IN THE MAGISTRATE DIVISION

OF THE OREGON TAX COURT

Property Tax

GUARDIAN MANAGEMENT CORPORATION, and WASHINGTON PLAZA OREGON LIMITED, Plaintiffs, v. MULTNOMAH COUNTY ASSESSOR, and DEPARTMENT OF REVENUE, STATE OF OREGON, Defendants.	)	No. 982683E (Control)
GUARDIAN MANAGEMENT CORPORATION, and SAMBELT DEVELOPMENT AND INVESTMENT CORPORATION, Plaintiffs, v. MULTNOMAH COUNTY ASSESSOR, and DEPARTMENT OF REVENUE, STATE OF OREGON, Defendants.	)	No. 982684E
GUARDIAN MANAGEMENT CORPORATION, and BETA INVESTMENT AND DEVELOPMENT CORPORATION, Plaintiffs, v. MULTNOMAH COUNTY ASSESSOR, and DEPARTMENT OF REVENUE, STATE OF OREGON, Defendants.	)	No. 982685E
TWELVE HUNDRED BUILDING LIMITED, Plaintiff, v.	)	No. 982686B

MULTNOMAH COUNTY ASSESSOR, and DEPARTMENT OF REVENUE, STATE OF OREGON,

Defendants.

JUNCTION CITY RESIDENTIAL CENTER - TWO LIMITED PARTNERSHIP,

Plaintiff,

v. No. 982688B

LANE COUNTY ASSESSOR, and DEPARTMENT OF REVENUE, STATE OF OREGON,

Defendants.

ROSE HOUSING INC, DALE C. DE HARPPORT, and RONALD D. TRAVER,

Plaintiffs,

v. No. 982689D

MULTNOMAH COUNTY ASSESSOR, and DEPARTMENT OF REVENUE, STATE OF OREGON,

Defendants.

DECISION

Plaintiffs appeal from the Department of Revenue's Opinion and Orders where it refused to exercise its supervisory authority. The properties, the county where located, assessor's Account Numbers and tax years appealed are as follows:

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Case Number	County	Account Number	Tax Years
982683E	Multnomah	R667728290	1994-95 1995-96 1996-97

982684E	Multnomah	R146806300	1994-95 1995-96 1996-97
982685E	Multnomah	R009601400	1994-95 1995-96
982686B	Multnomah	R667729170	1994-95 1995-96
982688B	Lane	16442	1994-95 1995-96
982689D	Multnomah	R505501630	1994-95 1995-96

A trial, on the limited issue of whether the Department of Revenue abused its discretion in refusing to exercise its supervisory authority, was held on March 15, 2000. W. Scott Phinney and Christopher Robinson represented plaintiffs. Marilyn J. Harbur represented defendant Department of Revenue (department). Frank Kaminski appeared for defendant Multnomah County. Lane County chose not to appear.

STATEMENT OF FACTS

The six properties involved are low income housing. Two of the properties are operated pursuant to regulatory agreements with the Oregon Housing Division. The four remaining properties are operated pursuant to regulatory agreements with the United States Department of Housing and Urban Development (HUD) under section 221(d)(3) of the National Housing Act.

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None of the plaintiffs appealed the real market values of their property for the years in question to their county's Board of Equalization. Instead their first appeals were to the department. Plaintiffs asked the department to use its supervisory authority, found in

ORS 306.115, to correct the rolls for the years in question. The department held hearings in May 1998 to determine if "the department ha[d] authority to review the appeal[s] pursuant to its supervisory power granted in ORS 306.115." (Ptfs' Ex 3 at 2.)[1] At each hearing, plaintiffs were represented by Mr. Phinney. In the cases where Multnomah County was the defendant, Frank Kaminski, Appraisal Supervisor, and Osei Banahene, Appraiser, appeared for the county. In the case where Lane County was the defendant, it chose not to appear. In each of the six cases, the department determined that it did "not have statutory authority to review petitioner's appeal for * * * the years at issue." (*Id.* at 4.) More specifically, the department found that the properties at issue had significant differences from other low income housing where the department **had** taken jurisdiction. Further, it found that there was no agreement as to facts that indicated a likely error on the roll. These appeals followed.

