IN THE SUPREME COURT OF THE STATE OF OREGON

BARBARA ELLISON, Plaintiff/Respondent, v. DEPARTMENT OF REVENUE, State of Oregon, Defendant/Appellant and CLACKAMAS COUNTY ASSESSOR, Defendant.	)	Tax Court No. 5177 SC S064092

PLAINTIFF'S/RESPONDENT'S ANSWERING BRIEF, SUPPLEMENTAL EXCERPT OF RECORD, AND APPENDIX

Appeal from the Judgment of the Oregon Tax Court dated April 27, 2016
Honorable Henry C. Breithaupt, Judge

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I. STATEMENT OF THE CASE

A. *Nature of the Proceeding*

This appeal arises from an ad valorem property tax appeal, in which the issue at trial was the Real Market Value ("RMV") of two tax lots. At trial, Defendants Department of Revenue ("Department") and the Clackamas County Assessor ("Assessor") asserted a value of not less than $19,815,225 for the two lots, while the Plaintiff asserted the value was $8,800,000. Ultimately, the Tax Court determined that the RMV was the existing roll value, as confirmed by the Board of Property Tax Appeals (BOPTA) for Clackamas County, $9,279,571.

After the trial, the Tax Court awarded Plaintiff/taxpayer a portion of her incurred attorney fees and costs for her successful defense against Defendants assertion of a significantly higher RMV. The Department appeals the Supplemental Judgment awarding those fees and costs.

B. *Nature of the Judgment, Basis of Appellate Jurisdiction, and Timeliness of Appeal*

Plaintiff accepts the Department's statements regarding the Nature of the Order to be Reviewed, Basis of Appellate Jurisdiction, and Jurisdictional Dates.

C. *Questions Presented on Appeal*

(1) Did the Tax Court find in the taxpayer's favor when, in a property tax appeal where the issue was the RMV of the property, the Tax Court rejected the Assessor's and the Department's asserted RMV of nearly $20 million and

determined that the RMV was actually $9,279,571 (or $10 million less than Defendants alleged)?

(2) Did the Tax Court abuse its discretion in awarding attorney's fees to Plaintiff where it determined that the Assessor's and the Department's position regarding the RMV was objectively unreasonable?

(3) Did the Tax Court abuse its discretion in determining that the amount of fees and costs requested by Plaintiff were reasonable and, accordingly, awarding those fees and costs?

D. *Summary of Argument*

In March 2015, the Tax Court held a three-day trial regarding the 2011 RMV of two tax lots comprising an equestrian training, breeding, and stabling facility and Plaintiff's associated home (the "Property"). At the trial, the Department and the Assessor both appeared and asserted the property had an RMV of $19,815,225, based on the appraisal of Matthew Healy, an appraiser for the Assessor. Through cross-examination and the testimony of Plaintiff's appraiser, including extensive examination by the Court, Plaintiff demonstrated that Mr. Healy was unqualified to appraise the property. It was proven that he had no experience in appraising the type of property at issue. Mr. Healy was also unaware of the existence of (or values of) several similar equestrian facilities in Oregon. Accordingly, the Tax Court found that Mr. Healy's appraisal was not credible

because of his lack of understanding of the market. Following the trial, the Court determined that the total RMV was $9,279,571[1]—$10 million less than the value asserted by the Defendants and within $500,000 of Plaintiff's asserted RMV.

Pursuant to ORS 305.490(4), where the Tax Court finds "in favor of the taxpayer" in an ad valorem property tax appeal, the Tax Court has discretion to award attorney fees to the taxpayer, to be paid by the Department. The Tax Court did so here, after properly weighing the ORS 20.075 factors. Moreover, the Tax Court determined that the amount of attorney fees and costs requested by Plaintiff were reasonable, again based on the ORS 20.075 factors.[2]

On appeal, the Department attempts to distance itself from the Assessor and the consequences of the arguments made against Plaintiff at trial. While the Department is the party that must pay the attorney fees award under ORS 305.490(4)(b), the conduct of the Assessor is also relevant to the decision to award fees. *See Clackamas Cty Assessor v. Village At Main Street Phase II, LLC*, 352 Or 144, 150–51 n 5, 282 P3d 814 (2012) (words of the statute indicate that the Department is responsible for paying award of attorney fees, although it was not

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[1] There was some confusion about the precise roll values and location of boundaries throughout these proceedings. Ultimately, the General Judgment entered was for a value of $9,279,571. (TCF 257-59).

[2] As discussed below, the Department did not adequately preserve a challenge to the amount of fees requested by Plaintiff.

the only defendant). In this case, the Department is not able to lay responsibility for an adverse outcome onto the Assessor. The Department must share such responsibility as an advocate for the higher RMV.

Had Defendants merely defended the roll value, this case would have been litigated differently. As found by the Tax Court, for Plaintiff, the "stakes were high and the county and department made them extremely high by arguing for a value approximately twice the amount of the conclusion of the county board of property tax appeals (BOPTA)." (ER-12). Moreover, the Tax Court found that "the position of the county and department in this matter was objectively unreasonable. Further, the persistence with which the position was advance left the taxpayer with no alternative but to expend significant amounts to defend against the position taken by Defendants in this case." (ER-13).

Ultimately, the Tax Court concluded that it had found in Plaintiff's favor and the ORS 20.075 factors supported an award of attorney fees to Plaintiff in the amount requested. The Tax Court did not abuse its discretion in making those findings. Accordingly, this Court should affirm the Supplemental Judgment.

E. *Summary of Facts*

For the Court to understand fully the circumstances leading up to the Tax Court's decision to award Ms. Ellison her attorney fees, a more comprehensive Summary of Facts is warranted than what was included in the Department's

Opening Brief. The facts recited below are both undisputed and largely described in the Tax Court's two opinions concerning this litigation.

Ms. Ellison's farm, called Wild Turkey Farm, consists of approximately 181 acres, in Wilsonville, Oregon. Wild Turkey Farm is a horse breeding, training, and stabling business, including facilities for equine competition training. The two tax lots at issue have improvements related to that business as well as Ms. Ellison's residence.[3] Being a "hands on" equine business operator, Ms. Ellison constructed her residence in close proximity to the equestrian facilities. (Ex. 1, p. 33 (describing the two tax lots at issue)). For an operation like Ms. Ellison's, the combination of a residence near the equestrian buildings is a common format within the equine industry. (Tr. 154:15-23). Ms. Ellison's clientele expect a highly professional, closely supervised operation, given the value of the horses kept at Wild Turkey Farm. (Tr. 56-58).[4] She built the facilities to attract outside horse owners and purchasers. They also house horses owned by Ms. Ellison kept for personal and business purposes. (Tr. 45-50; 38-39).

