

**THIS DECISION WAS SIGNED BY SENIOR JUDGE CARL N. BYERS ON JULY 11, 2001, AND FILED STAMPED ON JULY 12, 2001. THIS IS A NONPUBLISHED DECISION.**

IN THE OREGON TAX COURT  
REGULAR DIVISION  
Property Tax

RITA H. SCHAEFER and )  
KURT E. FREITAG, husband and wife, )  
dba QUATTUORCETI BEACH HOUSE, )  
and SANDY BOTTOMS PARTNERS, )  
 ) **Case No. 4530**  
Plaintiffs, )  
 ) **OPINION**  
v. )  
 )  
DEPARTMENT OF REVENUE, )  
State of Oregon, )  
 )  
Defendant, )  
 )  
and )  
 )  
LINCOLN COUNTY ASSESSOR, )  
 )  
Intervenor-Defendant. )

Plaintiffs (taxpayers) appeal from a magistrate Decision determining the 1999-2000 assessed value of both personal and real property located in Lincoln County. Taxpayers claim that a portion of the personal property is not taxable. They also assert that the assessed value of three lots should be reduced: one due to water runoff, the other two due to a Covenant of Release required by the county. The Lincoln County Assessor (the county) intervened and defended at trial.

Kurt Freitag (Freitag) appeared at trial and testified on behalf of taxpayers.

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### **FACTS**

The undisputed facts are that the subject properties are three ocean-front homes and furnishings used for vacation rentals. Freitag and his wife have owned the property located at 6855 Gladys Avenue (the Gladys property) since 1994. In 1997, Freitag and his wife purchased an unimproved ocean-front parcel of .85 acres, partitioned it, and constructed the two homes now at 8615 and 8625 North Coast Highway. As a condition to issuing building permits, the county required Freitag and his wife to execute a Covenant of Release. The houses sit on a cliff overlooking the ocean, and the county was concerned about potential liability claims if the earth were to subside, crack, or slide.

Some of the facts are disputed. Freitag testified that the two North Coast Highway houses are owned and operated by a partnership composed of Freitag and his wife and another couple named Spencer and McKirchy. Freitag introduced into evidence a copy of a partnership agreement indicating that he and his wife own 92 percent of the partnership and Spencer/McKirchy own 8 percent. Freitag and the assessor

agree there is only \$20,000 worth of personal property in the three houses. Freitag asserts that \$4,200 worth of property in the Gladys property is not owned

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by the partnership and therefore is not taxable.<sup>1</sup> Freitag argues that the assessor incorrectly combined all of the personal property in order to exceed the \$10,000 threshold and impose a tax on all the personal property.

Freitag also testified as to the value of the three parcels of land. He indicated that he has no quarrel with the value assigned to the improvements. However, he believes the value of the Gladys lot has been diminished. Beginning in 1996, an uphill property has been diverting water onto the Gladys property. The runoff from the uphill property has created a gully 30 yards across, which renders one half the land area unusable. In his opinion, the land value of the Gladys property should not be more than \$100,000.

Freitag testified that the land value on the two Coast Highway lots should be reduced due to the Covenant of Release.

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<sup>1</sup> ORS 308.250 cancels assessments for personal property of \$10,000 or less.

All references to the Oregon Revised Statutes are to 1997.

He reasons that if the county required a covenant of release it must be worth something. If it is worth something, it must have a negative effect on the value of the land. Freitag believes that the negative impact on the value of the land is equal to the amount of protection afforded the county. After contacting three insurance companies and the Federal Emergency Management

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Agency, he estimated that the value to the county is approximately \$5,000 per year. He admitted that \$5,000 per year at 8 percent into perpetuity makes the property almost valueless.

The county submitted minimal evidence. A county appraiser testified that he had checked the records and it is the practice of the assessor to combine all of the personal property of a single taxpayer for taxation. He also indicated that the Covenant of Release has no effect on land value because building a house on a cliff overlooking the ocean has an obvious risk. However, he was not aware of any sales of properties subject to a similar covenant.

