

IN THE SUPREME COURT OF THE STATE OF OREGON

DEPARTMENT OF REVENUE, State of
Oregon; and DESCHUTES COUNTY
ASSESSOR,

Plaintiffs-Appellant,

v.

RIVER'S EDGE INVESTMENT, LLC,

Defendant-Respondent

Tax Court No. 4962

Supreme Court No. S062829

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Oregon Tax Court
The Honorable Henry C. Breithaupt, Judge

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STATEMENT OF THE CASE

Nature of the Action or Proceeding

River's Edge Investment LLC (River's Edge) operates a hotel and convention center on property it owns in the City of Bend, Deschutes County. The Deschutes County Board of Property Tax Appeals (BOPTA) issued an order setting a real market value for the convention center at \$7,354,970 for the 2008-09 tax year. River's Edge appealed that decision to the Magistrate Division of the tax court. The magistrate reduced the property's real market value to \$3,538,000. The Department of Revenue (the department) and the Deschutes County Assessor then appealed to the Regular Division of the tax court. Following a trial, the Regular Division further reduced the real market value of the property to \$2,668,000, adopting the value conclusion of the River's Edge appraiser, and entered judgment against the department.

Following entry of a general judgment, the tax court entered a supplemental judgment. The department appeals from both judgments.

Nature of the Judgment and Supplemental Judgment

The tax court entered a judgment in favor of River's Edge for a real market value for the River's Edge property of \$2,668,000 for the 2008-09 tax year, and by supplemental judgment awarded attorney fees, expenses, and costs in the amount of \$243,040.40 (\$195,075 in attorney fees).

Statutory Basis of Appellate Jurisdiction

This court has jurisdiction pursuant to ORS 305.445.

Entry of Judgment and Timely-Filed Notice of Appeal

The tax court entered its judgment on November 10, 2014, and the department's Notice of Appeal was served and filed on December 8, 2014, within the statutory time period for appeal. The tax court entered the supplemental judgment on April 21, 2015, and the department's amended Notice of Appeal was filed on April 29, 2015, within the statutory time for appeal.

Questions Presented on Appeal

1. In order to determine real market value, property must be valued at its highest and best use. Does Article XI, section 11, of the Oregon Constitution (Measure 50) require that the highest and best use and real market value of property be determined without taking into consideration other property outside the specific tax account property being appealed when it is part of the same unit of property?

2. OAR 150-308.205-(A)(3) defines "especial use property" as "property specially designed, equipped, and used for a specific operation or use that is beneficial to only one particular user." Does that rule require that both a cost approach and income approach must be performed when valuing especial use property, or merely considered?

3. Whether or not the tax court correctly entered a judgment in favor of River's Edge, did the court err in awarding attorney fees under ORS 305.490(4)(a)?

Summary of the Argument

The tax court erred in rejecting the department's real market value appraisal based on an erroneous interpretation of both Measure 50 and OAR 150-308.205-(A)(3).

Measure 50 limits assessed value increases to a maximum of 1.03% of the prior year's assessed value. Measure 50 provides that the assessed value is the lesser of the real market value (RMV) or maximum assessed value (MAV) of the property in a tax account. Measure 50 does not limit RMV. The tax court erroneously concluded that Measure 50's focus on the specific tax account for purposes of determining MAV also extended to RMV and highest and best use determinations.

Based on this view of Measure 50, the tax court erroneously rejected the department's conclusion that the highest and best use for determining the real market value of the River's Edge convention center property is its existing integrated use with the adjacent River's Edge Hotel operated by the same owner/taxpayer, and wrongly accepted the taxpayer's income approach, based on a stand-alone convention center highest and best use.

The department's highest and best use and real market value conclusions were consistent with statutory and case law. In determining real market value for property tax purposes, the *first* issue is the highest and best use of the property; the *second* issue is the market value of the property at that use. In determining highest and best use of especial use property, such as the River's Edge convention center, it is appropriate to take into account the taxpayer's entire operation, which would include the adjacent hotel operated in conjunction with the convention center.

The tax court also misconstrued OAR 150-308.205-(A)(3), and held that it requires both the cost and income approaches to be performed. But all the rule requires is that just compensation for loss to the owner be determined "through *either* the cost or income approaches, *whichever is applicable, or* a combination of both." OAR 150-308.205-(A)(3) (emphasis added). The rule does not authorize the court to refuse to consider the department's cost approach simply because an income approach was not performed. The department did consider the income approach, but concluded it could not be performed reliably because the available income and expense information for the convention center commingled the income and expenses of the hotel, and no stand-alone convention center lease information existed for development of a capitalization rate. (Ex 1, pp 40-41).¹ Instead, the

¹ Exhibit 1 is the department's appraisal.

department's appraiser performed only a cost approach.

