IN THE SUPREME COURT OF THE STATE OF OREGON

BOARDMAN ACQUISITION, LLC, a Delaware limited liability company, Plaintiff, vs. **DEPARTMENT OF REVENUE**, State of Oregon, Defendant.	Tax Court No. 5209
PORT OF MORROW, Plaintiff-Appellant, vs. **DEPARTMENT OF REVENUE**, State of Oregon, Defendant-Respondent.	Tax Court No. 5249 Supreme Court No. S063682

CORRECTED BRIEF ON THE MERITS OF PLAINTIFF-APPELLANT PORT OF MORROW

On Appeal from the Judgment of the Oregon Tax Court
The Honorable Henry Breithaupt, Judge of the Oregon Tax Court
Decision Filed: October 20, 2015

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I. INTRODUCTION

In these two consolidated cases, the legal issue is whether the Morrow County Assessor (the County) permissibly assessed certain ad valorem property taxes (the "additional assessment") for tax year 2013-14 on property (the property) located in the County.[1] The Port of Morrow (the Port) had owned the property, which it had leased to a private party (the "prior tenant").[2] The property was not subject to ad valorem property taxation by the County when it was owned and in the possession of the Port; it became subject to such taxation when it was leased to the prior tenant. However, because the property was located in a nonexclusive farm use zone and was being put to farm use, it was eligible for a deferment of one-half of the tax that normally would be imposed on it, for so long as it was put to a farm purpose. The balance of the tax normally assessed on the property was "deferred" until such time as the property ceased to be used for farm purposes. The prior tenant was responsible for payment of whatever taxes were due on the property while it was in the prior tenant's possession.

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[1] An additional issue involving the standing of the two taxpayers in these cases to challenge the assessment was resolved by the Oregon Tax Court in a way that leads the Port to expect that the standing issue will play no part in this appeal.

[2] The Order of the Tax Court Judge contained references to entities and property that the Port adopts for the purpose of convenience of the reader, albeit sometimes without the extensive capitalization used by the Tax Court Judge.

In the summer of 2012, the Port and the prior tenant agreed to terminate the lease. The Port thus regained possession of the property and duly advised the County that the property no longer was being put to farm use and therefore was no longer qualified for the special assessment. A few days thereafter, the Port sold the property to Boardman Acquisitions LLC (Boardman), another private party.

The County eventually assessed the property for the amount previously deferred, and assigned responsibility for paying that additional tax to Boardman. Both the Port and Boardman objected.[3] After a magistrate determined in Boardman's case that the additional assessment was proper, the matter was appealed to the Regular Division of the Oregon Tax Court, where it was consolidated with the Port's case[4]. The parties stipulated to the pertinent facts and filed opposing motions for summary judgement. The court granted the County's motion, thus approving the additional assessment.[5] The present appeal followed.

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[3] The two separate actions were TC 5209 (filed by Boardman) and TC 5249 (filed by the Port).

[4] Although its proper name is the Oregon Tax Court, this brief usually will refer to that court as "the court" or "the trial court" throughout.

[5] A copy of the court's Order is attached to this brief as Appendix I. The parties' mutually-stipulated facts are set out in the Order.

II. QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

Question Presented No. 1: When property of a municipal corporation that was under lease to a private party is returned to the control of the municipal corporation, and that property was qualified for and received a partial deferment of property taxes under ORS 309A.068 during the period of the lease, does the amount of the deferred property taxes either become due and owing immediately, or become a lien on the property, so that a later sale of the property by the municipal corporation to a different private party requires that the deferred taxes be paid?

Proposed Rule of Law: No. Property of a municipal corporation that received deferred tax treatment because it was placed in farm use while leased does not carry with it a lien for the balance of the otherwise applicable tax when it reverts to the municipal corporation that owns it, and the assessed amount is not later revived, nor does it otherwise become due and owing, if the municipal corporation thereafter sells the property to another taxable party.

Question Presented No. 2: May the answer to Question No. 1 vary, depending upon the part of the tax or assessment year in which the property that lost its partial tax deferral status and reverted to public ownership later is sold to another private party?

Proposed Rule of Law: No. The additional taxes that otherwise would have been imposed on the property but for the farm use exemption do not become a lien on the property, or become due and owing, no matter the part of the tax or assessment year in which the property, after being returned to its municipal corporation owner, later is conveyed to another private party.

III. STATEMENT OF THE CASE

A. Jurisdiction. As previously stated, the parties stipulated to the relevant facts, and the court then decided the case as a matter of law on cross motions for summary judgment. The resulting judgment in favor of the County was filed on October 20, 2015. The Port's notice of appeal was timely filed on November 18, 2015—within the thirty-day period allowed by ORS 19.255(1).

B. Statement of Historical and Procedural Facts.[6]

1. Procedural Facts

As noted, these two cases were consolidated for hearing and decision. Boardman, the taxable purchaser, filed the first case, TC 5209, claiming that the County had improperly assessed additional taxes on the property. The County responded that it had authority to impose the additional taxes pursuant to ORS 308A.703(1)(b), set out *post*, because the property had been disqualified from the special assessment rate prescribed in ORS

[6] Because they are undisputed, most facts are set forth without citation to the record or the Order.

