composed of $2,593.45 paid to environmental consultants; $3,042.18 to engineers; $18,457.47 for legal costs; and $210.15 paid to the Oregon DEQ. (*See* Ptf's Ex 4.) Taxpayer submitted an estimate of its remaining costs in the amount of $306,918.00 – for completion of services by AES ($171,620.00); the cost of filling and compacting all excavations ($118,048.00); and engineering expenses ($17,250.00). (*See* Ptf's Ex 5.)

In response to the county's questioning of several of taxpayer's calculations, taxpayer adjusted three of its costs as follows:

1. Lowered its claim for contractor's fees in 2003 from $155,541.11 to $62,546.76[3] (to remove cost of demolition of existing buildings). (Ptf's Reply Brief at 7.)
2. Removed all attorney fees (as a tangential rather than direct cost of cleanup). (*Id.*)
3. Recognized a 42 percent reduction in taxpayer's 2003 cost to cure due to being able to claim those costs as a deduction on taxpayer's 2003 tax return. (*Id.* at 8.)

[3] In Plaintiff's Exhibit 9, taxpayer lists this revised figure as $62,561.11.

Regarding other issues raised by the county, taxpayer did not alter its costs. It maintained its assertion of an estimated $118,048 to fill and compact the open hole on the site, declaring that to be a valid estimate and direct cost of cleanup. (*Id*. at 8; *see* Ptf's Ex 9.) It stood by its claim of estimated future expenses, which was calculated by AES prior to filing of taxpayer's appeal, as an estimate worthy of no less probative weight than that of the DEQ. (Ptf's Reply Brief at 7-8.) It argued that application of OAR 150-308.205-(E) does not require consideration of the source of financing for cleanup costs, thereby permitting taxpayer to pursue possible funding from the City of Albany Urban Renewal District without effect upon the real market value of the property. (*Id*. at 8-9.)

Applying the requirements of OAR 150-308.205-(E) to its modified cost to cure, taxpayer calculated its total cleanup expenses during 2003 to be $396,146.63. (Ptf's Reply Brief at 9; *see* Ptf's Ex 9.) Taxpayer then applied a discount rate of 5 percent to its estimated total cost during 2004, to reach a discounted present value of $297,870.27. (Ptf's Reply Brief at 9; *see* Ptf's Ex 9.) Adding its expenditures during 2003 and 2004, taxpayer achieves a total of $694,016.90. (Ptf's Reply Brief at 9; *see* Ptf's Ex 9.) When that amount is reduced by 42 percent (taxpayer's tax savings), taxpayer's net estimated cost to cure is $402,529.80, the amount expended during calendar years 2003 and 2004. (Ptf's Reply Brief at 9; *see* Ptf's Ex 9.) Citing that figure as taxpayer's cost to cure, an amount greater than $300,000, taxpayer argues that the real market value of the property for tax year 2003-04 should be reduced to zero. (Ptf's Reply Brief at 9.)

III. THE COUNTY'S OPINION OF VALUE

The county maintains that the property at issue has a real market value of $300,000 for tax year 2003-04. It states it determined that value by considering taxpayer's total purchase price

of $350,000 and the costs taxpayer incurred in demolishing the onsite buildings,[4] and subtracting the value of the tax lots that taxpayer purchased along with the contaminated site (a reduction of $56,780). (Stip Facts at 3.) The county contests taxpayer's request to lower the property's real market value on two grounds. First, because the property does not meet the definition of "contaminated site," taxpayer's application of OAR 150-308.205-(E) is in error. (Def's Resp Brief at 3.) Second, recent sales and offers on the property around the $350,000 mark demonstrated that the market was already discounting the property's value due to possible contamination, therefore no additional reduction in real market value is warranted. (*Id*. at 4.)

In denying that the property meets the definition of a contaminated site provided in OAR 150-308.205-(E)(1) and (2), the county states that taxpayer both failed to proffer evidence sufficient to meet any of the criteria listed, and failed to demonstrate that a criterium was met as of January 1, 2003, the assessment date for tax year 2003-04. (Def's Resp Brief at 3.) The county disagrees with taxpayer's assertion that case law supports that the contamination need only be something that could have been known, rather than a matter of public record, such as being reported to the DEQ, on the assessment date. (*Id*. at 5.) Characterizing taxpayer's argument as premature, the county states that contamination will be a factor in setting the property's real market value for tax year 2004-05 on January 1, 2004, but should not be considered for the tax year in question. (*Id*. at 4.)

In support of its second argument, the county notes that the real market value recorded on the tax roll for the property in 2002 was $813,510. (*Id*.) Because taxpayer did not dispute that

[4] Plaintiff's Reply Brief, page 7, identifies that cost as $92,980.

value, and paid $350,000 for the property in fall of 2001 – a sum close to that being offered by the City of Albany – it suggests that the market was already responding to possible environmental concerns. (*Id*.)