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[3] Other tax lots are open spaces and pastures. Those lots were not included in the appeal to the Tax Court Regular Division.

[4] The Assessor acknowledged this by ultimately valuing the equestrian and residential improvements as a unit, rather than segregating the house and the stables and valuing them independently as unrelated residential and farm use properties. (SER-22-23) (Ex. A, p. 88-89).

Starting in 2007, Ms. Ellison progressed sequentially in constructing both the equine and residential buildings. (*See* Ex. 1, (Plaintiff's Appraisal), p. 41-50 (describing the facilities and their construction)). The equestrian facilities were completed over a multi-year period, as was the residence. Substantial completion of all the relevant improvements occurred by January 2011. (*See* TCF 83-89 (Assessor's explanation of the construction and taxation of the improvements from 2008 to 2011)).

Notwithstanding the lengthy build-out, the Assessor valued all the farm's components for each tax year preceding 2011, based upon their annual state of completion. This process culminated with the improvements' substantial completion and a set of 2011 tax roll values for a stabilized RMV and Maximum Assessed Value ("MAV"), which would be used as a platform for subsequent tax years. The contested improvements' total tax roll value was approximately $9 million. (TCF 83-89).

Being unclear as to the basis of her property's valuation, Ms. Ellison appealed the 2011 RMV to BOPTA.[5] At its administrative hearing on the appeal,

[5] The roll-setting process is largely opaque to the property tax payer. Prior to the roll's certification, the taxpayer has virtually no ability to meaningfully inform or influence the assessor over the impending RMV and roll certification. Even if such interactions occur, the assessor has the last word when the roll is certified. If a question is raised about the roll values, that question must be raised in a BOPTA appeal, as a required procedural step. Failure to do so prevents any subsequent

BOPTA received a memorandum from the Assessor concerning the total RMV roll value for all of Ms. Ellison's property, with the following commentary:

> "The total roll value for all improvements and land is $10,986,622. The Petitioner has requested a reduction to $1,787,320. No evidence has been submitted with the appeal to support this request.
>
> "This is a unique, very complex, "high dollar" residential property. In order to properly respond to the Petitioners request, a highest and best use analysis must be done on each of the tax lots involved. A physical inspection of the property needs to be done which could take up to a full day given the size and extent of improvements. All of the construction costs need to be made available, examined and analyzed. Any appraisals done on the property need to be made available, examined and analyzed. A search for comparable properties needs to be done beyond the county line, and perhaps beyond Oregon borders and into the Western United States. BOPTA proceedings are severely constrained by time, even with what might be considered a typical residential property, which the subject is not. Due to the size and scope of this type of valuation assignment and the time needed to present the results we strongly recommend that the Assessors roll values be sustained so that the complexity of this property maybe adequately addressed at the Oregon tax court level." (SER-1).

Because the construction was completed by January 2011, the 2011 tax year was significant to both Ms. Ellison and the Assessor. It was the last year that the Assessor could utilize, under ORS 308.153, an "exception value" attributable to

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form of taxpayer relief. Thus, the BOPTA process is the first time the taxpayer is provided information about the rationale for the RMV determination. This generally occurs on the eve of the BOPTA hearing.

new construction. Thereafter, the constitutional limit on MAV increases took effect.[6]

Due to the significance of the 2011 tax year, Ms. Ellison appeared before BOPTA and questioned the Assessor's recommendation. Nonetheless, the BOPTA order accepted the Assessor's recommendation that the RMV and MAV remain at the certified tax roll values, deferring analysis to the Tax Court.

Subsequently, Ms. Ellison appealed the BOPTA orders *de novo* to the Oregon Tax Court – Magistrate Division.[7] ORS 305.425, ORS 305.501. The Assessor responded by filing an Answer,

> "request[ing] that the court assess the properties at the values proved by defendant at trial in this case, and enter judgment in favor of defendant, together with costs and disbursements and any such other relief as may be deemed just and equitable."

(SER-4).

One week before the Magistrate Division trial, at the time of the parties' mandatory exchange of appraisals, Ms. Ellison learned for the first time of the Assessor's proposed RMV increase and of the Assessor's characterization that the residence and equestrian improvements constituted "especial property" under ORS

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[6] Under Measure 50, the MAV for subsequent tax years is capped at 3 percent, regardless of whether the RMV increased by more than 3 percent for the tax year inspection.

[7] Ms. Ellison appealed all of the seven tax lots at the Magistrate Division.

308.205(2)(c) and OAR 150-308.205(A)(3). The Assessor asserted that the improvements had "no immediate market value," permitting the Assessor to determine an RMV, using the above-cited statute and rule, based upon "the amount of money that would justly compensate the owner for loss of the property." This methodology was the Assessor's sole basis supporting an increase in RMV. (SER-6).

The Magistrate determined that a reconciliation of the differing values proposed by the parties' appraisers could not be accomplished. The Magistrate denied Ms. Ellison's appeal but found in apparent agreement with the Assessor that the disputed properties had "no immediate market value" and that "cost" was the correct indicator of value. (SER-11-12). Because of these findings, Ms. Ellison appealed the RMV issue for the two improved tax lots, *de novo* to the Tax Court-Regular Division. ORS 305.425.

In response to Ms. Ellison's Regular Division appeal, the Assessor filed a counterclaim, asserting that the tax roll should be corrected to an RMV of $19,951,229, alleging as follows:

> "The real market value of the properties for tax year 2012-13 [sic] is at least:
>
> "For account $14,851,577
> "For account $5,099,652"

(SER-13-14).

In the Regular Division proceeding, the Assessor was joined by the Department,[8] which requested in its prayer that the same, nearly $20 million, valuation be utilized, stating that the RMV should be "no less than" such an RMV and seeking a judgment in favor of the Assessor and the Department, accordingly. (ER-2-3).

Consistent with Regular Division rules, the parties exchanged appraisals and supporting materials two weeks before trial. Ms. Ellison and the Assessor each provided an appraisal; the Department did not, relying instead solely on the Assessor's appraisal. The Assessor's appraisal concluded that a RMV of $19,815,225 was accurate, based exclusively on the property's valuation as "especial" under the aforementioned statute and administrative rule. (SER-22-23) (Ex. A, p. 88-89). No alternative value or methodology was employed by the Assessor. (SER-21) (Ex. A, p. 54).