308A.068. *See* ORS 308A.116(1) (setting out bases for disqualifying property from nonexclusive farm use zone deferment). As required by the contract of sale between the Port and Boardman, the Port had paid the additional taxes imposed on the property by the County. The Port sought a refund of that payment, which was denied by the County. The Port then brought Case TC 5249 in the Magistrate Division, and that case was specially designated directly to the Regular Division of the Oregon Tax Court, where the two cases were consolidated. After the parties had submitted briefs, supplemental briefs, and additional briefs as to the relevant legislative history, and presented oral argument, the court entered its Order. The present appeal followed.

2. Historical Facts

As relevant here, the stipulated facts before the court establish the following:

Until it was sold to Boardman, the Port had owned the property (and leased it to the prior tenant) since at least 2005. The lease subjected the property to assessment and taxation pursuant to ORS 307.110, set out *post*, from at least 2005, if not before.

For *ad valorem* tax purposes, a "tax year" is a year that commences on July 1 of any year and extends through June 30th of the following year. ORS

308.007(1)(c).[7] The relevant property tax year in the present case is tax year 2013-14.

The prior tenant had qualified the property for special assessment as nonexclusive farm use zone farmland under ORS 308A.068 for the tax year 2013-14, but the property lost its eligibility for that assessment in early August 2012, when the prior tenant's lease was canceled. The additional taxes that the County assessed on the property pursuant to ORS 308A.703 represented the difference between the special assessment amount previously imposed and the amount that ordinarily would have been assessed, but for the deferral, under ORS 308A.068. On August 6, 2012, the Port was the owner of record of the property. On that date, the Port and prior tenant executed a document entitled "Lease Termination Agreement" that immediately canceled the lease and returned possession of the property to the Port. The Port reported the transaction to the County that same day, and asked that the special assessment of the property be discontinued. In an exchange of e-mails dated August 7, 2012, the County responded to the Port's initial email concerning

[7] As will be discussed later, a "tax year" is not an "assessment year." While the former commences on July 1 of one year and ends on June 30 of the next, the latter coincides with a calendar year. ORS 308.007(1)(b); 308.007(2). Although it is difficult to determine why, the dates applicable to those two concepts appears to have played a role in the trial court's analysis of this case.

disqualification, and the Port transmitted the Lease Termination Agreement and other information to the County. The County's email stated:

> * * *This DQ will be processed for 1/1/13, it is too late to process a DQ for the current year. We are in the middle of a computer software change here and things are pretty hectic around here so I won't be processing this until later this fall but go ahead and send the official request letter, email is fine.

Effective August 10, 2012 ("the purchase date"), Boardman acquired the property from the Port. Since the purchase date, Boardman has been (and currently is) the record owner of the property. More than nine months after purchasing the property, Boardman received Notices[8] of Disqualification of the property from Special Assessment as Farmland in a Non-EFU Zone from the County. Those Notices were dated May 29, 2013. Each of the notices further stated that an additional $127,270.61—the deferred part of the taxes on the property— would be "extended to the tax rolls" for collection

During November 2013, the County sent tax statements to Boardman Acquisition in the amount of the property taxes for the "Standard Property Tax" as well as for the additional taxes that the County claimed were due on the property. No tax statements for the property were sent to the Port for any tax years after 2011-12.

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[8] "Notices," because the property actually consisted of two identically-sized parcels.

On or about November 13, 2013, Boardman paid the full amount of the standard property tax for tax year 2013-14. On or about November 15, 2013, the Port paid the full amount of the additional tax. On June 26, 2014, the Port requested a refund of the additional tax payment. In a letter dated June 26, 2015, the County denied the Port's refund claim.

IV. SUMMARY OF ARGUMENT

A straightforward reading of the applicable statutes, coupled with an examination of the legislative history, demonstrates that the legislature did not intend that land belonging to a municipal corporation and that had been leased and put to a farming purpose would thereafter, upon termination of the lease and return to the control of the municipal corporation, carry with it an obligation to pay the taxing entity the difference between the lesser amount actually assessed during use of the property for farming purposes and the ordinary property tax on the property. The court's contrary ruling was achieved only by adding an additional requirement to the applicable law—a requirement that any such property that reverted to a municipal corporation be subject to the additional tax unless that body thereafter abstained from selling the property for some unspecified period of time. That judicial addition to the pertinent statutory criteria was error.

V. ARGUMENT

A. The Statutory Scheme

Several statutes found in separate chapters of ORS bear on the analysis in this case. It is useful to identify and set them out here as context:

The property of municipal corporations, including the Port, generally is exempt from property taxes. ORS 307.090(1). The parties agree that the Port is a "municipal corporation * * * of this state," or its legal equivalent. Thus, the property in question was exempt from taxation while it was possessed by the Port, but became subject to taxation when it was leased to the prior tenant. However, because the prior tenant was putting the leased property to farm use, the property was "subject to assessment and taxation [only] for the * * * specially assessed value thereof." That "special assessment" is prescribed in ORS 308A.068(1), which provides that

> Any land that is not within an exclusive farm use zone but that is being used, and has been used for the preceding two years, exclusively for farm use shall qualify for farm use special assessment[, subject to two requirements not relevant to this proceeding]* * *.

