

IN THE OREGON TAX COURT  
MAGISTRATE DIVISION  
Property Tax

1992 JONES FAMILY TRUST,	)	
ANGELINE R. JONES and R. L. JONES,	)	
	)	
Plaintiffs,	)	TC-MD 060472A
	)	
v.	)	
	)	
CLACKAMAS COUNTY ASSESSOR,	)	
	)	
Defendant.	)	<b>DECISION</b>

Plaintiffs appeal the tax year 2005-06 real market value (RMV) of an undeveloped lot identified in Defendant’s records as Account 00141395. The appeal originally included the three prior tax years, but those years were dismissed by court order filed July 13, 2006, because Plaintiffs did not meet the requirements of ORS 305.288 (2005).<sup>1</sup> That Order is incorporated into this Decision.

Trial for the 2005-06 tax year was held in the courtroom of the Oregon Tax Court on December 18, 2006. Plaintiffs were represented by J. B. Bishop (Bishop). Defendant was represented by Ron Saunders (Saunders).

The court granted Defendant’s motion, made prior to the commencement of trial, to exclude Plaintiffs’ exhibits because they were not exchanged within the timelines provided in TCR-MD 10C (providing that exhibits “must be either postmarked at least 14 days before the trial date or physically received at least 10 days before the trial date.”). Bishop delivered Plaintiffs’ exhibits to Defendant on Saturday, December 9, 2006; they were required to be physically received by Defendant on Friday, December 8, 2006. Plaintiff then objected to

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<sup>1</sup> All references to the Oregon Revised Statutes (ORS) are to 2003, unless otherwise noted.

Defendant's exhibits and Saunders withdrew Defendant's exhibits before the court ruled. Those exhibits will not be considered by the court in rendering its Decision.

## I. STATEMENT OF FACTS

The subject property is an irregularly shaped 9.32 acre undeveloped lot in the city of Damascus that has been owned by the Jones family since the mid-1970s. The subject property was part of a larger 18.64 acre parcel Plaintiffs bought in 1974. Shortly after that 1974 acquisition, Plaintiffs built a home on the parcel that was occupied by R. L. Jones' mother until about 1990, at which time she moved out of the home and into an assisted living center due to the onset of Alzheimer's disease. Shortly thereafter, in 1991, Plaintiffs partitioned the original 18.64 acre lot into three lots, leaving the home and 11.82 acres as one lot, and establishing two new lots on the east side of the property that were 3.31 acres (parcel 1, tax lot 102) and 3.51 acres (parcel 2, tax lot 104) in size. Plaintiffs sold the two smaller lots and retained the home on the 11.82 acres. The home was located on the northeast corner of the lot.

In 1993, Plaintiffs divided the 11.82 acre lot into two parcels. That division was contrary to a restriction in the approved partition prohibiting any further division of that lot. Plaintiffs sold the home and 2.5 acres around the house (the northeast corner of the 11.82 acre lot), identified as tax lot 105, and retained the remaining 9.32 acres, identified as tax lot 100. Tax lot 100 (the 9.32 acres) has never been developed and is the subject of the instant appeal. Tax lot 100 is essentially L-shaped, consisting of (approximately) a seven acre rectangle longer to the north and south than it is wide east-west (comprising the "leg" of the L), with a two-acre rectangle added to the bottom southeast portion of the property behind tax lot 105 (comprising the "foot").

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The parties agree that the subject property is not legally buildable (*i.e.*, cannot be developed by adding a home and driveway).<sup>2</sup> They also agree that there are wetlands on the roughly two-acre portion of the property that is level (the foot) and located behind tax lot 105. That section of the property is some distance from Borges Road and separated from the balance of the property by a creek. The seven or so remaining acres are wooded and steeply sloped, with a meandering creek running from the north to the south and a canyon on the north end of the property where the parcel abuts Borges Road. The creek runs through the canyon. In its present state, the subject property has no vehicular access from Borges Road. Borges Road is the only improved street abutting the property.

The RMV on the tax rolls for the subject property is \$102,414. The assessed value (AV) is \$96,944. Plaintiffs unsuccessfully appealed those values to the county board of property tax appeals (board). Plaintiffs timely appealed the board's order to this court. Plaintiffs request an RMV of \$75,000 to \$78,000.

## II. ANALYSIS

The issue is the RMV for the subject property as of January 1, 2005, which is the applicable assessment date for the tax year at issue. *See generally* ORS 308.007. RMV is defined by statute 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). Plaintiffs bear the burden of proof and must establish their case by a preponderance of the evidence. *See* ORS 305.427.

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<sup>2</sup> The parties used the term “legally unbuildable.”

Plaintiffs have not submitted any market evidence bearing directly on the likely selling price of the subject property. Plaintiffs have adequately demonstrated that there are significant hindrances to development, not the least of which is the fact that the property is not legally buildable. However, Saunders testified that William Niswander (Niswander), the owner of the adjacent property (tax lot 105), told him that he would pay \$100,000 for the subject property. Tax lot 105 is the 2.5 acre parcel with the house that Niswander purchased from Plaintiffs in 1993.

Bishop testified that Niswander has not formally offered to purchase the property. Moreover, Bishop testified that he is familiar with Niswander's financial situation and that Niswander is not in a position to pay \$100,000 for the property. Additionally, Bishop, who is an experienced real estate investor and developer, opined that a lender would not make a loan on the property because it is undeveloped and has significant development issues. Therefore, Bishop urged the court not to consider Niswander's opinion of value. The testimony is hearsay, but under ORS 305.501(4)(a), a Tax Court magistrate is not bound by the common law or statutory rules of evidence. However, given the rationale for the general prohibition against hearsay, the testimony, although not disregarded by the court, but will given less than full weight.