Ms. Ellison's appraiser valued the property using both discounted cost and comparable sales approaches, placing a much higher weight on the former to conclude an $8.8 million value. (SER-17-18) (Ex. 1, p. 100-01). Both approaches established and relied upon the existence of a "market" for the property in reaching a conclusion of value.

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[8] Under ORS 305.560(4), the Department may intervene in any tax court proceeding.

The parties essentially agreed about the value of the land. (ER-5). Accordingly, the only issue at trial was the valuation of the improvements—the residence and the equine facilities.

At trial, both the Assessor and the Department actively litigated their claims that the property's RMV was over $19.8 million. They were each represented by counsel. Neither deviated from its position that the RMV affirmed by BOPTA and the magistrate was too low. They offered no information to the Tax Court that pointed to a lesser value. The Assessor and the Department both advocated throughout that the only way to value the property was by characterizing it as "especial."

The trial began with an inspection of the property by the parties and the court. (Tr. 4). In the courtroom, Plaintiff presented testimony from Ms. Ellison and her appraiser, Mr. Gilmore. (Tr. 44-100; Tr. 103-489). Mr. Gilmore is a licensed appraiser with a longstanding, well-recognized special expertise in agri-business valuation, specifically for equestrian operations, which he has valued and appraised for many years throughout the country. (Tr. 103-115). Mr. Gilmore testified that the market for an equestrian facility like Ms. Ellison's is national. (Tr. 190). His appraisal used national data to determine that there was significant economic obsolescence in the newly constructed improvements on the property. (SER-16).

The Assessor called a single witness, Mr. Healy, the author of the Assessor's appraisal. He specializes in residential appraisals and had limited experience with appraising agri-business facilities, like the property. (*See* TCF 183-187, Plaintiff's Closing Argument, describing the qualifications of Mr. Healy). Mr. Healy determined that the property fell within ORS 308.205(2)(c), meaning that he could not use market data to value the property. He characterized the property as an "especial property" under OAR 150-308.205(A)(3), leading him to consider a variety of factors, ranging from original cost of construction, his view of the comparable quality of construction, the property's insured value, and his assumptions about the intended use and value of the property to Ms. Ellison. He found that there was no "immediate market" for the property because of these factors. (SER-22-23). Mr. Healy was extensively questioned by the Tax Court about both his valuation methodology and his RMV conclusion. (*See, e.g.*, Tr. 510-520, Tr. 720-730).

After Mr. Healy's testimony was concluded, the Tax Court asked if the Department intended to put on any additional evidence or testimony. The Department's counsel, who was accompanied by the Department's appraiser during the entire trial, declined, with the Assessor's counsel stating that the Department's evidence would be "cumulative" to the Assessor's case. (Tr. 844:13-14).

Following the trial, the parties filed written closing arguments (the Department and the Assessor filed separate closing arguments). (TCF 104, 165, 180). On December 30, 2015, the Tax Court issued its decision concerning the disputed property's 2011 RMV. In a written opinion, the Tax Court rejected the claims that the RMV should be increased according to the Defendants' contended methodology. The Tax Court found:

> "The appraiser for Defendants lacked any experience in appraising the types of property at issue. The appraiser made very limited inquiry into the state of the market for properties of this type. * * *
>
> "The appraiser for Defendants simply concluded that just compensation for the taxpayer would be a complete refund of all costs incurred in bringing the property into existence. Throughout his report and testimony, the appraiser for the Defendants repeatedly indicated a profound inability to distinguish between value in use and market value.[9] This may well have been a product of the belief of this appraiser that this property was 'especial' property. The acceptance by Defendants' witness of a premise that cost is equivalent to value ignores taxpayer's persuasive evidence that external obsolescence of a not insignificant amount affected the property.
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> "The Court placed no reliance upon the conclusions of the witness for the Defendants. Accordingly, they are not entitled to prevail on their counterclaim."

(ER-8-9).

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[9] *See STC Submarine v. Dept. of Revenue*, 320 Or 589, 595-96, 890 P2d 1370 (1995) (discussing the difference between value in use and market value).

The Tax Court also concluded that Ms. Ellison's appraiser did not offer adequate evidence for justifying an RMV lower than the BOPTA value, although the Tax Court acknowledged the expertise of Ms. Ellison's appraiser and stated that the Tax Court had "no difficulty accepting the general conclusion reached by taxpayer's appraiser—that external or economic obsolescence affected the property in question in more than insignificant amounts." (ER-8). The Tax Court therefore concluded that the 2011 RMV would remain at the BOPTA-ordered value. (ER-9-10). Neither party appealed that decision or the underlying judgment.

Ms. Ellison then applied to recover a portion of her attorney fees and costs incurred in the Tax Court litigation, specifically that portion attributable to responding to Defendants' claims for a higher RMV. In support of her application, Ms. Ellison submitted relevant billing summaries and supporting factual Declarations from her counsel and appraiser. (TCF 262-365; 379-89). The Department objected to the fee application, but filed no factual declarations supporting the objections, nor refuted the evidence in the Declarations supporting the application. (TCF 367-78). Further, the Department did not challenge the number or hours spent or rates of Plaintiff's counsel.[10]

[10] Pursuant to ORS 305.490(4)(b), the Department is responsible for paying the attorney fees, although the Assessor was also party to the case. The Department made no argument in this case that the Assessor should share the responsibility or

The Tax Court granted the fee request, making the following findings:

(1) The Department asserted that no fee award was allowed under ORS 305.490 and 305.790, but acknowledged that Ms. Ellison "successfully defended against the counterclaim" of Defendants. The Tax Court found that the Department offered "no authority" for its legal position that a fee award was beyond the Tax Court's authority, "Not even so much as an analysis of the text, context and legislative history of the statutory provisions is given." (ER-11).

(2) The Tax Court's authority was to determine a correct RMV. Because the counterclaims were rejected, the Court found in favor of Ms. Ellison with respect to the counterclaims. The Tax Court stated this was true whether the higher RMV was stated as a counterclaims or argument over valuation. (ER-12).

(3) The Tax Court stated the importance and centrality of Defendants' valuation methodology for the 2011 RMV. This was present because the use of an exception value would dictate the MAV "for a significant period of time if not perpetually." (ER-12). The Tax Court added, "The stakes were high and the county and department made them extremely high by arguing for a value approximately twice the [BOPTA] value." (ER-12).

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that the amount awarded should be limited because of conduct of the Assessor that should not be attributed to the Department.