Whether or not the court correctly entered a judgment in favor of River's Edge on the valuation issue, the court erred in awarding attorney fees under ORS 305.490(4)(a), because the department acted in good faith and presented objectively reasonable arguments in the tax court.²

Summary of Facts

River's Edge, the owner of a well-established Bend hotel, the Riverhouse Hotel, built a brand new state-of-the-art convention center, the River's Edge Convention Center, which was designed to operate, and actually operated, in conjunction with the adjacent Riverhouse Hotel. (Ex 1, p 15). The valuation date at issue in this case is January 1, 2008, just one year after the convention center was completed. In its opinion, the tax court described the property as follows:

The property in question is a convention center and related land (the subject property) located on the west side of the Deschutes River in Bend, Oregon. The subject property was constructed by taxpayer and completed in 2006. The convention center on the subject property is a modern and fully functioning convention center with large kitchen facilities, meeting rooms, audio-visual equipment and all of the facilities needed for operation of a convention center. Personal property associated with the convention center is not at issue in this case. Prior to construction of the subject property, taxpayer owned and operated, and still owns and operates, a large full-service hotel just north of the subject property. That facility is in a tax account separate

² The department did not participate in the Magistrate Division proceeding, but the tax court nevertheless awarded fees against it also for that proceeding.

from the tax account for the subject property. Taxpayer owns other property in the general neighborhood of the subject property, including a golf course.

(ER 5-6).

The department's appraiser concluded that the highest and best use of the property was a convention center used in conjunction with the hotel. (Ex 1, pp 37-38). The River's Edge appraiser concluded that the highest and best use was a stand-alone convention center. (Ex A, pp 40-41).³

At trial, the department introduced evidence that the convention center was always intended by its owners to operate as an integral part of the Riverhouse Hotel, and was only financially feasible to the owners based on the sale of additional hotel rooms to the groups the convention center would attract. (Tr 417-420). The department's appraiser concluded that the convention center had a symbiotic relationship with the other Riverhouse properties and that "income and expenses of the properties are comingled." (Tr 420; Ex 1, pp 40-41).

The department's appraiser testified that the convention center had no immediate market and was designed and built without regard for marketability as a stand-alone property. (Tr 421). The department's appraiser concluded that the convention center was an "especial property" for which the statutory measure of

³ Exhibit A is the River's Edge summary appraisal report.

value is just compensation to the owner for loss of the property. ORS 308.205(2)(c). The department's appraiser considered both the income approach and the cost approach to value as directed by OAR 150-308.205-(A)(3). He performed a cost approach, reaching a value conclusion of \$16,700,000, which included \$6,890,000 for land, but was unable to obtain the detailed income and expense information needed for an income approach, including the additional hotel room revenues attributable to the new convention center, because they were not reported separately. (Tr 425-427, 548, 1109-1110; Ex 1, pp 40-41).

The River's Edge appraiser conducted an income approach based solely on the direct income from convention center space rentals and its food and beverage sales, indicating a value of \$2,668,000⁴ for the convention center as a stand-alone facility. (Ex A, pp 2, 68). The River's Edge appraiser also performed a cost approach indicating a value of \$15,460,000, including \$4,790,000 for land. (Ex A, p 52). However, he did not place any reliance on this cost approach in his reconciliation, characterizing the difference between his income and cost approaches as functional and economic obsolescence, despite the fact that his opinion of value for both the land and improvements under his income approach

⁴ The River's Edge appraiser concluded a value of \$4,130,000 for the going-concern value of the property; from that, \$1,462,000 (personal property) was deducted to arrive at a final value of \$2,668,000 for the property under appeal.

(\$2,668,000) was less than his opinion of value under his cost approach for the land alone (\$4,790,000). (Ex A, p 69). He offered no explanation as to why a brand new state of the art facility would have so much functional obsolescence and external obsolescence. (*Id*).