The parties agree that the property was "qualif[ied] for farm use special assessment" before the Port's lease to the private tenant ended.

Qualification for special use assessment may not permanently protect the property owner/lessor against further tax liability, however. ORS 308A.083 provides:

> In the case of * * *nonexclusive farm use zone farmland that qualifies for special assessment under ORS 308A.068, the county assessor shall enter on the assessment and tax roll the notation "potential additional tax liability" until the land is disqualified under [a separate statute not pertinent here or] * * * ORS 308A.116.

ORS 308A.116 provides, in part:

> (1) Nonexclusive farm use zone farmland qualified for special assessment under ORS 308A.068 shall be disqualified from such special assessment upon:
>
> (a) Notification by the taxpayer to the assessor to remove the special assessment;
>
> (b) Sale or transfer to an ownership making it exempt from ad valorem property taxation;
>
> * * * * *.

In the event of a disqualification under ORS 308A.116, the property tax that has been deferred may be imposed. ORS 308A.703 provides in part:

> (1) This section applies to land upon the land's disqualification from special assessment under any of the following sections:
>
> * * * * *
>
> (b) Nonexclusive farm use zone farmland under ORS 308A.116;
>
> * * * * *.
>
> (2) Following a disqualification listed in subsection (1) of this section, an additional tax shall be added to the tax extended against the land on the next assessment and tax roll, to be collected

> and distributed in the same manner as other ad valorem property tax moneys. The additional tax shall be equal to the difference between the taxes assessed against the land and the taxes that would otherwise have been assessed against the land * * *.

Finally, ORS 308A.709 provides in part:

> Notwithstanding that land may have been disqualified from special assessment, no additional taxes may be imposed under ORS 308A.703 if, as of the date the disqualification is taken into account on the assessment and tax roll, the land is any of the following:
>
> * * *
>
> (5) Public property that was leased or rented to a taxable owner as described in ORS 307.110 at the time of disqualification, and the reason for the disqualification was the termination of the lease under which the land was assessed. * * *

In summary, then, land like that involved here is not subject to ad valorem property taxes while owned by a municipal corporation. However, if the land is leased to a private party for whom the land, if owned by that party, would be taxable, then the land is taxable to that party. The tax may be reduced if, *inter alia*, the property is non-exclusive farm use property and is being put to a farm use. However, the exempted portion of the ordinary tax may be imposed retrospectively if the property ceases to be put to farm use, but remains in the hands of the private party or is transferred to another private party. If, on the other hand, the property ceases to be so used because it is transferred back to the municipal corporation that holds title to it, the additional tax is not (indeed, cannot be) collected under the terms of ORS 308A.709(5). The only fact in this

case not specifically discussed in the foregoing statutes is the fact that, although the Port took back the leased property and appropriately notified the County that the tax deferral no longer applied, the Port soon thereafter sold the property to another private party—Boardman, in whose hands the property is taxable and not eligible for the deferment. We turn to an examination of how the court found that statutorily undiscussed detail to be the dispositive basis for ruling against the Port.

B. The Oregon Tax Court's Application of the Statutory Scheme to the Facts

The court's analysis of this question appears at pages five through eleven of its Order. The court's analysis has two parts: (1) a "grammatical" examination of the applicable statute, ORS 308A.709(5), and (2) an attempt to square the court's conclusion, after that grammatical examination, that the additional tax must be paid by the Port, with the legislature's apparent intent in enacting ORS 308A.709(5) that such taxes not be paid by a municipal corporation. As the Port believes that it can show, the first part of the court's analysis is unnecessarily strained and unrealistic; the second is indefensible.

1. The court's "grammatical" analysis

The "grammar" under discussion here is that of ORS 308A.709, and particularly the relationship between the introductory wording of that statute and the specific wording of its subsection (5). To assist the reader, the Port

repeats those two parts of the statute, juxtaposed precisely as they are in the statute as a whole:

> Notwithstanding that land may have been disqualified from special assessment, no additional taxes may be imposed under ORS 308A.703 if, as of the date the disqualification *is taken into account* on the assessment and tax roll, the land *is any of the following:*
>
> * * *
>
> (5) *Public property that was leased or rented to a taxable owner as described in ORS 307.110 at the time of disqualification, and the reason for the disqualification was the termination of the lease under which the land was assessed.* * * *

(Emphasis added.)

The Port begins by noting that, reading the statute in an ordinary way, the property is qualified for the revived exemption: Without question, the property "was leased or rented to a taxable owner as described in ORS 307.110 at the time of the disqualification." Even the trial court recognized that fact. Order at 7. Moreover, the "reason for the disqualification was the termination of the lease under which the land was assessed." The court also acknowledged that. Id. Finally, it seems obvious that the property was still public property at the time that the Port informed the County (and the County acknowledged) the disqualification, so that the requirement that the property be public property "as of the date the disqualification *is taken into account* on the assessment and tax roll" is met. Put another way: An ordinary reading of the pivotal statute should

mean that the Port is correct and the case is over. That is not, however, the way the trial court chose to read the statute.