(4) The Tax Court further accepted Ms. Ellison's argument that a Regular Division appeal was "necessary" to respond to "a persistent position" by the Assessor that the "property had been grossly undervalued by the BOPTA." (ER-12)

(5) The Tax Court concluded by stating that the Assessor/Department positon concerning the property's "especial" character was fundamentally incorrect:

> "Attempting to use the notion of especial property, which the appraiser for the county could not explain or justify, that appraiser essentially argued that the value of the property must be equal to the amount the taxpayer spent to build it. This position was rejected in the opinion issued by this court. [on the merits]
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> "The court finds that the position of the county and department in this matter was objectively unreasonable. Further, the persistence with which this position was advanced left taxpayer with no alternative but to expend significant amounts to defend against the position taken by Defendants in this case. Persistence may not be bad faith or malicious, but it is willful.
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> "An award of fees and expenses in this matter is needed to deter the types of claims made by Defendants and then so inadequately supported."

(ER-13).

The Supplemental Judgment was entered, based on the Tax Court's opinion, on April 27, 2016. This appeal by the Department followed.

II. RESPONSE TO ASSIGNMENT OF ERROR

The Tax Court did not err in entering the Supplemental Judgment.

A. *Preservation of Error*

Plaintiff agrees that the Department objected to its Statement of Attorney Fees and preserved some of the arguments in its Opening Brief. However, some of the Department's arguments are asserted for the first time on appeal. As to the first issue—whether the Tax Court found "in favor of the taxpayer"—the Department made only a glancing argument before the Tax Court and did not cite to the sources of authority or specific arguments made here. *See* ER-11 ("The department offers no authority for its position, not even as much as an analysis of the text, context, and legislative history of the statutory provisions is given."). Regarding the ORS 20.075 factors, the Department also makes several new arguments on appeal. Specifically, the Department did not raise any legal or factual issue regarding settlement negotiations in response to the statements and arguments made by Plaintiff's counsel (Opening Brief, p. 27-28) or object specifically to the amount of the appraiser's fees to the Tax Court (Opening Brief, p. 30). Additionally, at the Tax Court, the Department made only a general objection to Plaintiff's estimation of 75 percent of fees which related to the counterclaim. It did not object to specific time entries or use any specific time entries to bolster its argument. (Opening

Brief, p. 29). Thus, some issues and arguments raised in the Opening Brief were preserved below, while others were not.

B. *Standard of Review*

This court reviews the Tax Court's legal determinations for errors of law and its factual findings for lack of substantial evidence in the record. *Dep't of Revenue v. River*'s *Edge Investments, LLC*, 359 Or 822, 835, 377 P3d 540 (2016). However, the ultimate question, in reviewing an award of attorney fees under ORS 305.490, is whether the Tax Court abused its discretion under ORS 305.490(4). *Id.* at 842.

C. *Argument*

The Tax Court did not err in entering the Supplemental Judgment in favor of Plaintiff. The Tax Court followed the ORS 20.075 factors in making its determination and did not abuse its discretion.

1) The Tax Court found "in favor of the taxpayer"—Plaintiff—when it rejected Defendants' argument as to the RMV.

Whether the Tax Court found "in favor of the taxpayer" here is both a question of fact and of statutory interpretation. However, neither issue is as complicated as the Department makes it seem. The Tax Court concluded that the value of the Property was $10 million less than the value asserted by Defendants, rejecting the only argument made by Defendants. Had Defendants succeeded, the tax consequences for Plaintiff would have been significant for the 2011 tax year

and following years. Defeating Defendants' claim was of benefit to Plaintiff and a determination "in favor of the taxpayer." There is no doubt that Defendants were seeking affirmative relief, in the form of an increased RMV and MAV. Plaintiff undisputedly defeated those claims, as the Tax Court stated unequivocally.

> *(a) If Defendants had succeeded at trial on their RMV claim, Plaintiff's taxes would have been increased significantly in the tax year at issue and going forward.*

Plaintiff will briefly summarize the statutory framework and process involved in this case, to demonstrate what was at stake for Plaintiff. As the Tax Court summarized: "The outcome of this case would burden or benefit the party for a significant period of time, if not perpetually. The stakes were high and the county and department made them extremely high by arguing for a value approximately twice the amount of the conclusion of [BOPTA]." (ER-12).

The Oregon Constitution generally limits an annual increase in assessed value (AV) to three percent over the prior year's AV (assuming the AV is less than the RMV). The Court recently summarized the relationship between RMV and the AV of a property:

> "The real market value of property, however, is not necessarily the assessed value that goes on the tax roll. That qualification derives from Measure 50, a constitutional amendment enacted in 1997 (codified as Article XI, section 11, of the Oregon Constitution), and its enabling legislation. In sum, Measure 50 caps property taxes: The assessed value of the property will be the lesser of the real market value or what is called the "maximum assessed value." *See* Or. Const,

> Art XI, § 11(1) (describing calculation of maximum assessed value); ORS 308.146(2). The maximum assessed value generally is designed to keep the assessed property value from increasing more than three percent per year. *See* Or. Const, Art XI, § 11(1)(b); ORS 308.146(1)."

River's Edge Investments, 359 Or at 826 (footnotes omitted).

However, the calculation of MAV where there is new construction is not confined to three percent of the prior year's MAV. New construction is an "exception event," meaning the MAV can increase by more than the tax otherwise applicable constitutional limit.[11] Or Const, Article XI, § 11(1)(c)(A). Here, the Assessor used the exception value to contend that the RMV was nearly $20 million, attributable to fully completed new construction. (SER 35) (TCF 151-156) (Assessor's closing argument). Thus, using the Assessor/Department approach, the amount of Plaintiff's property taxes would be increased dramatically, thereafter staying at that higher level (with 3 percent annual increases); or as the Tax Court noted "perpetually."

[11] Moreover, the calculation here was more complicated because the construction occurred over several years and the Assessor determined there was an exception event in each of those years. There was a dispute between the parties as to how much exception value could be added in the 2011-2012 tax year related to the value of buildings that were mostly complete in the prior tax year and exception value had been added in the prior tax year to acknowledge that the buildings were mostly complete, with Defendants asserting that they could attribute 50 percent or more of the RMV to the last 25 percent or less of construction. However, the Tax Court did not have to decide that issue because it did not accept Defendants' RMV. To the extent that the Department challenges fees incurred addressing this issue, those fees directly related to avoiding an unjustified increase in MAV to Plaintiff's detriment.

(b) Plaintiff defeated Defendants' counter claim.