Typically, in hearing a case where the issue is whether the department abused its discretion in refusing to hear plaintiffs' appeals, the court will rely on the record created before the department. In these cases, however, the records were destroyed. The parties presented evidence at trial of the content of the hearings before the department.

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Plaintiffs presented evidence that they claim shows that the department abused its discretion in refusing to hear plaintiffs' appeals. Plaintiffs argue that low income housing cases were "of interest to the department" and were moved directly to the merits in other supervisory appeals. Plaintiffs introduced into evidence two instances where the

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[1] Each Opinion and Order has nearly identical language. Unless there are substantive differences, the court will cite to one Opinion and Order as a proxy for all six.

department moved a low income housing supervisory appeal to the merits where the low income housing was operated pursuant to regulatory agreements with HUD under section 221(d)(3) of the National Housing Act.

Greenwood Housing, Ltd. (Greenwood) is a low income housing property operated under section 221(d)(3) of the National Housing Act. (Ptfs' Ex 43.) After a timely appeal to the department for tax year 1994-95, it appealed for tax year 1993-94. The department granted a merits hearing. (Ptfs' Ex 42.) Opinion and Order No. 96-3463 stated that:

> "Petitioner's retroactive appeal, dated June 28, 1996, was **administratively advanced to merits consideration by the department on the basis that the subject property shares in common the government restrictions as to use characterized by the Oregon Supreme Court in Bayridge** Assoc. Ltd. Partnership v. Dept. of Rev., and by Oregon Tax Court in Douglas County Assessor v. Dept. of Rev., and DBSI-TRI IV dba Forest Village Apartments (Intervenor), OTC No. 3803, issued February 16, 1996."

(Ptfs' Ex 44 at 1) (citation omitted) (emphasis added).

The Opinion and Order goes on to state that "[i]n the department's opinion the facts in evidence strongly suggested that the county likely failed to take account of these restrictions in its assessment of the subject property for the 1993-94 tax year." (*Id.*) However, by the Opinion and Order's language quoted above, that was not the basis for advancing the appeal for merits consideration.[2] The *Bayridge* decision mentioned above was a case that involved low income housing that was regulated by IRC § 42. *Bayridge Assoc. Ltd. Partnership v. Dept. of Rev.*, 321 Or 21, 24, 892 P2d 1002 (1995).

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[2] The language "strongly suggested" confirms that the department did not advance the case to the merits based on an agreement as to facts that indicate a likely error. *See* OAR 150-306.115(3)(b)(A)(ii). "Strongly suggested" is not an agreement between the parties.

The appeal of Ochoco Manor Oregon Ltd (Ochoco Manor) is the second example where the department moved a low income housing supervisory appeal to the merits where the low income housing was operated pursuant to a regulatory agreement with HUD under section 221(d)(3) of the National Housing Act. Ochoco Manor is also a low income housing property operated under section 221(d)(3) of the National Housing Act. (Ptfs' Ex 32.) On April 5, 1996, the department sent Ochoco Manor a request for information. In that request, the department asked for "*written evidence as to the specific portion of federal code under which the subject property qualifies for consideration as a government-restricted property.*" (Ptfs' Ex 31 (emphasis in original).) Later in the request the department stated that, "**[b]ased on a review of these materials**, the department will make a decision on how to proceed with your appeal. If no information is submitted, or the information is inconclusive, a supervisory hearing will be scheduled in regular course after the thirty day period has expired." (*Id.* (emphasis added).) After receiving Ochoco Manor's regulatory agreement and its housing assistance payment contract, the department scheduled a hearing on the merits. (*See* Ptfs' Exs 32, 33 and 34.)

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Plaintiffs presented evidence that in at least one instance the department granted a merits hearing in a low income housing property operated pursuant to a regulatory agreement with the Oregon Housing Division. Parkside Village Oregon Ltd. (Parkside), while operated pursuant to a regulatory agreement with the Oregon Housing Division, also receives "the benefit of Housing Assistance Payments under Section 8 of the U.S. Housing Act of 1937[.]" (Ptfs' Ex 19 at 1.) Plaintiff Twelve Hundred Building Limited (1200 Building) also receives "the benefit of Housing Assistance Payments under Section 8 of the U.S. Housing Act of 1937[.]" (Ptfs' Ex 10 at 1.) Indeed, the regulatory

agreements for the 1200 Building and Parkside appear to be identical. Additionally, both the 1200 Building and Parkside appear to have contract rents that are higher than market rents.[3] In contrast, the regulatory agreement for plaintiff Junction City Residential Center (Junction City), the other plaintiff operated pursuant to a regulatory agreement with the Oregon Housing Division, has some obvious differences. (*See* Ptfs' Exs 49 at 9 and 22 at 4.)