The court analyzed the foregoing wording in ORS 308A.709 in this way: The court first emphasized that the word "is" in the introductory phrasing of the statute contrasts with the reference in subsection (5) to public property that "was" leased. It further assumed that the emphasized part of the phrase "as of the date the disqualification *is taken into account* on the assessment and tax roll" can refer to only one of two possible dates within the year, *viz.*, January 1 or July 1. *See*, generally, discussion in Order, pages eight to nine. From that assumption, the court went on to point out that the property in this case was not "public property" on either of *those* dates, so that the requirement in subsection (5) that, to qualify for the exemption under that subsection, the property "was" public property at the time that the property was taken into account on the assessment and tax roll could not be met. Order at 8.

Aside from its own grammatical and syntactic expertise, the court pointed to the text of ORS 308A.068(3) for support. That statutory subsection provides:

> (3) Whether farmland qualifies for special assessment under this section *shall be determined as of January 1 of the assessment year*. However, if land so qualified becomes disqualified prior to July 1 of the same *assessment year*, the land shall be valued under ORS 308.232, at its real market value as defined by law without regard to this section, and shall be assessed at its assessed value under ORS 308.146 or as otherwise provided by law. If the land becomes disqualified on or after July 1, that land shall continue to qualify for special assessment as provided in this section for the *current tax year*.

(Order at 8; emphasis supplied by court.)[9]

The trial court also placed considerable importance on the fact that the "assessment role" is to be prepared "as of" January 1 of the assessment year, *i.e.*, at the beginning of the calendar year. Order at 8. ORS 308.210 provides in part:

> (1) The assessor shall proceed each year to assess the value of all taxable property within the county, except property that by law is to be otherwise assessed. The assessor shall maintain a full and complete record of the assessment of the taxable property for each year as of January 1, at 1:00 a.m. of the assessment year, in the manner set forth in ORS 308.215. Such record shall constitute the assessment roll of the county for the year.
>
> * * *.

It is difficult to see how this statute furthers the court's analysis, however. Obviously, creating "a full and complete record of the assessment of taxable property for each year as of January 1" is not an event that simply occurs on New Year's Day: No assessor could have either the personal energy or the manpower to do all that is required on that single day; rather, the "full and complete record" necessarily is a compendium of information collected and assessment work done throughout the preceding year.

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[9] As noted earlier, an "assessment year" is a calendar year; a "tax year" runs from July 1 of a calendar year through June 30 of the following year. ORS 308.007(1)(b); 308.007(2). An "assessment year" begins on January 1 of a given year and corresponds to the "tax year" commencing on July 1 of that same year.

The court thought otherwise. Its analysis is set out in full here:

> The statutes at issue in this case fit within the context of an annual cycle of assessment and taxation of property. *In that annual cycle, most, if not all, changes in status are taken into account either on January 1 or July 1. Daily determinations could be done, but would present expensive and disruptive consequences in the annual system.*
>
> * * *[I]n this case the disqualification of the Property would next have been taken into account on an assessment and tax roll as of January 1, 2013. Accordingly, unless, as of that date, a requalification for special assessment had occurred—and no party contends it did—*the disqualification of the land in question here was taken into account on the assessment and tax roll on January 1, 2013.*
>
> *The present-tense condition of Subsection 5 therefore is to be evaluated from the point in time of January 1, 2013*. The condition is that the property be, *as of that date*, "public property." No party asserts that the land in question here was public property on January 1, 2013. Accordingly, Subsection 5 cannot and did not apply to shield the property from the imposition of the additional tax.
>
> It does not matter that the past-tense condition of Subsection 5 (that the property was leased by a public owner to a taxable lessee at the time of the disqualification) is satisfied as to this property. It indeed was, at the time of the disqualification, rented or leased to a taxable owner—the Prior Tenant. However, that is only one of two conditions that must be satisfied for Subsection 5 to be applicable. The other, a return to public ownership, *to be determined as of a particular time*, was not satisfied.

Order at 9 (emphasis supplied).

In other words, the entire case depended, not on whether there had been a disqualification, or even on whether the disqualification occurred at the same time that control of the property was returned to the public corporation. In order for the relief provided by ORS 308A.709(5) to apply, *the property must*

still be in public ownership on a particular January 1(or July 1). Of course, none of the statutes in question actually say anything of that sort and—so far as the Port is aware—none ever has. But, the trial court insists, that is the outcome that the legislature intended.

C. The Correct Analysis; the Oregon Tax Court's Analysis Critiqued

The Port submits that the following observations are necessary to a correct reading of the statute.