The tax court concluded that, applying “the paramount provisions” of Measure 50, “the RMV of the convention center, and any other property in the same property tax account, must be determined independently of consideration of property (here the hotel) contained in another property tax account.” (ER 11). The court placed “no reliance” on the department’s appraisal, in part because the court concluded that the appraisal had failed to consider the “income method [of valuation] required by OAR 150-308.205-(A)(3). (ER 14). The tax court gave full weight to the River’s Edge appraiser’s income approach, and concluded a value of \$2,668,000 for the property. (ER 15).

FIRST ASSIGNMENT OF ERROR

The tax court misinterpreted the provisions of Measure 50, and the effect of those provisions on ORS 308.205, when it held that the highest and best use and real market value of property must be determined without reference to any property outside of the tax account under appeal.

Preservation of Error

As explained above, the department's position at trial was that "the relationship of the subject property to the hotel and the common ownership of the two properties is of decisive importance in the valuation of the subject property."

(ER 8). The tax court rejected that position, concluding that:

The department's expert therefore had no legal basis for taking into account, in the valuation of the convention center, what he considered to be augmented income at the hotel, produced by the presence of the convention center. That income could only be relevant to the value of the property in the tax account in which the hotel property was found. Further, his conclusion that the highest and best use of the convention center was operation in conjunction with the hotel is simply inconsistent with the account focus of Measure 50.

(ER 10).

The question of the effect of Measure 50 on the determination of highest and best use of property was not raised at trial and only arose in the tax court's written opinion. Therefore, ordinary preservation requirements do not apply. *See, e.g., McCarthy v. Oregon Freeze Dry, Inc.*, 327 Or 84, 90 n6, 957 P2d 1200 (1998) *modified on recons.*, 327 Or 185, 957 P2d 1200 (1998) (party not required to take action to preserve an issue that first arose when court issued its order); *Peeples v. Lampert*, 345 Or 209, 220, 191 P3d 637 (2008) (preservation rules do not apply "when a party has no practical ability to raise an issue").

Standard of Review

This court reviews decisions of the Oregon tax court for “errors or questions of law or lack of substantial evidence in the record to support the tax court’s decision.” ORS 305.445.

ARGUMENT

I. Measure 50 does not prohibit consideration of characteristics of property outside the tax account under appeal in determining that property’s real market value.

Measure 50 established that each unit of property would have a maximum assessed value and that the assessed value of the property would not exceed the property’s real market value. Or Const, Art XI, § 11 (Measure 50).⁵ However,

⁵ Article XI, section 11(1)(a)-(f) provides:

(1)(a) For the tax year beginning July 1, 1997, each unit of property in this state shall have a maximum assessed value for ad valorem property tax purposes that does not exceed the property’s real market value for the tax year beginning July 1, 1995, reduced by 10 percent.

(b) For tax years beginning after July 1, 1997, the property’s maximum assessed value shall not increase by more than three percent from the previous tax year.

(c) Notwithstanding paragraph (a) or (b) of this subsection, property shall be valued at the ratio of average maximum assessed value to average real market value of property located in the area in which the property is located that is within the same property class, if on or after July 1, 1995:

(A) The property is new property or new improvements to property;

Measure 50 and its implementing statutes did not change the manner in which real market value is determined.

A. Real market value must be determined separate and apart from the Measure 50 limitation on maximum assessed value.

Measure 50 provides that the assessed value of property is the lesser of its real market value (RMV) or maximum assessed value (MAV). Measure 50 further caps increases in MAV from year to year at 3 percent of the prior year's MAV.

(B) The property is partitioned or subdivided;

(C) The property is rezoned and used consistently with the rezoning;

(D) The property is first taken into account as omitted property;

(E) The property becomes disqualified from exemption, partial exemption or special assessment; or

(F) A lot line adjustment is made with respect to the property, except that the total assessed value of all property affected by a lot line adjustment shall not exceed the total maximum assessed value of the affected property under paragraph (a) or (b) of this subsection.

(d) Property shall be valued under paragraph (c) of this subsection only for the first tax year in which the changes described in paragraph (c) of this subsection are taken in to account following the effective date of this section. For each tax year thereafter, the limits described in paragraph (b) of this subsection apply.

(e) The Legislative Assembly shall enact laws that establish property classes and areas sufficient to make a determination under paragraph (c) of this subsection.

(f) Each property's assessed value shall not exceed the property's real market value.

Thus, the first step in determining a property's assessed value is determination of its RMV. The MAV cap is a mathematical calculation applied to the property tax account. In contrast, RMV is based on the appraised value of property, considering all characteristics of the property, including its location, physical condition, and operation in proximity to other property.