Parkside timely appealed the decision of Douglas County's Board of Equalization to the department. When Douglas County asked the department to increase Parkside's assessed value Parkside withdrew its appeal. Douglas County then filed a supervisory appeal to the department claiming that the legal issue was "of interest to the department" and that the parties agreed as to facts that indicated a likely error on the roll. (Ptfs' Ex 22.) In Opinion and Order No 96-3667, dated May 13, 1997, the department stated that "[t]he county has failed to satisfy either of the supervisory standards it outlined in its petition to the department." (Ptfs' Ex 25A at 10.) Douglas County asked the department to rescind its order, citing, among other things, a letter dated January 14, 1997, from James Wallace of the Department of Justice, to Lou Ellen Pearson of the Appeals Section of the department. In that letter, Mr. Wallace wrote that:

> "However, on January 7 attorneys in this office met with you and some hearings officers, including the hearings officer in this petition, to discuss the assessment of low-income housing: **an issue of apparent, considerable interest to the department**.
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> "* * * * *
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> "* * * [Y]ou informed me that you were receiving numerous appeals concerning the assessments of low-income housing apartments which were requesting supervisory review as a

[3] There is no evidence what material, if any, Crook County submitted.

> result of the decision in *Bayridge*. You also stated the department changed its policy and **was considering the merits of these appeals**, even though they involved federal programs other than I.R.C. §42."

(Ptfs' Ex 25C at 2 (citation omitted) (emphasis added).)

The letter closed with a recommendation "that the department assume supervisory review of the merits of this petition." (*Id.* at 3.) In Rescind Order No. 96-3667(R) the department rescinded Opinion and Order No. 96-3667 stating that "the issues of the proper valuation method for low income housing brought forward in this appeal is **'of interest to the department'**. Allowing the parties to move forward to a merits hearing will further the department's interest in assuring all low income housing projects are valued using consistent appraisal methodology." (Ptfs' Ex 26 at 2 (emphasis added).)

Plaintiffs also argue that the parties agreed to facts that indicated a likely error on the roll. Last, plaintiffs argue that the hearings officer created a hostile environment which limited the ability of plaintiffs to adequately present their cases before the department.

The department presented its evidence through the testimony of several witnesses including Lou Ellen Pearson, Rick Schack, Ed Gerhardus and Frank Kaminski. Ms. Pearson testified that from 1991 to 1998 she was a supervisor in the Appeals Section for the department. She testified that after *Bayridge* was decided by the Oregon Tax Court she formed a team of three hearings officers to decide all low income housing cases. The team and Ms. Pearson decided that certain supervisory appeals involving low income housing were "of interest to the department" and would be advanced directly to a hearing on the merits. The types of low income housing properties that were "of interest to the department" involved interest subsidies or tax credits or were operated pursuant regulatory

agreements under §§ 236 or 515 or IRC § 42. She testified that in other low income housing cases the department received information from the county that it had not taken the low income status of the property into account when valuing the property. The department would also move those cases directly to a merits hearing. She acknowledged under cross-examination that the policy was not written because "[w]e didn't feel it was necessary." (Tr at 100.)

COURT'S ANALYSIS

The department is charged with "exercis[ing] general supervision and control over the system of property taxation throughout the state." ORS 306.115(1). As a part of that responsibility it:

> "may order a change or correction applicable to a separate assessment of property to the assessment or tax roll for the current tax year and for either of the two tax years immediately preceding the current tax year if for the year to which the change or correction is applicable the department discovers reason to correct the roll which, in its discretion, it deems necessary to conform the roll to applicable law without regard to any failure to exercise a right of appeal."

ORS 306.115(3).