1. The Oregon Tax Court's reading of the statute

a. The court's "is"/"was" dichotomy, even if it were grammatically correct in the abstract, is irrelevant here. The meaning of "was" in subsection (5) is not a reference to the property's present ownership; it is, instead, a part of a phrase that describes the property, *viz.*, property that at some time in the past was (and still may be) property leased to a taxpayer. And that is precisely what the property in the present case *is*: property whose history includes a period of lease to a taxpayer, during and after which it was owned by a public body. Thus, there is no true conflict between the use of "is" in the introductory part of the statute and the use of "was" in subsection 5. The Port concedes that the foregoing is not the only permissible reading of the statutory wording, but submits that it is a reasonable reading that removes the artificial inconsistency in the statute purportedly identified by the trial court, and is the only reading

that, as the Port will show *post*, conforms to what manifestly was the intent of the legislature in enacting the provision.

b. The trial court's "authorities" do not help that court's analysis. The court seizes upon the phrase, "as of the date the disqualification is taken into account," in the preface to subsection (5). But that "date" could, based on the face of the statute, be any of 365 dates in a year. This fact is illustrated by the August 7, 2012 email from the County to the Port in which the writer stated, "so I won't be processing this until later this fall but go ahead and send the official request letter." Clearly, the trial court's assumption notwithstanding, events like the disqualification here are "taken into account" throughout the year.

The court attempted to support its approach by pointing to the wording of ORS 308A.068(3), the statute that identifies the "as of" date on which the value of land under special assessment is to be determined. But, far from supporting the court's theory, that statute merely describes a date that the valuation *must relate to, i.e.*, a date that serves the administrative purpose of putting the imposition of all ad valorem property taxes on an equal temporal footing.. The statute does not state when, in fact, the value must be "determined," much less inform the reader what is meant by the preamble of ORS 308A.709.

Neither is ORS 308.210, also cited by the court, of any assistance to its theory. That statute establishes what the "tax roll" is: "a full and complete

record of the assessment of the taxable property for each year as of January 1, at 1:00 a.m. of the assessment year." It says nothing about the meaning of the critical wording in ORS 308A.709(5)—"as of the date the disqualification is taken into account on the assessment and tax roll." Obviously, and as explained and illustrated above, information relating to the valuation process may come to the assessor throughout the year. Equally obviously, actual assessments are conducted throughout the year, subject always to new information. To suggest, as the court does, that the only relevant date here is January 1 is difficult to understand. Indeed, the dynamic process of assessment and recording probably is at its least dynamic on the very day on which the court relies—January 1. There is no reason to read the statutes in such an unrealistic fashion.

Even if this court were to assume that the tax court's reading of the statute remains a permissible one, it is clear that the tax court did not itself consider that reading particularly persuasive. Instead, that court purported to delve into the legislative history of ORS 308A.709(5), beginning with the hopeful assertion that its tentative analysis "is not illogical." Order at 10. But saying that does not make it so.

The Tax Court's explanation of the legislature's rationale appears in its Order at 10:

> * * *Recall that the Property was originally public land and exempt from tax under ORS 307.090. Subsection 5 [of ORS 308A.709] assumes that the disqualification was related to the termination of the lease or

> rental to a taxable party. Upon that occurrence the land would return to the ownership that had existed prior to the lease—public ownership. **If that public ownership continues**, the history of the property is one of public ownership with a period of private use.
>
> **The legislature appears to have considered that pattern to be one for which the imposition of additional tax was not appropriate**. The department has supplied legislative history of a component of what is now ORS 308A709(5) that supports the conclusion that **the legislative intent behind what is now the statute was to relieve public bodies of any tax obligation or lien on their property when a taxable lease ended and possible additional tax accrued.** That legislative history does not specifically address a situation where land returns to public ownership and thereafter, before the next determination—January 1 or July 1—becomes property of a taxable owner. However, the discussion in the legislative history strongly suggests that the legislature was providing for relief in situations where land returned to *and remained* in public ownership. Nothing in the legislative history suggests that the legislature intended to relieve property of the additional tax burden where the property returned to private taxable ownership.

(Italics in original; bold supplied; footnote omitted.)

With respect, the foregoing conclusion is not defensible. The Port offers the following analysis of the key points in the Tax Court's reasoning:

1. "Subsection 5 [of ORS 308A.709] assumes that the disqualification was related to the termination of the lease or rental to a taxable party."

That assumption applies here: The Port and the prior tenant mutually executed a termination of the lease to prior tenant on August 6, 2012, and a copy of that document, together with other information confirming its meaning, was emailed to the County the next day. Commencing August 6, therefore, the property was once again owned and possessed by a municipal corporation and was exempt from property taxes. The County acknowledged receipt of the

documents on August 7, 2012, so the County knew of the status of the property as of that date.

2. "If that public ownership continues, the history of the property is one of public ownership with a period of private use."

Public ownership did, in fact, "continue" for three more days. The Port then sold the property to Boardman. As shall appear, however, the court appears to have perceived some reason that the ownership continue far longer.

3. "*The legislature appears to have considered that pattern* [*i.e.*, lease of the property for a time, followed by return to municipal corporation ownership] *to be one for which the imposition of additional tax was not appropriate*. The department has supplied legislative history of a component of what is now ORS 308A709(5) that supports the conclusion that *the legislative intent behind what is now the statute was to relieve public bodies of any tax obligation or lien on their property when a taxable lease ended and possible additional tax accrued*."