The statutory process allows a party to advocate any proposed value, *de novo*. Yet, it is significant that when an assessor advocates a RMV greater than the roll value, the taxpayer is placed in a vise of having to respond to the adopted roll value *and* the Assessors' assertion that the roll value was incorrect. At trial, the Department and the Assessor both asserted a RMV for the property of $19,815,225. Furthermore, under ORS 305.412,[12] enacted in 2005, where the RMV of a property is at issue in a property tax appeal, the Tax Court is not beholden to the values argued by any party and it determines the value as a matter of fact. *See, e.g., Betz Evans Associates v. Dep't of Revenue*, 21 OTR 461, 468, 2014 WL 3973358 (2014) (Tax Court accepted parts of the county assessor's appraisal and parts of the taxpayer's appraisal in determining the RMV for the subject property). The statute allows the assessor and/or the Department to seek a higher value than what was determined by the BOPTA or the Magistrate, if Magistrate decision is appealed. The Assessor and the Department each did that in this appeal, seeking a total RMV of $19,815,225. The Assessor called that argument a "Counterclaim." (SER-13-14). The Department pleaded this RMV in

[12] ORS 305.412 provides: "When the determination of real market value or the correct valuation of any property subject to special assessment is an issue before the tax court, the court has jurisdiction to determine the real market value or correct valuation on the basis of the evidence before the court, without regard to the values pleaded by the parties."

its Answer, including the change in roll value in its prayer for relief, requesting that that Tax Court determine the RMV was "no less than" the amount it pleaded. (ER-2). Thus, both Defendants sought a significant change from the roll value. Neither Defendant made any alternative argument that the BOPTA value should be affirmed.

Regarding this counterclaim, the Tax Court found:

> "The appraiser for Defendants lacked any experience in appraising the types of property at issue. The appraiser made very limited inquiry into the state of the market for properties of this type. This failure may have been due to his view (which the court finds unsupported) that the only market into which he could inquire was the local market. The evidence presented by taxpayer establishes without a question that horse properties of the type involved here are bought and sold in a national market.
>
> "* * * * *
>
> "The court places no reliance upon the conclusions of the witness for the Defendants. Accordingly, they are not entitled to prevail on their counterclaim."

(ER-8-9).

Ultimately, the Tax Court determined that neither party met its burden of proof,[13] and affirmed BOPTA-ordered value. However, given the magnitude of the parties' difference in RMV projections, this was not a "tie." Defeating Defendants

[13] Pursuant to ORS 305.427, the burden of proof is on the party seeking affirmative relief. Thus, Defendants bore the burden of proof on their claim of increased RMV.

exaggerated RMV claim provided a significantly greater benefit to Plaintiff than winning on her own RMV claim would have provided. In this case's context the Tax Court found that neither the Assessor nor the Department could act with impunity concerning a proposed RMV increase. The Tax Court specifically identified the deterrent effect that the fees awarded would have on other unwarranted RMV claims.

(c) Defeating Defendants' assertion of value was a finding in Plaintiff's "favor" in the meaning of the text of the statute.

The Department contends that ORS 305.490(4) only authorizes an award of attorney fees to the taxpayer where the "taxpayer obtain[s] a material benefit as compared to her position before the appeal was filed." Opening Brief, p. 12.

The Department's position is, in part, dependent on its narrow understanding of how ORS 305.412 operates. Under that statute, in a property tax appeal, the Tax Court can determine the RMV of the property at issue without being limited to the arguments asserted by the parties. Thus, as the Department admits that the "sole 'claim' before the [tax] court is a request to determine the actual value of the property." Opening Brief, p. 13.[14]

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[14] Whether Defendants' assertion of a higher value is properly considered a "counterclaim" is matter of contention between Defendants and other taxpayers. *Village at Main St. Phase II, LLC v. Dep't of Revenue*, 22 OTR 52, 55-59, 2015 WL 1810580 (2015). That decision is currently under advisement with this Court, S063163.

In this instance, the Department's claims ignore the fact that the Assessor and the Department asserted the $19.815 million value as a "counterclaim" (SER-13-14) knowing the very real harm that would have been caused to Plaintiff had this contention prevailed. Neither the Assessor nor the Department left any doubt about their positions as the only correct positions concerning RMV.

The Department's relies, in part, on *Kaib v. Roving R.Ph. Agency, Inc.*, 338 Or 433, 111 P3d 739 (2005), to support its argument that only a judgment resulting in lowered taxes could be in "in favor of the taxpayer." However, *Kaib* is not helpful to the Department's position. In *Kaib*, the court looked at the meaning of the words "in favor of" in the context of a statute allowing attorney fees to petitioners in cases before the Employment Department and on judicial review. The Employment Department made the same argument that it does here: that "in favor of" means the same thing as "prevailing party" and that it required "substantial benefit" to the petitioner. *Id.* at 443. This Court rejected that argument and determined that "in favor of" could mean a procedural victory. In that case, the "victory" was a remand for the Department to determine the case on the merits. *Id.* at 444. The Court held that a procedural victory was a determination "in favor of" the petitioner there, because the alternative would have

meant the order against the petitioner would have stayed intact, although it remained a possibility that a similar order would be entered on remand. *Id.*[15] Further, the Court determined there that "in favor of" did not have the same meaning at "prevailing party" under ORS 20.077. *Id.*[16]

The words "in favor of" imply a relation between two entities—here, between the taxpayer and the Defendants. The definitions cited by the Department (Opening Brief, p. 12) actually support that understanding. Those definitions include: "on the side of" and "for the acquittal of." *Webster's Third New International Dictionary* 830 (unabridged ed 2002).

Here, relative to the judgment sought by Defendants, the judgment entered was in Plaintiff's favor, thus it was "of present benefit to Petitioner." *Id.* at 442 n 4. In other words, the Tax Court opinion was on the side of Plaintiff or "for the acquittal of Plaintiff," relative to Defendants' position. The Tax Court so found.

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[15] This is significant here, where the Tax Court rejected the Magistrate's finding that the property had "no immediate market value" (i.e., that it was "especial property") and that "cost" was the correct indicator of value.

[16] In that case, the court did not look at legislative history because it determined that text and context were sufficient to determine the meaning of the statute under the *PGE* analysis. Here both parties provide the court with some legislative history. However, as discussed below, Plaintiff contends that the legislative history does not demonstrate that the legislature understood "in favor of the taxpayer" to mean the same thing as "prevailing party" under ORS 20.077.

(d) The Legislative History Supports Plaintiff's Argument.