In the event that taxpayer's property is found to qualify as contaminated property, the county disagrees with taxpayer's calculation of its costs to cure the contamination. The county sees inflation in taxpayer's estimate of future costs, arguing that taxpayer's estimates reflect "worst case scenarios" unsupported by documentation provided to date and, more specifically, that taxpayer's claim of $118,048 for "fill and compact open hole" is not supported by documentation. (Def's Resp Brief at 7; *see* Ptf's Ex 5.)

IV. ISSUES

The issues before the court are whether existing contamination, not discovered until after the assessment date, should be considered in valuing the property and, if the contamination is a consideration, what the resulting real market value of the property should be.

V. ANALYSIS

In controversies brought before the Tax Court, the party seeking relief bears the initial burden of proof and must establish its case by a preponderance of the evidence. ORS 305.427.[5] A preponderance of the evidence means "the greater weight of evidence, the more convincing evidence." *Feves v. Dept. of Revenue*, 4 OTR 302, 312 (1971). Hence, in an appeal of a

[5] ORS 305.427 provides:

> "In all proceedings before the judge or a magistrate of the tax court and upon appeal therefrom, a preponderance of the evidence shall suffice to sustain the burden of proof. The burden of proof shall fall upon the party seeking affirmative relief and the burden of going forward with the evidence shall shift as in other civil litigation."

property's real market value, it is not sufficient to merely cast doubt upon the values assessed by the county appraiser. Taxpayer must demonstrate that it is more likely than not, that the value on the roll is incorrect.

The statutory value standard for assessment purposes is real market value. *Gangle v. Dept. of Rev.*, 13 OTR 343, 345 (1995). ORS 308.205 defines real market value as "the amount in cash that could reasonably be expected to be paid by an informed buyer to an informed seller, each acting without compulsion in an arm's length transaction occurring as of the assessment date for the tax year." ORS 308.205(1). The method for determining real market value is stated in the same statute:

> "(2) Real market value in all cases shall be determined by methods and procedures in accordance with rules adopted by the Department of Revenue and in accordance with the following:
>
> "(a) The amount a typical seller would accept or the amount a typical buyer would offer that could reasonably be expected by a seller of property.
>
> "(b) An amount in cash shall be considered the equivalent of a financing method that is typical for a property.
>
> "(c) If the 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.
>
> "(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."

ORS 308.205(2)

The Department of Revenue has adopted rules that amplify and interpret the above statute. *See* OAR 150-308.205-(A) - 150-308.205(3). If the property meets the definition of a

"contaminated property," its real market value must be evaluated under OAR 150-308.205-(E). That administrative rule provides, in relevant part, as follows:

> "(1) DEFINITIONS:
>
> "(a) 'Contaminated site' means real property that, **on the assessment date:**
>
> "(A) Is on the National Priority List of the Environmental Protection Agency;
>
> "(B) Is included by the Department of Environmental Quality in an inventory of confirmed releases pursuant to ORS 465.225;
>
> "(C) Is an illegal drug manufacturing site as defined in ORS 453.858; or
>
> "(D) **Is demonstrated as provided under Section (2) of this rule to have had a release of a hazardous substance as defined in ORS 465.200.**
>
> "(b) 'Contaminated site' does not include any permitted release or permitted facility approved by the Department of Environmental Quality for storage or disposal of a hazardous substance.
>
> "* * * * *
>
> "(2) DEMONSTRATING CONTAMINATION OF SITE:
>
> "A property is defined as a contaminated site under Section (1)(a)(D) above if it is shown that the property has had a release of a hazardous substance. This will be demonstrated through:
>
> "(a) the submission of reliable, objective information such as engineering studies, environmental audits, laboratory reports or historical records; or
>
> "(b) evidence that the release has been reported to the Department of Environmental Quality."

OAR 150-308.205-(E)(1), (2) (emphasis added). In the case at hand, the assessment date for the property was January 1, 2003. On that date, the property had not been reported to the Environmental Protection Agency or Oregon's DEQ, so it was not listed by either agency as a

priority, or in any inventory of confirmed releases.[6] The property was not listed by the DEQ as a facility approved for storage or disposal of a hazardous substance, nor was it an illegal drug manufacturing site. Therefore, to qualify as a contaminated property under the rule, the property must meet the requirements of both subsection (1)(a)(D) and section (2).