Before the enactment of Measure 50, RMV was defined in Measure 5 as “the minimum amount in cash which could reasonably be expected by an informed seller acting without compulsion from an informed buyer acting without compulsion, in an arm's-length transaction.” Or Const, Art XI, § 11b(2)(a) (Measure 5). Measure 50 contains essentially the same definition of RMV: “the amount in cash that could reasonably be expected to be paid by an informed buyer to an informed seller, each acting without compulsion in an arm's length transaction. Or Const, Art XI, § 11(11)(a)(A). Both before and after the enactment of Measure 5 and Measure 50, ORS 308.205 has continuously similarly defined RMV as follows:

(1) Real market value of all property, real and personal, means the amount in cash that could reasonably be expected to be paid by an informed buyer to an informed seller, each acting without compulsion in an arm's-length transaction occurring as of the assessment date for the tax year.

(2) Real market value in all cases shall be determined by methods and procedures in accordance with rules adopted by the Department of Revenue and in accordance with the following:

- (a) The amount a typical seller would accept or the amount a typical buyer would offer that could reasonably be expected by a seller of property.
- (b) An amount in cash shall be considered the equivalent of a financing method that is typical for a property.
- (c) If the property has no immediate market value, its real market value is the amount of money that would justly compensate the owner for loss of the property.
- (d) If the property is subject to governmental restriction as to use on the assessment date under applicable law or regulation, real market value shall not be based upon sales that reflect for the property a value that the property would have if the use of the property were not subject to the restriction unless adjustments in value are made reflecting the effect of the restrictions.

B. The tax court's decision erroneously applied Measure 50 to limit RMV determination.

The tax court's opinion restricts the determination of RMV to a "property tax account" under ORS 308.142, even though this statute does not address RMV, but instead implements Measure 50 and the MAV calculation. The opinion states:

The AV of any property can be determined only after comparing the RMV of the property and the MAV determined for the property. It therefore logically follows that the RMV of any property must be determined by reference to what the RMV of all property in a tax account is. Consideration of the RMV or MAV of property found in another tax account is, as a necessary conclusion, not permitted.

(ER 9).

The tax court's conclusion regarding the effect of Measure 50 is in error.⁶

The statute's direction to compare RMV and MAV does not require that RMV be determined in the same manner as MAV; if they are the same the comparison would be unnecessary. Where a property is in more than one tax account the property's RMV is allocated to each of the tax accounts and it is that allocated value that is compared to the tax account MAV. Measure 50 did not alter or limit the methods used to determine RMV, including the determination of highest and best use. Actually, it is not the adjacent hotel's RMV that is considered in valuing the convention center, but the existence, quality and functional integration of the properties.⁷

⁶ This error led the tax court to reject the department's appraisal, and to accept the River's Edge appraiser's highest and best use and income approach for the convention center as a stand-alone facility, ignoring that appraiser's reliance on a fatally flawed income shortfall methodology. The River's Edge appraiser's cost approach concluded a value of \$15,460,000, including \$4,790,000 for land. However, he did not place any reliance on this cost approach in his reconciliation, characterizing the drastic difference between his income and cost approaches as functional and economic obsolescence, despite the fact that his opinion of value for both the land and improvements under his income approach (\$2,668,000) was less than his opinion of value under his cost approach for the land alone (\$4,790,000). He offered no explanation as to why a brand new state of the art facility would have so much functional obsolescence and external obsolescence. An appraiser's conclusion of economic and functional obsolescence derived from subtraction of one approach from another was rejected by this court in *United Telephone Co. v. Dept. of Rev.*, 307 Or 428, 770 P2d 43 (1989).

⁷ An earlier tax court ruling held that Measure 50 did not change RMV. See *Georgia-Pacific Consumer Products LP v. Clatsop County Assessor*, 20 OTR 426,

The tax court relied on the holding in *Flavorland Foods v. Washington County Assessor*, 334 Or 562, 54 P3d 582 (2002), to support its conclusion that Measure 50 requires that the property in a property tax account be appraised without regard to the existence of any property in another property tax account. But *Flavorland* does not address the issue of calculation of RMV—only the comparison of RMV to MAV. For that comparison purpose, the unit of property is the property tax account. However, nothing in *Flavorland* limits the ability of assessors to appraise property according to its highest and best use in relation to the surrounding property that may not be in the same tax account, but operated as a single unit.