#### **ANALYSIS**

As the appealing party, taxpayers have the burden of proof. ORS 305.427. That means that taxpayers must establish

their claims by a preponderance of the evidence, or the more convincing or greater weight of evidence. Feves v. Dept. of Revenue, 4 OTR 302 (1971).

ORS 308.250(2) provides:

"If the total assessed value of all taxable personal property required to be reported under ORS 308.290 in any county of any taxpayer is less than \$10,000 in any assessment year, the county assessor shall cancel the ad valorem tax assessment for that year."

Freitag argued that it is improper to combine the value of the personal property in the Gladys property with the personal property in the North Coast Highway properties because he and his wife own the Gladys property separate from the partnership that owns the North Coast Highway properties. To prove separate ownership, he introduced a copy of the partnership agreement. However, the partnership agreement does not describe or identify any property. The North Coast Highway properties are in the names of Freitag and his wife and not in the name of the partnership.

In order to support his statements, Freitag needed to introduce evidence that the partnership owned the personal property in the North Coast Highway properties. That evidence could take many forms. For example, ORS 308.290 requires taxpayers to file an annual personal property tax return. A copy of that return would state the name of the owner or party

in possession of the personal property reported. Similarly, other documents could show ownership such as an income tax return depreciation schedule, a listing for fire and casualty insurance, or even rental agreements or contracts. No evidence of any kind was submitted other than Freitag's statement. Where the property is solely in the name of Freitag and his wife, he has not established that for purposes of ORS 308.250(2), the property is not taxable to him.

#### **Gladys Avenue Property**

Taxpayers accept the assessor's value of the improvements (\$105,860). However, Freitag testified that the land value declined to \$100,000 because of water damage. Although Freitag gave a brief description of the topography, he had no before or after pictures, diagrams, or measurements. He introduced no evidence of contractor's estimates of the cost to correct the situation. Also, he provided no estimates of real estate brokers or appraisers as to the value of the land. While Freitag expressed his personal opinion, he offered no supporting rationale for his conclusion. He believes the property was reduced in value to \$100,000 but it could just as well be \$120,000 or \$80,000. Without more information, it is pure speculation that the court will neither indulge in nor accept.

## **North Coast Highway Properties**

Taxpayers claim that the assessed value of the land should be reduced for both North Coast Highway parcels due to the existence of a recorded Covenant of Release. Freitag contends that a Covenant of Release can only reduce the value. However, in the court's view, Freitag applies the wrong logic. The amount that it would cost the county to obtain similar protection by way of insurance says nothing about the effect of the risk on the value of the property. Typically, the value of a building is not decreased due to the presence of fire insurance, flood insurance, or other similar types of risk protection. The real question is, how does the market view the risk associated with that type of property?

Freitag introduced no market evidence of the effect of the Covenant of Release upon the property's market value. Again, how much or whether the covenant affects the value of the property at all is a matter of speculation. As the county appraiser pointed out, the cliff is obvious and the risk of some future sliding, cracking, or subsidence is obvious. A buyer may or may not be concerned about such risk and may or may not adjust the amount he or she would pay. Freitag introduced no evidence of sales of properties with or without covenants, no broker's opinions, or appraiser's opinions.

Taxpayers did not even submit evidence with regard to the degree of risk. The court questions how great the risk could be, considering that, despite the county's insistence on a Covenant of Release, taxpayers built on the site anyway.

The court finds that taxpayers have failed to prove that they are entitled to cancellation of an assessment on a portion of personal property. The court also finds that taxpayers failed to prove any decline in the value of the Gladys property and failed to prove that the Covenant of Release has any effect on the value of the North Coast Highway properties. The court therefore finds that the value of the subject properties as of January 1, 1999, are as follows:

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<b>Property</b>	<b>Account</b>	<b>RMV</b>	<b>MAV</b>
Personal	P507414	\$ 20,000	\$ 20,000
6855 Gladys Avenue	R245597	\$241,710	\$209,800
8615 North Coast Highway	R224664	\$403,166	\$336,760
8625 North Coast Highway	R509391	\$377,630	\$314,680

Costs to neither party.

Dated this \_\_\_\_ day of July 2001.



Carl N. Byers  
Senior Judge