

IN THE OREGON TAX COURT
MAGISTRATE DIVISION
Property Tax

FOUNTAIN PLAZA LLC,)	
)	
Plaintiff,)	TC-MD 060724C
)	
v.)	
)	
JACKSON COUNTY ASSESSOR,)	
)	
Defendant.)	DECISION ON CROSS
)	MOTIONS FOR PARTIAL
)	SUMMARY JUDGMENT

This matter is before the court on cross-motions for partial summary judgment.¹ Oral argument was held in the courtroom of the Oregon Tax Court in Salem, following two rounds of briefing by the parties. Plaintiff was represented by Christopher Robinson, Attorney at Law. Defendant was represented by David Arrasmith, Deputy Assessor, Jackson County Assessor’s office.

I. STATEMENT OF FACTS

The subject property is a 132 unit apartment complex for the elderly located in Medford, Oregon. A regulatory agreement with the Housing Authority requires that 20 percent of the units be set aside for low and moderate income tenants. The Department of Human Services (DHS) issued a Residential Care Facility License for the subject property on June 1, 1991, with renewals of that license through the present. Eighteen beds currently are licensed as residential care.

Plaintiff applied for special assessment for the 2006-07 tax year under the provisions of ORS 308.701 to 308.724. Defendant denied Plaintiff’s application by letter dated July 20, 2006, because the subject property was deemed to be an “assisted living” facility precluded from special

¹ Although the parties filed motions for partial summary judgment, the court’s decision fully resolves the appeal, and a Decision, rather than an Order, is being issued.

assessment under ORS 308.701. Plaintiff appealed that denial and the parties now seek a determination from the court as to whether the subject property qualifies for special assessment under the applicable statute.

II. ANALYSIS

ORS 308.701² through ORS 308.724 provides for special assessment for certain multiunit rental housing properties operating under qualifying low income housing programs that impose government restrictions on use, provided the owner files the necessary application. “Multiunit rental housing” is defined in the statute as:

“(a) * * * residential property consisting of four or more dwelling units;
and

“(b) Does not include assisted living facilities.”

ORS 308.701(2).

Thus, a low income housing project with at least four dwelling units, that is subject to certain government restrictions on use, may be specially assessed, unless the property is an “assisted living facility.” ORS 308.701(2)(b).

The statute does not define the term “assisted living facilities.” Pursuant to the authority granted by ORS 308.724 (authorizing the department to “prescribe any other rules necessary to administer the provisions of ORS 308.701 to 308.724”), the Department of Revenue (department) promulgated an administrative rule intended to define that term. The rule provides:

“The property must not be an assisted living facility. An assisted living facility is a *physical structure in which a program of ‘assisted living’ as defined in OAR 411-056-0005(6) takes place.*”

OAR 150-308.704(2)(e) (emphasis added).

///

² All references to the Oregon Revised Statutes (ORS) are to 2005.

OAR 411-056-0005(6) does not define “assisted living” or “program of assisted living.” Subsection (5) of that rule comes close; it defines “assisted living facility.” Because the special assessment statute here at issue precludes “assisted living facilities” from receiving special assessment, the court assumes that the department intended the underlying definition of assisted living facility found in OAR 411-056-0005(5) to apply to the statute.

OAR 411-056-0005(5) defines “assisted living facility” as:

“* * * a building, complex or distinct part thereof, consisting of fully self-contained individual living units where six or more seniors and persons with disabilities may reside. The facility offers and coordinates a range of supportive services available on a 24-hour basis to meet the activities of daily living, health, and social needs of the residents as described in these rules. A program approach is used to promote resident self-direction and participation in decisions that emphasize choice, dignity, privacy, individuality, independence, and home-like surroundings.”

Plaintiff argues that the subject property qualifies for special assessment because it “is undisputedly a licensed residential care facility [and] does not hold a license to operate as an assisted living facility.” (Ptf’s Cross-Mot for Partial Summ J at 5.) Plaintiff insists that the two are “distinctly different and mutually exclusive entities under Oregon law[,]” and that only assisted living facilities are precluded from receiving special assessment. (*Id.*)

Defendant, of course, disagrees. Defendant argues that the administrative rule promulgated under the special assessment statute takes a programmatic approach, precluding special assessment for any “physical structure in which a program of ‘assisted living’ as defined in OAR 411-056-00[0]5(6) takes place.” (Def’s Mot for Partial Summ J and Opening Br at 3.) Defendant acknowledges that there are separate licensing requirements for the two types of facilities, but notes that “there are more similarities than differences between the two programs,” and contends that the primary distinctions concern “physical structure and design.” (*Id.* at 2.)