A property tax account is an administrative division of property. ORS 308.142(2).⁸ It allows assessors to comply with the statutes requiring entry of

431 (2012) (“there is no indication in the text or history of Measure 50 to suggest that the amendment adding its provisions was directed to the specifics of how appraisers would determine the RMV of assets.”).

⁸ ORS 308.142(2) provides:

For purposes of determining whether the assessed value of property exceeds the property’s maximum assessed value permitted under section 11, Article XI of the Oregon Constitution:

(1) “Property” means:

(a) All property included within a single property tax account; or

* * *

values on the property tax roll, and aids in determining MAV for purposes of implementing Measure 50. *Id.* However, as merely an administrative construct, the scope of the property tax account does not dictate the highest and best use of property for determining its real market value. According to the definition of RMV — “the amount in cash that could reasonably be expected to be paid by an informed buyer to an informed seller, each acting without compulsion in an arm’s-length transaction occurring as of the assessment date for the tax year” — the RMV is not constrained by the tax account because a transaction between a buyer and seller might include more or less than a single tax account’s property. If an informed buyer would only purchase the convention center along with the hotel, then the value of the convention center must be determined in light of its connection to the hotel.

The tax court’s conclusion that Measure 50 limits the manner in which real market value is determined is in error and should be reversed.

(2) “Property tax account” means the administrative division of property for purposes of listing on the assessment roll under ORS 305.215 for the tax year for which maximum assessed value is being determined * * *.

C. A property’s highest and best use may appropriately take into consideration the characteristics of property outside the specific tax account being valued.

When valuing property, appraisers must first determine the property’s “highest and best use” (HBU). *Sabin v. Dept. of Rev.*, 270 Or 422, 425-426, 528 P2d 69 (1974) (In order to properly determine real market value, property must be valued at its highest and best use.); *First Interstate Bank of Oregon, N.A. v. Dept. of Rev.*, 306 Or 450, 454, 760 P2d 880 (1988). The highest and best use of a property must be identified before the real market value can be determined. *Freedom Federal v. Dept. of Rev.*, 310 Or 723, 727, 801 P2d 809 (1990) (“the *first* issue is the highest and best use of the property; the *second* issue is the market value of the property at that use”) (Emphasis in original).

The tax court did not determine a highest and best use of the property.⁹ The only discussion of highest and best use is the court’s statement that “[the department’s] conclusion that the highest and best use of the convention center was

⁹ The appraiser for River’s Edge concluded a highest and best use for the property as a stand-alone convention center. The department’s appraiser concluded the highest and best use of the property was a convention center operated in conjunction with the hotel. The tax court’s decision does not resolve this conflicting evidence, although the court implicitly accepted the River’s Edge appraiser’s highest and best use by accepting his income approach based on the stand-alone convention center.

operation in conjunction with the hotel is simply inconsistent with the account focus of Measure 50.” (ER 10).

The tax court’s decision regarding the effect of Measure 50 is in error. The concept of highest and best use was not changed in any way by Measure 50. Highest and best use is not statutorily defined – the courts have generally relied on the definition of that concept contained in the various editions of *The Appraisal of Real Estate*, both before and after passage of Measure 50. *STC Submarine, Inc. v. Dept. of Rev.*, 320 Or 589, 593, 890 P2d 1370 (1995); *U.S. Nat. Bank of Oregon v. Multnomah County Assessor*, 15 OTR 366, 371 (2001); *Lincoln County v. Dept. of Rev.*, 11 OTR 5, 8 (1988). Pursuant to legislative rulemaking authority in ORS 308.205(2), the department adopted an administrative rule that incorporates the definition of highest and best use from *The Appraisal of Real Estate*:

“Highest and best use” means the reasonably probable and legal use of vacant land or an improved property that is physically possible, appropriately supported, and financially feasible, and that results in the highest value. See *The Appraisal of Real Estate*, 12th edition (2001).

OAR 150-308.205-(A)(1)(e).