The Department's position would result in a situation where county Assessors and the Department could argue for significantly higher RMVs when a BOPTA order was appealed, without any risk of any adverse consequence. That interpretation would allow the government to use ORS 305.412 to threaten taxpayers with expensive litigation and the specture of a higher tax bill, should they choose to appeal. This imbalance of power and barrier to settlement is exactly the situation the Legislature sought to avoid in enacting ORS 305.490(4). The Department's position would be a clear discouragement to legitimate appeals. This case is an object lesson. As the Tax Court held, the RMV contended by the Assessor and the Department lacked any rationale and was solely premised on an appraisal which had no credibility. The taxpayer was right but it took multiple proceedings to establish that.

The plain words of the statute and the legislative history support Plaintiff's position here. The statute applies whether it is the government that appeals or the taxpayer. Legislative history confirms that this is what the legislators understood. Tape Recording, Senate Committee on the Judiciary, SB 130, March 7, 2001, Tape 55, Side A (colloquy between Senator Burdick and Larry Tapanen) (transcript at DOR's App-12).

The positions of the parties in this case are identical to what they would have been if the Assessor had appealed the decision to the Regular Division, which, in effect, is what the Assessor and Department did. At the Regular Division, the government (the Assessor and the Department) argued for a significantly higher valuation, as the Assessor did at the Magistrate level, and the taxpayer argued for a slightly lower valuation than the BOPTA value. Proponents of ORS 305.490(4) imagined a similar scenario: "If the government has already gone in front of the judiciary, taken a position and lost and the government chooses to appeal, this simply says the judges – the judge may at that time determine that it's fair to that taxpayer under those circumstances to allow the taxpayer to recover attorney fees." Tape Recording, Senate Committee on the Judiciary, SB 130, March 7, 2011, Tape 55, Side A (Testimony of Kevin Mannix) (transcript at DOR's App-10).

Additionally, the legislative history suggests that the Legislature intended ORS 305.490(4) to serve as a check against the Department's ability to litigate tax disputes in a manner that would be costly to taxpayers, therefore encouraging the Department to settle cases. Proponents of the bill suggested that it would provide a check on the government, when the government proposed to raise taxes for individual taxpayers. This check was also intended to encourage settlement, because there would be a potential adverse impact on the government if it unsuccessfully attempted to raise taxes or where a taxpayer's challenge was

unreasonably met with, "If you don't like the existing roll value, wait until you see what we now have in store for you."

David Canary, a private attorney and former Department of Revenue attorney, summarized the bill as follows:

> "We feel this bill will level the playing field a little bit in view of the fact that the county assessor and the department of Revenue are both represented by the Attorney General's office, will allow the tax court discretion, that if the case is meritorious on behalf of the taxpayer and the taxpayer prevails that the state would pay the taxpayer's attorneys' fees, if the taxpayer prevails. So we believe this will level the playing field, it will make the magistrates division probably a bit more significant for the parties to meet and to try and settle their differences without incurring legal fees and going up to the tax court."

Tape Recording, House Committee on the Judiciary, SB 130, May 7, 2001 (testimony of David Canary) (transcript at DOR's App. 22-23). Mr. Canary also responded to a question from Representative Ringo about whether SB 130 was "based on the feeling that the department of Revenue is occasionally unreasonable in dealing with a taxpayer on tax issues?" Mr. Canary responded that "I think there's still the opportunity for abuse in some situations and consequently I think this bill, as Mr. Tapanen has testified, it has expanded a very successful bill that's in place now for personal income taxpayers to apply to property taxpayers." *Id*. at App. 25. Mr. Tapanen, referenced by Mr. Canary, had commented that very few income tax disputes are litigated, and suggested that the potential for an award of attorney fees was the reason those cases settled. *Id.* at App. 23. Another

proponent described the bill as "a better 'check and balance'" in litigation with the Department of Revenue. Exhibit, House Committee on the Judiciary, SB 130, May 7, 2001 (Letter from Robert May, Chief Legal Officer DL Lumber Company) (Supp. App. 2).

Finally, the Legislative history also demonstrates that the intent was to give the Tax Court discretion in determining whether to award attorney fees, as a matter of "fairness and flexibility." Exhibit A, Senate Committee on the Judiciary, SB 130, March 7, 2001 (also attached as an exhibit to House Committee on the Judiciary, SB 130, May 7, 2001) (Letter from Taxpayers Association of Oregon) (Supp. App. 1 & 3). As Representative Ringo stated, "This bill would make attorney fees discretionary." Tape Recording, House Committee on the Judiciary, SB 130, May 7, 2001) (transcript App. 24).

The Department contends that references in the legislative history to prevailing parties indicates that the legislature intended for "in favor of" to mean that the taxpayer is the "prevailing party" under ORS 20.077.[17] (Opening Brief, p. 14-16). However, there is no mention of another bill regarding the definition of "prevailing party" and the legislature did not choose to use that language when it easily could have. Accordingly, the legislative history does not support the

[17] ORS 20.077 provides, in pertinent part, "prevailing party is the party who receives a favorable judgment or arbitration award on the claim * * *."

Department's interpretation. The Department attempts to supply language which the legislature did not use.

(c) Plaintiff, in fact, prevailed.

That being said, even if ORS 20.077 does apply, Plaintiff was the "prevailing party" on Defendants' counterclaim, which must be evaluated separately from Plaintiff's claim because Defendants' were seeking affirmative relief.[18]

As the Tax Court discussed, this case was not about sustaining the roll value. The Assessor and the Department disavowed the roll value altogether. They both respectively insisted (and persisted) that the property's RMV was "at least" or "not less than" $19.815 million. Neither made any effort to justify the roll value, despite having ample opportunities to re-consider their positions about a doubling of the RMV. In fact, one of the many ironies of this case is that when the Plaintiff raised, through the BOPTA process, questions about how the roll value was determined, the Assessor had no answers but only a separate set of questions

[18] As noted above, it is irrelevant if the Department labeled its RMV position a counterclaim (which the Assessor did). The intended effect was the same—a significant increase in RMV and MAV with a corresponding material increase in tax liability. Thus, Plaintiff prevailed on the RMV issue by being much closer to the mark than Defendants. Moreover, Plaintiff prevailed by overturning the Magistrate's ruling that the property was especial.

with the comment that it would be necessary for the Plaintiff to go to Tax Court in order to learn how her property's RMV should be established.