Bishop testified that he arrived at his estimate of value by applying Defendant's property trends to a 1996 stipulated value for the subject property of approximately \$22,000. Bishop feels that value is a fair starting point because the 1996 stipulated value purportedly took into account all the problems impacting the property (access, topography, water, etc.). No evidence was submitted to corroborate the 1996 stipulation or the details of that agreement. Nor was the trending information provided. Even if all of that information had been submitted into evidence, the court would place very little weight on the evidence because county trends are market

averages that may not be appropriate for a particular property. In other words, demand for the subject may have trailed or outpaced the general average, causing its value to change at a different rate. Moreover, the greater the number of years a trend is applied, the greater the likelihood of distortion.

On cross-examination, Bishop introduced a document pertaining to another property which Plaintiffs own nearby in Multnomah County. That property is roughly twice as large, with similar development issues. In about 2000, Metro<sup>3</sup> purportedly offered to buy it for \$7,800 per acre. That offer yields a value of \$72,696 for the subject property. The court gives that information very little weight for several reasons. First, it was only an offer and not a completed transaction because Plaintiffs rejected the offer. Second, the offer was made approximately five years prior to the applicable assessment date and Bishop acknowledges that values have risen since that time. Accordingly, whatever that information might suggest, the numbers are likely low. Third, the property is located in another county, and there is no reliable expert testimony or other evidence before the court as to the comparability of the values in the two locations. Fourth, Plaintiffs' rejection of the offer suggests that they believed that property was worth more than \$7,800 per acre at the time the offer was made. Of course, Plaintiffs may simply not have desired to sell at that time. Regardless, the court considers the offer an unreliable indicator of value.

A significant part of Plaintiffs' case concerns the lack of access. There was considerable testimony on that point. According to Bishop's testimony, which was not refuted by Saunders, there are several reasons why the property is unbuildable. First, tax lot 100 is not a legal lot of record due to the illegal division in 1993. According to Bishop, the county transportation (and/or

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<sup>3</sup> According to its website, "Metro is the directly elected regional government that serves more than 1.3 million residents in Clackamas, Multnomah and Washington counties, and the 25 cities in the Portland, Oregon, metropolitan area." <http://www.metro-region.org/sitemap.html>.

planning) department considers tax lots 100 and 105 to be one legal lot of record, and they only allow one legal access (driveway) per lot. Because tax lot 105 has access for the home Plaintiffs built in the mid-1970s, the county will not allow another access to tax lot 100. Second, only a small portion of the northeast corner of the property abuts a public roadway (Borges Road) and the transportation department has concluded that there would be insufficient sight lines from Borges Road if a driveway were allowed. Third, there is a canyon with a creek running through the northeast corner of the property where the parcel abuts Borges Road and the state will not allow a culvert to be installed to allow access from that road to the property. The court finds all of those considerations valid. However, Plaintiffs failed to demonstrate the financial impact those problems exert on the subject property. The same is true of the topography and water issues presented at trial. It may well be that the property is worth \$102,414 with those problems and worth considerably more in their absence.

A property owner seeking a reduction in value because of certain negative factors he or she believes would impact value must present sufficient evidence to allow the court to arrive at a proper value. Typically the owner would either: 1) demonstrate the market value of the property without the problems (*i.e.*, “but for” the problems, the property would be worth “x” amount), and the loss in value attributable to the problems (deducting the latter from the former); or 2) provide evidence of market transactions involving properties with similar constraints, where the selling price would have a built-in adjustment for the negative factors. Plaintiffs in this case have done neither.

Bishop argued in closing that the court’s booklet, “Presenting Tax Appeals to the Oregon Tax Court,” indicates on page 14 that an appraisal is not required in order to prove the value of property. The court agrees. However, as the statute requires, and the referenced booklet

explains, evidence of the property's market value must be presented. The booklet explains that the options include the presentation of sales of similar properties occurring near the applicable assessment date or the value opinion of an appraiser or real estate agent. Plaintiffs presented none of those options, but relied instead on a recitation of the numerous problems impacting the subject property and a mechanical trend of a nine-year-old stipulated value.

Saunders testified that, in his opinion, the highest and best use of the property is to be held for future development. Damascus was apparently only recently incorporated, and the city will be developing regulations governing future development. Saunders testified that he spoke with two realtors familiar with property values in the city of Damascus and was told that buyers are making speculative purchases at \$200,000 per acre. Bishop brought out on cross-examination that the zoning of the properties referred to by the realtors may be different than the subject's zoning. That is a valid consideration, and the lack of any reference to specific sales is not lost on the court. Moreover, the evidence is hearsay. Nonetheless, the evidence does make an impression, particularly when coupled with Saunders' sworn testimony that Niswander is willing to buy the subject property for \$100,000. In contrast, Plaintiffs have no relevant market evidence.

### III. CONCLUSION

After considering the evidence in light of applicable law, the court concludes that Plaintiffs have failed to demonstrate an error in the RMV of the subject property for the 2005-06 tax year by a preponderance of the evidence. In fact, the court really has no idea whether the RMV on the rolls is above or below actual market value. Now, therefore,

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IT IS THE DECISION OF THIS COURT that Plaintiffs' request for a reduction in the RMV of the subject property, identified in Defendant's records for tax year 2005-06 as Account 00141395, is denied.

Dated this \_\_\_\_\_ day of January 2007

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DAN ROBINSON  
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 Dan Robinson on January 10, 2007. The Court filed and entered this document on January 10, 2007.***