(Emphasis added.)

In other words, the present case fits precisely the situation for which the legislature thought that it was providing a remedy. On this point, the Port's own review of the legislative history agrees with the court: The legislature intended that municipal corporations not be (in effect) punished for putting their property in the hands of those who would have to pay taxes on it, thereby enhancing the relevant county's tax revenue.

At this point in the court's recitation, the Port submits that the case should have been over. But it was not.

4. "That legislative history does not specifically address a situation where land returns to public ownership and thereafter, before the next determination—January 1 or July 1—becomes property of a taxable owner."

That statement is accurate, but unhelpful. The discussion in the legislative history, like the legislation itself, was general, because the policy of the legislation was a general one. The narrower class of situations that seems to have fascinated the Tax Court is simply a subset of a larger category, and the legislative policy choice applied to that entire larger category. To the Port's knowledge, there is no statement anywhere in the legislation or its history to the effect that "the benefit of this statute shall not accrue to any municipal corporation which, having recovered its property, conveys it to a private party within a short time, or before either January 1 or July 1 of the following calendar year." Yet that is precisely how the Tax Court reads the subsection. The Tax Court's justification for that addition to the statute appears next:

> 5. "However, the discussion in the legislative history strongly suggests that the legislature was providing for relief in situations where land returned to *and remained* in public ownership. Nothing in the legislative history suggests that the legislature intended to relieve property of the additional tax burden where the property returned to private taxable ownership."

(Emphasis in original.)

To make the simplest point first: The Tax Court's reference to "property return[ing] to private ownership" is a red herring. Nothing of the sort occurred

here—the property returned to the *Port*, not private ownership—and the court's mention of it suggests that the court was analytically off course.

As for the balance of the court's rationale, the court cites no part of the legislative history in support of its assertion that the legislative history "strongly suggests" that the statute was only intended to apply when property "remained" with the municipal corporation, and with good reason: Far from "strongly suggesting" what the Tax Court describes, the legislative history does nothing of the kind.

2. The legislative history behind ORS 308A.709(5)

Any review of the legislative history of ORS 308A.709 must begin with the earlier statute that enunciated the policy choice that is now embodied in ORS 308A.709(5). That review reveals the following:

The wording of ORS 308A.709(5) originates from the wording of former ORS 308.396(2) and (3). Former ORS 308.396 was created by 1983 Or Laws chapter 599 (Senate Bill 41). That measure represented a substantive policy choice by the Legislative Assembly—a specific choice to eliminate a "tail" of additional taxes on property that was owned by a public body, leased to a private party who used it for farm purposes and received the benefit of the farm use tax deferral, and then returned to the public body.

From the outset, the legislature's own working summary of the bill showed that its scope included cases like the present one. That summary

appears in the Ways and Means Committee Analysis dated June 17, 1983, that was prepared by Sue Acuff of the Legislative Fiscal Office, and it followed the measure throughout the balance of the legislative session. It describes the problem addressed, and the scope of the legislative answer, this way:

> Problem addressed.
>
> * * *
>
> Clarifies tax treatment of surplus lands upon termination of a lease, under which the property was specially assessed for tax purposes.
>
> Function and purpose of measure as reported out.
>
> * * *
>
> *Finally, the bill specifically exempts the state from payment of additional taxes on state lands when removed from Special Farm Use*. It is unclear at present, if the state is responsible for the difference in taxes between those paid on leased property specially assessed for farm use versus its highest and best use when the land is no longer leased out for farming activities. *This provision exempts all such additional taxes which may be in question.*

(Emphasis added.)[10] Nothing in the summary suggested that any "waiting period" was involved. Every legislator who eventually voted on the measure had before her specific information that informed her that she was voting on precisely the issue that confronted the trial court in the present case.

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[10] As noted, this statement, referred to in legislative jargon as the "pony," was available to the Joint Ways and Means Committee, its subcommittees, and other substantive legislative committees throughout the period in which the proposed legislation was pending.

The legislative history also is replete with statements to the same effect as the "pony," some even from those legislators who opposed the idea. *See* generally Minutes, Ways and Means Committee, June 21, 1983 (Tape 29 Side A at 147ff). Moreover, it must be noted that no one in those discussions suggested that, if the legislation were passed, it should be limited to those circumstances in which the municipal corporation, having regained control of the property, kept the property off the tax rolls for any particular length of time. Thus, it not only is true that the legislative history says nothing at all to justify the court's description of it as "strongly suggest[ing]" the court's conclusion.

In summary, then, the substantive law in existence at the time of the passage of ORS 308A.709 specifically supported the Port's position. We turn to the legislative history of ORS 308A.709.