When a property has been developed to integrate into a larger operation, consideration of the entire operation is consistent with valuation of the subject property at its highest and best use. This court discussed a similar issue in *STC Submarine*. In that case, the question before the court was the valuation of a

factory used in the manufacturing of undersea fiber optic cable. The taxpayer asserted that the highest and best use of the factory was general purpose industrial use; the department argued that the highest and best use was the existing use of manufacturing marine fiber optic cable. In reaching this determination, the department considered the viability of the taxpayer's entire operation, not merely the property in a single tax account.¹⁰ The court agreed that this was the correct method for determining highest and best use:

In determining the “highest and best use” of taxpayer’s building and structures, the department properly considered the continued viability of taxpayer’s entire operation. The following example from Professor Bonbright’s treatise, I *The Valuation of Property* (1937), illustrates the point. Suppose that a prosperous water company has its reservoir in one county and its purifying plant and offices in another county. One may have little value without the other. As Professor Bonbright explains: “Like one glove or half a fountain pen, each part alone may be almost valueless. So, too, though our water company is a valuable business organism, the sum of what would be received from separate sales of the assets on each side of the county line would be ridiculously small.” *Id.* at 493.

The value of taxpayer’s building and structures, like the value of the water company’s reservoir in Professor Bonbright’s example, should not be measured in isolation, but rather in relation to the value of the operation as a whole.”

STC Submarine, 320 Or at 594 n 6 (emphasis added).

¹⁰ The Riverhouse Hotel is itself located on three separate tax accounts.

Here, the same principle is in play. The department's conclusion that the highest and best use of the property was continued use as a convention center in conjunction with the adjacent hotel properly takes into account the integrated River's Edge hotel/convention center operation. To value the convention center as a stand-alone facility based on an income approach does not capture its full value.¹¹ Consistent with the court's decision in *STC Submarine*, the value of the convention center "should not be measured in isolation, but rather in relation to the value of the operation as a whole." The operation as a whole includes both the convention center and the hotel.

Similarly, in *First Interstate Bank of Oregon, N.A. v. Dept. of Rev.*, 306 Or 450, 453, 760 P2d 880 (1988), this court observed that highest and best use could be determined in the context of other properties: "it is possible that in certain situations, the highest and best use of a lot would be a part of a group of lots. If that were the case, it would be appropriate to assess that lot based on its value as part of a group." This is consistent with the court's decision in *STC Submarine* that property should be valued in relation to its value to the taxpayer's operation as a whole.

¹¹ The segregated inputs in the cost approach allow it to be used for valuing this type of integrated property, unlike the income approach.

Based on the foregoing, both before and after the passage of Measure 50, the highest and best use and real market value of property has been determined without regard to a single tax account. The tax court’s opinion in this case is a significant departure and should be reversed.

SECOND ASSIGNMENT OF ERROR

The tax court misinterpreted OAR 150-308.205-(A)(3) when it held that the department’s cost approach should be given no weight because the department did not also perform an income approach to value the property.

Preservation of Error

In its closing brief, the department addressed the issue of whether it was required to perform—or merely consider—both income and cost approaches under OAR 150-308.205-(A)(3). (TCF 328-329, 342).

Standard of Review

This court reviews decisions of the Oregon tax court for “errors or questions of law or lack of substantial evidence in the record to support the tax court’s decision.” ORS 305.445.

ARGUMENT

- II. OAR 150-308.205-(A)(3) provides that the department must consider both cost and income approaches to value, but does not require that the department actually complete both approaches if the department determines that one approach is not appropriate.**

To address a lack of sales of comparable properties, which was the case here, ORS 308.205(2)(c) provides that “[i]f the property has no immediate market value, its real market value is the amount of money that would justly compensate the owner for loss of the property.” Pursuant to legislative rulemaking authority in ORS 308.205(2), the department adopted an administrative rule prescribing valuation treatment for the property known as “especial property” both in the rule and appraisal literature generally. OAR 150-308.205-(A)(3) sets forth the relevant valuation methodology by which to estimate loss to the owner, in pertinent part, as follows:

(3) Valuation of Especial Property: Especial property is property specially designed, equipped, and used for a specific operation or use that is beneficial to only one particular user. This may occur because the especial property is part of a larger total operation or because of the specific nature of the operation or use. In either case, the improvement’s usefulness is designed without concern for marketability. Because a general market for the property does not exist, the property has no apparent immediate market value. Real market value must be determined by estimating just compensation for loss to the owner of the unit of property through *either* the cost *or* income approaches, *whichever is applicable, or* a combination of *both*.

(Emphasis added.)

In this case, based on the lack of comparable sales, the department concluded that the property in question was especial use property and valued it pursuant to OAR 150-308.205-(A)(3). The tax court did not decide whether the property was especial use property.¹² The court stated that, even if the property was especial property,

[t]he department's own rule directs consideration of both the income and cost indicators of value, even if a property is "especial" or to be valued in order to arrive at just compensation. And yet, the department's expert witness did not develop an income indicator. That is a serious departure from appraisal practice. Appraisal Institute, *The Appraisal of Real Estate* 130 (13th ed 2008). If not adequately justified, it would lead the court to place no reliance on the appraisal of the expert who took the departure.