As OAR 150-308.205-(E)(1)(a)(D) has not been interpreted before, this is a case of first impression. Section (1) requires, in order for the property to qualify as contaminated, that it be demonstrated on the assessment date (present tense) to have had a release of a hazardous substance under ORS 465.200 (past tense), as well as meet the requirements of subsection (2). ORS 465.200 specifically includes oil in its definition of hazardous substances, and defines a "release" as "any spilling, leaking, * * * escaping, leaching, dumping or disposing into the environment including the abandonment or discarding of barrels, containers and other closed receptacles containing any hazardous substance, or threat thereof * * *." ORS 465.200(15), (21). The report provided by AES on July 31, 2003, demonstrates by a preponderance of the evidence that the property was contaminated prior to the assessment date. Thus, the property qualifies as to the contaminates upon it.

However, the phrase "on the assessment date" from section (1)(a) of the rule qualifies the verb "to demonstrate" in subsection (1)(a)(D). Section (2) of the rule explains what will suffice as a demonstration – either evidence that the release has been reported to the DEQ or admission

[6] Taxpayer submitted an 'Environmental Cleanup Site Information Site Summary Report' dated February 7, 1994. (*See* Ptf's Ex 6.) That report states that in 1992 the DEQ responded to a complaint regarding waste being disposed of onsite. The investigator noted "some stained soil" in a storage area, but concluded: "No further state action required." The court does not find that DEQ response to a complaint to be evidence of a release of a hazardous substance under OAR 150-308.205-(E)(2). Rather, it is evidence that a complaint regarding the property was once investigated and determined to be unfounded.

of "reliable, objective information" regarding the release – as of the assessment date. Included as examples of what would meet that requirement are environmental audits. Taxpayer has entered into the record two environmental assessments of the property, one prepared by Capitol Environmental Consulting in June 2001, the other prepared by AES on July 31, 2003. (*See* Ptf's Ex 1, 2.) The first report, dated prior to the assessment date of the tax year in question, "revealed no evidence of recognized environmental conditions." (Ptf's Ex 1 at 2.) The AES report, dated after the assessment date in question, detailed contamination that meets the definitions of ORS 465.200. (Ptf's Ex 2 at 2.) Thus, under the plain wording of the administrative rule, the property meets the definition of a contaminated site as stated in subsection (1)(a)(D), except that it does not meet the initial timing requirement stated in subsection (1)(a).

Taxpayer contends that case law supports it was not necessary that the contamination be substantiated by the assessment date in order for the property to qualify as a contaminated property. It cites *Wilcox, LLC v. Multnomah County Assessor*, OTC-MD No 990510C, WL 33225434 (Jan 12, 2000), in which this court held that facts that were readily discoverable as of the assessment date could be used in determining real market value. In *Wilcox*, the issue was the real market value of a residential property that sold at less than it would have had the existence of a conditional use permit been known. That court found that facts readily discernable by prudent market participants, although not known to them on the assessment date, could be used to determine a property's value. *Wilcox*, WL 33225434 at *4. It supported that conclusion with case law holding that recent sales are persuasive evidence of value, but not determinative indications of value. *Wilcox*, WL 33225434 at *3. That case differs from the case at hand in two

respects. First, the conditional use permit in question was a matter of public record, while the contamination of the property at hand was neither a matter of public record nor easily discernable, as is evidenced by the fact that the buried waste was undetected by the first environmental audit. Second, the *Wilcox* case interprets only ORS 308.205, while for the case at hand OAR 150-308.205-(E) specifically applies, in which substantiation of the contamination by the assessment date is expressly mandated.

Taxpayer further contends that it will lose the deduction for all work performed during 2003 if it cannot alter the property's real market value for tax year 2003-04 because, by 2004, the property would be cured and no longer contaminated. However, there is no language in the rule limiting a property owner's deductions for cost to cure to those incurred during the tax year.

VI. CONCLUSION

Plaintiff's appeal of Defendant's assessment of real market value is denied for the reasons stated above. The department's assessment of $300,000 for tax year 2003-04 is upheld. Now, therefore,

IT IS THE DECISION OF THIS COURT that Plaintiff's appeal is denied.

Dated this ____ day of October, 2004.

_____
SALLY L. KIMSEY
MAGISTRATE

IF YOU WANT TO APPEAL THIS DECISION, FILE A COMPLAINT IN THE REGULAR DIVISION OF THE OREGON TAX COURT, BY *MAILING* TO: 1163 STATE STREET, SALEM, OR 97301-2563; OR BY *HAND DELIVERY* TO: FOURTH FLOOR, 1241 STATE STREET, SALEM, OR. YOUR COMPLAINT MUST BE SUBMITTED WITHIN 60 DAYS AFTER THE DATE OF THE DECISION OR THIS DECISION BECOMES FINAL AND CANNOT BE CHANGED.

THIS DOCUMENT WAS SIGNED BY MAGISTRATE SALLY L. KIMSEY OCTOBER 29, 2004. THE COURT FILED THIS DOCUMENT OCTOBER 29, 2004. THIS DOCUMENT WAS ENTERED NOVEMBER 1, 2004.