///

Defendant insists that “Fountain Plaza is a structure in which a program of ‘assisted living’ takes place and therefore the application must be denied.” (*Id.* at 3.)

The case comes down to the question of whether the term “assisted living facilities” in the statute refers to a specific type of facility based on licensing, *i.e.*, assisted living facility versus residential care facility, as Plaintiff contends, or whether it refers to any facility in which a program of “assisted living” takes place, as Defendant contends. Put another way, the question is whether only licensed assisted living facilities are precluded from special assessment, or whether the exclusion encompasses all facilities in which assisted living programs take place. The statute leaves the question open, but the department’s rule (OAR 150-308.704(2)(e)) tends to support the latter construction, thus favoring Defendant’s position.

Plaintiff’s case hinges on the fact that the statute only precludes assisted living facilities from receiving special assessment, that the subject property is a licensed residential care facility and not a licensed assisted living facility, and that the two entities are not interchangeable.

(Ptf’s Cross-Mot for Partial Summ J at 3, 4; Ptf’s Reply to Def’s Mot for Partial Summ J at 1, 2.)

In interpreting a statute, the court is guided by the methodology of statutory construction set forth in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-611, 859 P2d 1143 (1993). Under the first level of analysis, the court must start with the text of the statute itself, and must not insert what has been omitted. *Id.* The court, therefore, cannot insert the word “licensed” before the term “assisted living facilities” found in ORS 308.701(2)(b) (*i.e.*, the statute is not written as: “[d]oes not include *licensed* assisted living facilities”). Because the statute is not expressly limited to “licensed” assisted-living facilities, the court cannot, at the first level of analysis, rule that the preclusion from special assessment is so narrowly tailored. Thus, Plaintiff’s arguments accentuating the licensing distinctions between residential care and

assisted living facilities are without merit. (Ptf's Cross-Mot for Partial Summ J at 3-5.)

Accordingly, while OAR 411-056-0008 requires an entity to have a license to operate an assisted living facility, and precludes an entity from even using the term "assisted living facility," or holding oneself out as such, without obtaining an assisted living facility license, the legislature did not limit the exception from the special assessment provisions found in ORS 308.701(2)(b) to "licensed" assisted living facilities. Those observations about the statute, however, do not resolve the question before the court.

The statute is somewhat ambiguous and, at the second level of analysis, the court is permitted to consider legislative history. *PGE*, 317 Or at 611-12. However, no such history was provided by the parties and the court found none of relevance. There is, of course, the department's rule, set forth above. And, a duly established and promulgated rule has the force and effect of law. *Dayton v. Dept. of Rev.*, 5 OTR 56, 65 (1972), citing *Arnold v. Gardiner Hill Timber Co.*, 199 Or 517, 523, 263 P2d 403 (1953). Unfortunately, the rule is somewhat problematic.

The problem with the department's rule is that it purports to incorporate, by reference, a definition for "program of 'assisted living' " that does not appear in the referenced DHS rule, and the definition that *does* appear (although in a different subsection than the one referenced in the department's rule), defines a slightly different term. As indicated above, the department's rule declares that the DHS rule, OAR 411-056-0005, will define the term "assisted living," and the rule in fact does not define that term. The rule does define "assisted living facility," but the definition speaks in terms of building design (self-contained living units), the number and type of persons served (six or more seniors and persons with disabilities), and the services provided

///

(a range of supportive services on a 24-hour basis, employing a program approach.) That is certainly not a bright line test.