ORS 308A.709 was enacted as Section 7 of SB 248 (1999). SB 248 was designed as a reorganization and restructuring of the farm use statutes. As a general theme, legislative history materials state repeatedly that the enactment of ORS 308A.709 and the other statutes related to the special assessment of properties such as those at issue in this matter was intended to be a nonsubstantive reorganization of the prior statutes. For example, a representative of the office of legislative counsel stated:

> SB 248 is a bill which reorganizes the farm use statutes but does not change existing law. A working committee was formed in February of '98 to begin reorganizing the statutes, and the intent of the bill was just

> to make the law more accessible to users. There is one minor change in the abatement section, section 24, which would cause a change in disqualification penalties. Under current law, interest is added to the taxes that should be paid once farmland is disqualified. This measure eliminates interest to be paid on penalty taxes if farmland is disqualified. The revenue impact from eliminating interest would really be very minor. There would only be a slight reduction in local property tax revenues due to eliminating these interest charges on disqualified farm owners.

Similarly, Gary Wright, an employee of Defendant, told a Senate committee that:

> The reason that we are here today is that the farm use statutes as we know them today have been in existence for close to 40 years… The laws have been amended, passed, and restructured but never organized. That's basically why we are here. We are not here to change the law or change policy. We are here to restructure these laws so they are administratively organized and much easier to work with. DOR contacted interested parties to see if there was an interest in reorganizing and simplifying these laws.

Finally, an unidentified individual stated in the same committee meeting that, "[SB] 248 is just clarifying the farm use statutes into a more organized fashion. They put in subheadings to make it easier to use the law."

Viewed through that lens, the meaning of ORS 308A.709 becomes apparent. As noted, ORS 308A709(5) was enacted as Section 7 of SB 248 (1999). It replaced ORS 308.396 and a part of ORS 308.399, which were repealed by the same Act. In substance, subsections (1)(a) through (d) of ORS 308.396 became ORS 308A.709(1) through (4); ORS 308.396(2) and (3) became ORS 308A.709(5); and ORS 308.399(3) became ORS 308A.709(6). To facilitate those changes, the lead-in wording of ORS 308.396(1), (2)-(3), and

ORS 308.399(3) was deleted and, in place of that wording, ORS 308A.709 was given a slightly different lead-in. Here are how those changes look in the context of ORS 308A.709 as currently written:[11]

> Notwithstanding that land may have been disqualified from special assessment, no additional taxes may be imposed under ORS 308A.703 if, as of the date the disqualification is taken into account on the assessment and tax roll, the land is any of the following ~~No additional tax shall be collected under ORS 308.395, 308.299 or 321.960 from an owner of land that has received special assessment under ORS 308.370 if the land becomes disqualified for such special assessment because the land is acquired~~:
>
> (1) Acquired by a governmental agency as a result of the lawful exercise of the power of eminent domain or the threat or imminence thereof.
>
> (2) Acquired by purchase, agreement or donation under ORS 390.121 (relating to State Parks and Recreation Commission acquisitions).
>
> (3) Acquired by a city, county, metropolitan service district created under ORS chapter 268 or park and recreation district organized under ORS chapter 266 for public recreational purposes or for the preservation of scenic or historic places.
>
> (4) Acquired for wildlife management purposes under ORS 496.146.
>
> (5) Public property that was leased or rented to a taxable owner as described in ORS 307.110 at the time of disqualification, and the reason for the disqualification was the termination of the lease under which the land was assessed. ~~No additional tax shall be collected under ORS 308.395 or 308.399 upon land described in ORS 270.100 to 270.190, upon land acquired under ORS 390.121 or upon land acquired for~~

[11] In the following quotation, enacted wording is underlined, wording not retained from its original statutory source is stricken through.

~~wildlife management purposes under ORS 496.146 that has received special assessment as farmland under ORS 308.370, special assessment under ORS 307.110 or special assessment as forestland or small tract under ORS chapter 321 when the lease under which the land was assessed is terminated. * * * [The previous sentence] applies to all land described therein upon notice to the county assessor by the Oregon Department of Administrative Services, the State Parks and Recreation Department or the State Department of Fish and Wildlife regardless when the assessment was made or the lease terminated.~~

~~* * * * *~~.

The question at issue in this matter – when the exemption in ORS 308A.709(5) is required to be provided in the case of a lease termination – is resolved by the legislative intent to "reorganize" ORS 308.396 and ORS 308.399 into ORS 308A.709 in two different respects: First of all, the policy choice underlying what was originally ORS 308.396 (2) and (3)—the choice to totally exempt property of public bodies from a "tail" of additional taxes—continues. To hold otherwise would be to say that the legislature in fact made substantive changes to the law, when substantive changes were disavowed throughout the process. Second, and as set forth above, former ORS 308.396(3) clearly and unequivocally provided that the exemption to which it applied would be available "regardless when * * * the lease terminated." Once again, and even if the substantive rule under the former statute were ignored, the legislative history is clear that statutory rewording was intended to clarify statutes, not to change them. Given the legislature's intent that the enactment of ORS 308A.709 would be a nonsubstantive reorganization of prior law, the

former statute's "regardless" rule survives, thereby resolving this matter in favor of the Port.