ORS 306.115 is intended to be an extraordinary remedy. OAR 150-306.115(2).[4] The rule states that:

> "(A) The substantive issue in a petition will be considered under ORS 306.115(3) when:
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> "(i) There is an extraordinary circumstance concerning the assessment and taxation of the subject property. Extraordinary circumstances under this provision are:
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> "* * * * *

[4] All cites to OAR 150-306.115 are to the 1997 version unless otherwise noted. OAR 150-306.115 (1999) specifically states that it only applies to petitions filed after August 31, 1997.

> "(IV) Instances in which a question of fact exists which is of interest to the department, does not fall within any other provision of ORS 306.115 or this rule and does not involve an error in valuation judgment.
>
> "(ii) The parties to the petition agree to facts which indicate it is likely that an error exists on the roll."

OAR 150-306.115(3)(b)(A).

As this court stated in *Resolution Trust Corp. v. Dept of Rev.*, 13 OTR 276, 278 (1995), once an administrative rule is adopted the department "cannot act contrary to its rule." Furthermore, "in applying the rule and determining what cases come within it, defendant exercises its discretion. The court's ability to review defendant's decision or determination is limited to determining whether the agency acted 'capriciously or arrived at a conclusion which was clearly wrong.'" *Id.* at 278-9 (citing *Martin Bros. v. Tax Commission*, 252 Or 331, 449 P2d 430 (1969).

As an preliminary matter, the court finds that written documents issued by the department are more persuasive than testimony of department employees when the documents and testimony conflict.

Case Nos. 982683E, 982684E, 982685E and 982689D

The court finds that the department's actions in Greenwood and Ochoco Manor demonstrate that low income housing properties operated pursuant to regulatory agreements with HUD under section 221(d)(3) of the National Housing Act were "of interest to the department" within the meaning of OAR 150-306.115(3)(b)(A)(i)(IV). The low income housing properties in Case Nos. 982683E, 982684E, 982685E and 982689D are also operated pursuant to regulatory agreements with HUD under section 221(d)(3) of the National Housing Act. The department argued that Greenwood was advanced to the merits because the county had not taken the government restrictions into account in valuing

the property. While Deschutes County may not have taken the government restrictions into account in valuing the property, the explicit language of the Opinion and Order contradicts the department's assertion. In acting contrary to its rule, the department abused its discretion.

Case No. 982686B

The court also finds that the department's actions in Parkside demonstrate that low income housing properties operated pursuant to a regulatory agreement with the Oregon Housing Division that receive "the benefit of Housing Assistance Payments under Section 8 of the U.S. Housing Act of 1937" were "of interest to the department" within the meaning of OAR 150-306.115(3)(b)(A)(i)(IV). Again, in acting contrary to its rule, the department abused its discretion. As noted above, Parkside and the 1200 Building share many attributes including nearly identical regulatory agreements and contract rents that are higher than market rents.

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Case No. 982688B

The department destroyed the records from the supervisory hearing. While the court has closely examined the evidence before it, it can not discern which standard the department applied in denying plaintiff's appeal. Accordingly, the court is remanding this case to the department to reconsider plaintiff's appeal consistent with this decision.

CONCLUSION

In Case Nos. 982683E, 982684E, 982685E, 982686B and 982689D the court finds that the department acted contrary to its rule, thereby abusing its discretion. In Case No. 982688B the court finds that it should be remanded to the department for consideration consistent with this decision. Because the court finds that the department

abused its discretion relating to the "of interest to the department" standard of OAR 150-306.115(3)(b)(A)(i)(IV), the court need not decide the other grounds of plaintiffs' appeals.

IT IS THE DECISION OF THE COURT that Case Nos. 982683E, 982684E, 982685E, 982686B and 982689D are remanded to the department for hearings on the merits.

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IT IS THE FURTHER DECISION OF THE COURT that Case No. 982688B shall be remanded to the department for reconsideration consistent with this decision.

Dated this _____ day of July, 2000.

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SALLY L. KIMSEY
MAGISTRATE

IF YOU WANT TO APPEAL THIS DECISION, FILE A COMPLAINT IN THE REGULAR DIVISION OF THE OREGON TAX COURT, FOURTH FLOOR, 1241 STATE ST., SALEM, OR 97310. 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 ON JULY 19, 2000. THE COURT FILED THIS DOCUMENT ON JULY 19, 2000.