The Assessor and the Department transformed this case from a basic property tax appeal into a massive struggle between a taxpayer and two government agencies over an equally massive increase for the foreseeable future in the Plaintiff's property taxes. Not a word was ever written or uttered by either Defendant before the Tax Court about the correctness of the roll value. Neither wanted the roll value sustained, but only "corrected" by court action and increased.

Under the circumstances, the Tax Court accurately discerned what had occurred and how profoundly the taxpayer had succeeded and how profoundly the Defendants had failed.

The Department now seeks to claim that the taxpayer was unsuccessful and the Tax Court was wrong in awarding reimbursement for 75 percent of her professional fees. The Assessor and the Department picked the fight. They must now accept that they lost the fight, badly. They didn't want the roll value to be the Tax Court's outcome. They wanted more. The Tax Court held that in this instance of unjustified conduct, such greed had its price. By anyone's definition, the taxpayer "won" this case

( ) The Tax Court appropriately used its discretion to award Plaintiff's fees.

"The decis on to award attorney fees is a discretion ry one, granted to the Tax Court." *River's Edge Investments*, 359 Or t 845. Af er a three-day trial and over a ear of po t-trial briefing and argument, the Tax C urt used its discretion, guided by the ORS 20.075 factors, as discussed below, to determine that an award of attorney fees was warranted here. The Tax Court was perfectly situated to make this fin ling given its intimate involvement with the trial a id post-trial proceedings. That is precisely hat type of check on the government's ability to engage in high-cost litigation tha the Legislature intended.

2) The ORS 20.075 Factors Su port the Award of Attorney Fees to Plaintiff.

(a) The Assessor's appraiser was unqu lified to appraise the Property, therefore it was unreasonable for Defendants to rely on his appraisal.

Under OR 20.075(1)(b), the Court is to consider the "objective reason bleness of the claims and defenses asserted by the parties." Both appraisers at trial used the cost approach to value the Property. The main difference between the two appraisals was that Mr. Healy, the Assessor's appraiser, did not provide for any de reciation from the cost of construction in his appraisal. On the other hand, Mr. Gilmore, Plaintiff's appraiser, reviewed market data from sales of other equestrian facilities to determine that there should be depr ciation for economic

obsolescence factored into the RMV. The Tax Court agreed with Plaintiff's appraiser that market data supported the existence of economic obsolesce. (ER-8-9).

Mr. Healy testified at trial that his expertise was limited to residential properties and that he had never previously appraised an agri-business operation. (Tr. 506:11-15, 632:21-23). He also stated that he was unfamiliar with the equestrian operations similar to the Property in the area. (Tr. 641:25-642:6). In sharp contrast, Mr. Gilmore, had appraised thousands of agricultural properties, many of which were in Oregon or the Pacific Northwest. (Tr. 111:9-11). He was the chief review appraiser for Northwest Farm Credit based in Spokane, covering both Washington and Oregon. (Tr. 105:10-14;114:8-15). Mr. Gilmore further stated that he had appraised several hundred equine facilities throughout the United States since 1976, and he is recognized as an expert with respect to valuing these properties. (Tr. 222:8-13).

Underlying Mr. Healy's determination that the cost of construction was the only indicator of value, was the Assessor's conclusion that the property was "especial." Throughout the proceedings, the Assessor asserted because the property was "especial," no market values could be used to determine the RMV, including for depreciation. (*See* Assessor's Closing Argument, TCF 121-124). This premise failed to acknowledge the difference between a brand new facility and one that is

in use, or the value that a potential buyer would give to the facility. This premise also fails to appreciate that the market for a facility like the Property is a national market.

Notably, this was the Assessor's and Department's sole theory of valuation. Their cases rose or fell based on Mr. Healy's choice of methodology. The Department contends on appeal, the only consequence of the "especial" property designation is that the cost approach is the proper valuation methodology and that the court need not decide here whether the property an "especial." (Opening Brief, p 21).[19] While Plaintiff does not disagree with this statement as a matter of judicial economy, the Court should note how the Assessor attempted to use the especial property designation to justify its failure to account for economic obsolescence by asserting: "For a property, such as the subject, which is unique due to the owners' preferences in design and construction, the best measure of that highest and best use is a loss for the owner standard." The Assessor asserted that measure was "actual cost incurred by the owner to build the property." (Assessor's Closing Argument, TCF 125, 126). This underscores the manifest unreasonableness of Defendants' position. Whatever valuation arguments the Department now wishes

[19] Again, Defendants did not appeal the Tax Court opinion and judgment on the merits. Therefore, there is no basis to consider or challenge the merits of the Tax Court's decision regarding RMV.

to fashion are irrelevant. The Tax Court has spoken with finality that the Healy appraisal methodology was absolutely wrong.

(b) There is evidence in the record related to settlement, which indicates that the Assessor's position prevented settlement.

ORS 20.075(1) allows the court to consider the "objective reasonableness" and "diligence of the parties in pursuing settlement [.]" On this factor, the Tax Court found:

> "[B]ut for the massive counterclaim by Defendants, it is much more likely than not that a settlement on a value between taxpayer's position and the BOPTA finding would have been achieved. Whether a settlement somewhere above taxpayer's position was possible cannot be determined. However, the persistence of Defendants in arguing for a value over twice that of BOPTA suggests that settlement would not have been possible."

(ER-12).

On appeal, the Department asserts that there is no evidence in the record to support this finding. That argument is both unpreserved and factually incorrect.

Plaintiff's Statement for Attorney Fees stated: "Before trial, there was no effort made by the Assessor to engage in settlement discussions or any indication of a willingness to stray from Mr. Healy's appraisal. After trial, in the months before closing arguments were exchanged, settlement discussions were limited and unfruitful." (TCF 287).

Additionally, the Supplemental Declaration of Jack L. Orchard, submitted with Plaintiff's Reply in Support of her Statement of Attorney Fees stated: "Throughout this process, the Assessor's office did not express any doubts about its valuation methodology or express a desire to settle the case." (TCF 380).

There was evidence in the record regarding settlement negotiations. Neither the Department, nor the Assessor, put any evidence in the record contradicting Plaintiff's counsel's assertions regarding settlement negotiations. Absent any statements by Defendants, Plaintiff's counsel and the Tax Court could not state with certainty the motivations or calculations of Defendants. However, the result of this case indicates that Defendants were not willing to settle the case without a substantial increase in Plaintiff's taxes. There actions spoke volumes to the Tax Court.

This failure to engage in reasonable settlement negations before and during Tax Court litigation is precisely the result the Legislature wanted to avoid in enacting ORS 305.490(4).