To the extent any uncertainty remains due to the non-inclusion of the lease-termination wording quoted above from ORS 308.396, that uncertainty is eliminated by understanding the deletion of that wording in the context of the new wording that was added. ORS 308A.709 is an outgrowth of at least three operative statutory provisions: ORS 308.396(1), ORS 308.396(2)-(3), and ORS 308.399(3). As reflected above, in order to combine those three different provisions into one statute, the lead-in wording of each of the former statutory provisions was deleted and replaced with the single lead-in sentence of ORS 308A.709. Thus, the direction that "no additional tax shall be collected" was eliminated, and the phrase, "notwithstanding that land may have been disqualified from special assessment, no additional taxes may be imposed" was substituted.

The addition of that initial clause – "notwithstanding that land may have been disqualified from special assessment" – further reveals the legislature's intent not to do away with the expansive lease-termination concepts of ORS 308.396(2)-(3). Instead, the clause has a backward focus – back to when the disqualification occurred. Having identified the disqualification as a past event, the assessor is now instructed to take that event – the disqualification and facts

surrounding it – into account at some later time and extend an exemption if the event is one of those enumerated in ORS 308A.709.

The foregoing history clarifies the flaw in the trial court's "was"/"is" rationale: ORS 308.709(5) is a past-tense section that requires the assessor to determine whether the property at issue *was* public property at the time of the lease termination and that the termination of the lease was the reason for the disqualification. That perfectly squares with the rule of former ORS 308.396(2)-(3), which required the exemption to be applied "regardless when * * * the lease terminated." That latter wording became unnecessary when the statutes were reorganized, because the new lead-in wording of ORS 308A.709 was broadened to permit each of the ORS 308A.709 subsection events to be "taken into account" at a later time.

In summary, ORS 308A.709 is a reorganization of provisions of former statutes that were repealed upon the enactment of ORS 308A.709. One of those former statutes – ORS 308.396(2)-(3) – expressly provided that no additional taxes would be collected in the event of a lease termination and special assessment disqualification of the type at issue in this case. To the extent the wording of ORS 308A.709 is different from the prior statutes, it is because the current statute is a reorganized version of several repealed statutes. Seen in this light, ORS 308A.709(5) applies in this situation because, at the time the property was disqualified from special assessment, it was "public property" in

the meaning of ORS 308A.709. Once informed of them, the assessor was required to exempt it from additional taxation whenever he got around to taking the pertinent facts into account on the assessment and tax roll.

Finally, the Port notes that the foregoing analysis finds support elsewhere in the tax code. Consider, for example, ORS 308A.116, which governs the disqualification of land for farm use deferment. Of the four possible grounds for disqualification, only the first—notification by the taxpayer—specifically applies in this case. (Or, at least, so the Tax Court declares. Opinion at 7.) But the *second* of those criteria—"sale or transfer to an ownership making [the property] exempt from ad valorem property taxation"—surely informs the analysis here: The legislature thought returning the property to ownership such as the Port extinguished the "tail."

VI. CONCLUSION

The Port respectfully suggests that its critique of the trial court's opinion alone establishes the correct analysis and that, even if it does not, the recital of relevant legislative history completes that task. The legislature was faced with a straightforward policy choice in its consideration of the statutory wording that eventually became ORS 308A.709(5). The value of leasing out publicly-owned properties to a taxable tenant was self-evident: It increased the property tax income in each county in which such leasing occurred. On the other hand, imposing a tax "tail" on such property when it reverted to public ownership

would have at least two deleterious effects: (1) no county could force any other public body to pay the tax, making the additional tax at best a contingent liability, and (2) having the additional tax bill hanging over the property made the property more difficult to sell, virtually assuring a lower price or no price at all to the public body. And, in fact, the two foregoing concerns create a third: When a developer wants property, it wants it immediately. If the Port has to say, "Well, we have the perfect property for you, but you'll have to wait until next January 1 before we can sell it to you," such transactions are going to be rare. None of those described circumstances was in the public interest. Hence, the choice made in the measure.

As worded, ORS 308A.709(5) directly and unequivocally establishes that "no additional taxes" shall be imposed on a piece of public property that was under lease, qualified for a tax deferral, and then later returned to the public body that owned it. The wording is as clear as is the justification for the policy choice that the statute makes, and the property in the present dispute precisely fits that scenario. The trial court erred in adding its own additional, temporal requirement to those expressed in the statute. If such an additional, temporal requirement is to be applied, the legislature, not the Oregon Tax Court, must create it.

For the reasons stated, the judgment of the Oregon Tax Court should be reversed, and the case remanded to that court with instructions to grant the Port's motion for summary judgment and to enter judgment accordingly.

DATED this 29th day of March, 2016.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

I certify that: (1) this brief complies with the word-count limitation in ORAP 5.05; and (2) the word-count of this brief, as described in ORAP 5.05(2)(b), is 8,728 words. I also 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(4)(f).

Dated this 29th day of March, 2016.

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CERTIFICATE OF FILING AND SERVICE

I certify that on March 29, 2016, I filed the original of this PLAINTIFF-APPELLANT'S CORRECTED BRIEF ON THE MERITS with the State Appellate Court Administrator by the eFiling system.

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