(ER 11).¹³

The tax court's opinion gives no weight to the department's cost approach.

The tax court declined to consider the department's appraisal because the appraiser

¹² The tax court did not decide whether this is especial property under ORS 308.205(2)(c). But, based on the lack of sales to do a sales comparison approach in both parties' appraisals, the convention center property is, by definition, "especial property," such that the value must be "just compensation" to the owner for loss of the property.

¹³ *Cf. Hewlett-Packard Co. v. Benton County Assessor and Department of Revenue*, 21 OTR 186, 192 (2013), *appeal pending* SO61456-1458 ("The department suggests that the failure by taxpayer's appraiser to develop an income indicator of value is fatal to his appraisal. * * * That is not so. In cases where the HBU is occupation and use of a special purpose facility by the owner, it is an accepted view that the income indicator is not practically available or useful.").

did not perform an income approach to valuation, but this is not a requirement of OAR 150-308.205-(A)(3). All that is required under that rule is that the just compensation for loss to the owner be determined “through either the cost or income approaches, *whichever is applicable*, or a combination of both.” OAR 150-308.205-(A)(3) (emphasis added). The department considered the income approach and concluded it could not be applied. (Tr 425-427, 548, 1109-1110; Ex 1, pp 40-41). Even if the tax court had correctly determined that the department’s justification for that conclusion was unpersuasive,¹⁴ there is still no authority under the rule or under ORS 308.205 for the tax court to refuse to consider the department’s cost approach, which, consistent with OAR 150-308.205-(A)(3), the department determined to be the appropriate method for estimating the loss to the owner of the property. The tax court’s decision refusing to consider that cost approach is incorrect and should be reversed.

¹⁴ Defendant maintains that, even for income producing property, an income approach is nevertheless not applicable where income and expenses are commingled with income and expenses of property not under appeal but operated as a unit with the property appealed. The River’s Edge appraiser did not include any commingled income or expenses in his income approach, which distorts the value indicated from his income approach downward. The lack of stabilized income history for the newly operating convention center also limits the reliability of an income approach here.

THIRD ASSIGNMENT OF ERROR

The tax court erred in awarding attorney fees, costs and expenses of \$243,040.40.

Preservation of Error

The department filed an objection to the River's Edge request for attorney fees, costs and expenses. (ER 18-23).

Standard of Review

Review is for abuse of discretion. *Clackamas County Assessor v. Village at Main Street Phase II, LLC*, 352 Or 144, 151, 282 P3d 814 (2012) (“Under ORS 305.490, the court’s decision whether to award attorney fees is discretionary”); *Pendell v. Dept. of Rev.*, 315 Or 608, 616, 847 P2d 846 (1993) (so reviewing).

ARGUMENT

III. The department acted in good faith and presented objectively reasonable arguments in the tax court, so attorney fees are not warranted under ORS 305.490 and ORS 20.075.

ORS 305.490(4)(a) allows attorney fees only where the court finds in favor of a taxpayer. Therefore, if this court reverses the judgment of the tax court in favor of taxpayers, the award of attorney fees, costs and expenses should be reversed in its entirety. However, even if this court holds that the tax court was correct in whole or in part, the award of attorney fees should be reversed for the reasons that follow.

ORS 305.490(4)(a) provides:

If, in any proceeding before the tax court judge involving ad valorem property taxation, exemptions, special assessments or omitted property, the court finds in favor of the taxpayer, the court may allow, in addition to costs and disbursements, the following:

(1) Reasonable attorney fees for the proceeding under this subsection and for the prior proceeding in the matter, if any, before the magistrate; and

(2) Reasonable expenses as determined by the court. Expenses include fees of experts incurred by the individual taxpayer in preparing for and conducting the proceeding before the tax court judge and the prior proceeding in the matter, if any, before the magistrate.

“In deciding whether to exercise its discretion to award attorney fees, the court must consider the factors listed in ORS 20.075(1); that statute is mandatory.”