> *(c) The Tax Court found that the award of attorney fees would deter meritless counterclaims by Assessors and the Department in future cases.*

The Court may consider the deterrent effort of a fee award under ORS 20.075(1)(d). On this factor, the Tax Court found:

> "[T]he position of the county and department in this matter was objectively unreasonable. Further, the persistence with which the position was advanced left taxpayer with no alternative but to expend significant amounts to defend against the position taken by Defendants in the case. Persistence may not be in bad faith or malicious, but it is willful.
>
> "An award of fees and expenses in this matter is needed to deter the type of claims made by Defendants and then so inadequately supported."

(ER-13).

In other words, that Court found that Defendants did not have adequate support for the Healy appraisal, because he was unqualified to appraise the property and had not done proper research.

Despite this finding, the Department argues that the award of fees to Plaintiff "will not change the conduct of the parties in future cases." (Opening Brief, p. 27). The Department continues to assert that neither it, nor the Assessor, did anything wrong in relying on the Assessor's appraisal. Essentially, the Department asserts that it will continue to bullheadedly attempt to raise taxpayers' taxes when they challenge the valuation of their property, even where the evidence upon which the government's valuation is based is woefully insufficient. For an agency which has statutory authority over the state's property tax system, the Department's comments are jarring. This case was one where the Assessor and the Department

were clearly in the wrong. Is the Department saying that it learns nothing from cases like this?

In the Assessor's closing argument, it stated: "Plaintiff appealed the value on the roll of $9,279,571. The County is entitled to improve its position on appeal." (SER-33). This was the attitude of Defendants throughout this case—the government is entitled to assert a $10 million increase in RMV without consequence, and it will do so without a hint of doubt.

This is precisely the type of situation the legislature sought to avoid in making the Department responsible for the attorney fees when plaintiffs successfully resist unreasonable RMV re-valuations. If the Department continues to litigate cases this way, it should continue to pay taxpayers for their attorney fees spent in responding to unreasonable attempts to raise their taxes.[20]

3) The Amount of Attorney Fees and Costs Awarded Is Reasonable.

Finally, the Department contends that the amount of the fees awarded by the Tax Court is unreasonable. Plaintiff's counsel estimated that 75 percent of the effort in the attorney fees requested was attributable to defending against Defendants' counterclaim and accordingly requested 75 percent of the attorney fees spent on this matter before the regular division.

[20] The other factors set forth in ORS 20.075 support the fee award, as demonstrated in Plaintiff's fee application and supporting documents.

The issue before the Tax Court at trial was the RMV of the Property. Additionally, had Defendants' prevailed, there may have been an issue for the Court to decide with regard to the MAV of the Property.[21] The effort involved in attempting to prove Plaintiff's appraiser's value was the same as the effort involved in disproving Defendants' appraiser's value. Likewise, there was significant overlap of issues related to both. Where there are fee-generating and non-fee-generating claims in litigation, where the claims share a common core of facts or legal theory, attorney fees related to both are recoverable under the "'theory that they contributed to the plaintiff's ultimate success.'" *Moro v. State of Oregon*, 360 Or 467, 487, __ P3d __ (2016) (quoting *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 586 F Supp 2d 732, 822 (SD Tex 2008)).

Here, rather than request all of her fees, Plaintiff sought only 75 percent of her fees, to account for the fact that her claim to reinstate the roll value to $8.8 million had failed. For the first time, on appeal, the Department lists specific time entries that specifically mention Defendants or their appraisal and contends that those are the only time entries that could possibly relate to the counterclaim. That

[21] *See* Department of Revenue's Closing Argument, p. 1, TCF 169 ("The issues before the court are determination of the RMV of the subject property, and the exception maximum assessed value (MAV) for the portion of the property not previously subject to assessment.").

is not the case.[22] First, many time entries do not separate between the counterclaim and Plaintiff's claim. For example, many of the time entries listed on TCF 279 refer to the preparation of the (written) closing argument generally. A review on Plaintiff's Closing Argument (TCF 180-203) shows that the majority of the submission was dedicated to discrediting Defendants' appraisal.

More importantly, a look at the variation in the values asserted by the parties, in comparison to the BOPTA value, shows why so much effort was needed to go toward defending the counterclaims.

The truth is that the Department provided no substantive objection to the Tax Court's determination that a 75 percent fee award was appropriate. It is now using this Court as a trier of such facts. Also for the first time on appeal, the Department objects to the award of a portion of Plaintiff's appraiser's fee as a litigation cost. The Department contends that the Court found "all aspects of the appraiser's opinion ** * unsupported and unpersuasive" (Opening Brief, p. 30). To the contrary, as explained by Plaintiff, above, her appraiser was key to

[22] If the Court were to agree with the Department that Plaintiff's 75 percent request was insufficient, the Court should remand for the Tax Court to determine that proper allocation. Defendant's list of time entries referencing the county/department or the county's appraisal is missing several entries including entries on 6/18/13 for strategizing regarding the county's valuation report and email exchanges with Mr. Adair, the Department's counsel, regarding inspecting the property on in 12/11/13, 12/12/13, 1213/13, and 12/19/13. (TCF 265-66).

disproving Defendants' asserted value. More importantly, the Tax Court found: "the evidence of [plaintiff'] appraiser and his experience with the precise type of property in question was of material benefit to the court and was a basis for rejecting the position of the department in its entirety." (ER-13).

The Court looked at all of the applicable ORS 20.075 factors and determined that the amount of attorney fees and costs requested by Plaintiff, including her appraiser costs, were reasonable. The Department has not pointed to any source to support is assertion that the award of attorney fees and costs was an abuse of discretion, because there is none. The Court should affirm that amount of the award.

III. CONCLUSION

Plaintiff successfully defended against the Department and the Assessor's attempt to significantly increase her property tax liability. The Tax Court found in her favor and the resulting judgment was of significant benefit to Ms. Ellison, in comparison to the judgment sought by Defendants. Thus, this Court should affirm the award of attorneys' fees to Plaintiff because the award was warranted under the circumstances of this case and was within the Tax Court's discretion.

Respectfully submitted: November 15, 2016.

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CERTIFICATE OF FILING AND PROOF OF SERVICE

I certify that on November 15, 2016, I filed the original of the foregoing **PLAINTIFF'S/RESPONDENT'S–ANSWERING BRIEF** using the electronic filing system provided by the Oregon Judicial Department. I further certify that, on the same day I used the electronic service function of that system to serve the same document on:

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 8,599 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

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