Moreover, the definition of “assisted living facility” found in OAR 411-056-0005(6) is very similar to the definition of “residential care facility” found in OAR 411-055-0000(33).³ For example, both serve six or more seniors and persons with disabilities (residential care facilities serve “adult” persons with disabilities) in “home-like” surroundings, “offer[] and coordinate[] a range of supportive services available on a 24-hour basis,” address or meet the resident’s “activities of daily living, health, and social needs,” and operate in a way that promotes or emphasizes choice, dignity, individuality, and independence. OAR 411-055-0000(33) and OAR 411-056-0005(6). The only obvious distinction between the two definitions is that an assisted living facility provides “fully self-contained individual living units,” whereas a residential care facility can provide “shared or individual living units.” *Id.*

Defendant’s Exhibit B is a DHS publication titled “Oregon Consumer Guide [for] Assisted Living and Residential Care Facilities.”⁴ As Defendant notes in its Motion for Partial Summary Judgment, that guide indicates that “[w]hile there are separate licensing categories for the two types of settings, there are more similarities than differences between the two programs.” (Def’s Mot at 2; Def’s Ex B-4.) That guide further states that “the difference is in the physical structure and design.” (Def’s Ex B-4.) A table depicting the basic differences in physical structure reveals

³ OAR 411-055-0000 (33) provides:

“ ‘Residential Care Facility (RCF)’ means a building, complex or distinct part thereof, consisting of shared or individual living units in a home-like surrounding where six or more seniors and adult persons with disabilities may reside. The facility offers and coordinates a range of supportive services available on a 24-hour basis. Facility services address the residents’ activities of daily living, health, and social needs in a way that promotes choice, dignity, individuality and independence.”

⁴ DHS oversees the operation and licensing of assisted living and residential care facilities.

that “assisted living” must have private units with at least 220 square feet of living area, a kitchenette, with sink, refrigerator and cooking appliance, and a wheelchair-accessible bathroom with shower in each unit, whereas “residential care” can have shared or private rooms, and individual or common bathrooms. (*Id.*)

According to information from Plaintiff’s web site, submitted into evidence as Defendant’s Exhibit A, Fountain Plaza provides private apartments with kitchenettes equipped with a microwave, refrigerator, stove top, and cabinets (and presumably a sink), and easy access showers. (Def’s Ex A-2.) Residents in the licensed residential care units “receive a variety of services including medication management, personal laundry and assistance with daily living tasks.” (Def’s Ex A-5.) According to that information, staff are on duty 24 hours per day and there are three levels of care available. (*Id.*) Moreover, services are available to respond to a change in a resident’s needs. (Def’s Ex A-4.)

It appears to the court to the services provided by Fountain Plaza meet the definition of assisted living facility found in the DHS rule, OAR 411-056-0005(6).

Plaintiff insists there is a difference in emphasis between assisted living facilities and residential care facilities, the former using a program approach to meet certain needs of the resident, and where the resident “can self-direct and participate in the program in order to meet their needs; whereas a residential care facility merely offers services that might address those same needs without necessarily providing a mechanism to involve the residents.” (Ptf’s Cross-Mot for Partial Summ J at 3.) The court finds that distinction to be of no consequence for purposes of administering the statute. It does, however, highlight the problem that has resulted from the definition of “assisted living facilities” adopted by the department for the special assessment program.

The court finds it somewhat difficult to believe that the legislature actually intended the various county assessors to evaluate the numerous facilities applying for special assessment under ORS 308.701 to 308.724, to determine whether they meet the physical and programmatic description of an assisted living facility found in the DHS rule, given that their expertise is in the area of property valuation, assessment, and taxation. However, that is precisely what is required by the department's rule incorporating the DHS rule to interpret the special assessment statute.

III. CONCLUSION

The court concludes that the subject property does not qualify for special assessment under ORS 308.701 to ORS 308.724 because it is an assisted living facility as that term is defined in the applicable administrative rules and, under ORS 308.701(2)(b), is precluded from receiving special assessment. Now, therefore,

IT IS THE DECISION OF THIS COURT that Plaintiff's Cross Motion for Partial Summary Judgment is denied and that Defendant's Motion for Partial Summary Judgment is granted; and

IT IS FURTHER DECIDED that Plaintiff's appeal is denied and Defendant's determination to deny Plaintiff's application for special assessment stands.

Dated this _____ day of October 2007.

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 October 25, 2007.
The Court filed and entered this document on October 25, 2007.*