Clackamas County Assessor, 352 Or at 151.¹⁵

¹⁵ ORS 20.075(1) provides:

A court shall consider the following factors in determining whether to award attorney fees in any case in which an award of attorney fees is authorized by statute and in which the court has discretion to decide whether to award attorney fees:

(a) The conduct of the parties in the transactions or occurrences that gave rise to the litigation, including any conduct of a party that was reckless, willful, malicious, in bad faith or illegal.

(b) The objective reasonableness of the claims and defenses asserted by the parties.

(c) The extent to which an award of an attorney fee in the case would deter others from asserting good faith claims or defenses in similar cases.

The department determined that there was no immediate market for taxpayer's property and that it should be valued as especial property under OAR 150-308.205-(A)(3). The tax court did not reject that determination. OAR 150-308.205-(A)(3) provides that in valuing especial property, "[r]eal market value must be determined by estimating just compensation for loss to the owner of the unit of property through either the cost or income approaches, whichever is applicable, or a combination of both." The department considered the income approach, but determined it would not be a reliable approach based on the lack of reliable information available, instead placing sole reliance on the cost approach. The tax court rejected the department's rationale for making that determination.

The department's determination that the best indicator of value was the cost approach was based on objectively reasonable criteria. The department's appraiser

- (d) The extent to which an award of an attorney fee in the case would deter others from asserting meritless claims and defenses.
- (e) The objective reasonableness of the parties and the diligence of the parties and their attorneys during the proceedings.
- (f) The objective reasonableness of the parties and the diligence of the parties in pursuing settlement of the dispute.
- (g) The amount that the court has awarded as a prevailing party fee under ORS 20.190.
- (h) Such other factors as the court may consider appropriate under the circumstances of the case.

found that the property's income was unreliable due to the concessions given in return for food and beverage sales and the commingling of income and expense information. (Ex 1, pp 40-41). Further, he was unable to find long-term leases of free-standing convention centers from which to determine a reliable capitalization rate to use in the income approach. (*Id.*).¹⁶ Thus, the department had a reasonable basis in fact and law for not relying on the income approach and instead relying on the cost approach to value taxpayer's property.

An attorney fees award in this case will not deter others from raising meritless claims or defenses. As explained above, the department's decision to rely on the cost approach to value was supported by fact and law and was made in good faith. As this court recently noted, "if a government entity takes a position that is based on an objectively reasonable interpretation of a statute, the fact that that position is erroneous is not alone a basis for a discretionary award of attorney fees." *Clackamas County Assessor*, 352 Or at 153. An attorney fees award will not deter the department from making similar good faith determinations in the future. *Preble v. Dept. of Rev.*, 331 Or 599, 605, 19 P3d 335 (2001).

¹⁶ The River's Edge appraiser's income approach relied on only one property, a non-comparable nonprofit-owned convention center. The department's appraiser testified that the information derived from this one, non-comparable property was insufficient to determine a market rent for the subject property. (Tr 1147).

As a matter of policy and legislative intent, when the government acts in good faith, presenting reasonable arguments in the tax court, neither the county nor the department should be required to pay the prevailing taxpayer's attorney fees. *See Preble v. Department of Revenue*, 331 Or at 605. Only in situations where the government has acted unreasonably did the legislature intend to award attorney fees. Indeed, only in those circumstances is an attorney-fee award consistent with the purposes behind the relevant statutes. Neither the county nor the department acted unreasonably in this case, so no award of fees or expenses is justified.

CONCLUSION

The tax court's decision should be reversed and remanded for consideration of the parties' appraisal approaches to value based on (1) the appropriate highest and best use and RMV determinations unrestricted by Measure 50, and (2) the correct construction of OAR 150-308.205-(A)(3).

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In the event this court reverses the general judgment, it should also reverse the supplemental judgment awarding attorney fees and costs. Even if this court affirms the general judgment, the supplemental judgment should be reversed, because taxpayers are not entitled to an award of discretionary attorney fees in this case.

Dated this 29th day of May, 2015.

Respectfully submitted,

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

Brief length

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 6,930 words.

Type size

I certify that the size of 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 May, 2015.

By: /s/ Marilyn J. Harbur

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CERTIFICATE OF SERVICE

I certify that on May 29, 2015, I directed the original APPELLANT'S
OPENING BRIEF to be electronically filed with the Appellate Court
Administrator, Appellate Records Section, and electronically served upon Mark G.
Reinecke, Attorney for Defendant-Respondent, and Laurie Craghead, Attorney for
Deschutes County, using the court's electronic filing system.

Dated this 29th day of May, 2015.

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