

IN THE SUPREME COURT OF THE STATE OF OREGON

VILLAGE AT MAIN STREET,  
PHASE II, LLC,

Plaintiff-Respondent,

v.

DEPARTMENT OF REVENUE,  
State of Oregon,

Defendant-Appellant,

and

CLACKAMAS COUNTY  
ASSESSOR,

Intervenor-Appellant.

TC 5054

S063163 (Control)

VILLAGE AT MAIN STREET,  
PHASE III, LLC,

Plaintiff-Respondent,

v.

DEPARTMENT OF REVENUE,  
State of Oregon,

Defendant-Appellant,

and

CLACKAMAS COUNTY  
ASSESSOR,

Intervenor-Appellant.

TC 5055

Supreme Court No. S063164

*Continued.....*

VILLAGE RESIDENTIAL, LLC,  
Plaintiff-Respondent,

TC 5056

v.

DEPARTMENT OF REVENUE,  
State of Oregon,  
Defendant-Appellant,

Supreme Court No. S063165

and

CLACKAMAS COUNTY  
ASSESSOR,  
Intervenor-Appellant.

VILLAGE RESIDENTIAL, LLC,  
Plaintiff-Respondent,

TC 5057

v.

DEPARTMENT OF REVENUE,  
State of Oregon,  
Defendant-Appellant,

Supreme Court No. S063174

and

CLACKAMAS COUNTY  
ASSESSOR,  
Intervenor-Appellant.

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APPELLANT CLACKAMAS COUNTY ASSESSOR'S OPENING BRIEF

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Direct Appeal from the judgments of the Oregon Tax Court entered March 19, 2015, and the Order denying relief from judgment entered April 20, 2015.

The Honorable Henry C. Breithaupt.

*Continued.....*

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Brief filed September 30, 2015

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## **Appellant/Intervenor Clackamas County Assessor's Opening Brief**

### **I. STATEMENT OF THE CASE.**

#### **A. Nature of the Proceeding.**

Plaintiffs/taxpayers Village at Main Street Phase II and Phase III, and Village Residential, LLC (referred to collectively as Village) challenged the real market value of the improvements to their properties. *Village at Main St. Phase II, LLC v. Dept. of Rev.*, 356 Or 164, 166 (2014). The cases were tried together in the Magistrate Division of the Oregon Tax Court on the improvement value only. *Id.* Plaintiffs appealed the magistrate's decisions to the Regular Division of the tax court (the tax court.)

The Assessor moved for leave to amend his answers to assert his right under ORS 305.287 to bring all components of value (land and improvements) before the court. The tax court denied the motions, opining that ORS 305.287 did not apply to the appeals. *Village at Main St. Phase II, LLC v. Dept. of Rev.*, 20 OTR 524 (2012). This court rejected the tax court's reasoning, and held that the Assessor had the statutory right to challenge both components of value on appeal. *Village at Main St. Phase II, LLC v. Dept. of Rev.*, 356 Or 164, 179-80 and 184 (2014). This court reversed the limited judgments denying the motion to amend the answers,

and remanded the cases to the tax court for “further proceedings.” *Id.* at 185.

The day that this court’s opinion was issued plaintiffs filed notices of voluntary dismissal of their complaints in the tax court pursuant to Tax Court Rule (TCR) 54A(1), which permits voluntary dismissal if “no counterclaim has been pleaded.” The Assessor filed an opposition to the notices of dismissal.

After this court entered judgment the tax court dismissed the complaints. *Village at Main St. Phase II, LLC v. Dept. of Rev.*, 22 OTR 52, 55 (2015). The Department of Revenue (DOR) and the Assessor moved for relief from the judgments, arguing that the original answers raised counterclaims. Appellants also argued that this court’s remand and reversal of the tax court’s denial of the Assessor’s motion to amend its answer to add counterclaims under ORS 305.287 prevented voluntary dismissal. After additional briefing and argument the tax court denied the motions for relief from judgment.

#### **B. Nature of the Judgment.**

The tax court dismissed the complaints pursuant to TCR 54A(1). In its order denying appellants relief from the judgments the court concluded that there were no pending counterclaims to prevent voluntary dismissal under

rule 54A(1).The Assessor and DOR appeal from the orders and judgments of dismissal.

**C. Basis of Supreme Court Jurisdiction.**

This court has jurisdiction under ORS 305.445.

**D. Dates of Entry of Judgment and Filing Notice of Appeal.**

The judgments of dismissal were entered on March 19, 2015. The Order denying relief from the judgments was entered April 20, 2015. The Assessor timely filed his notices of appeal on April 20, 2015. The cases are consolidated for appeal.

**E. Questions on Appeal.**

The issues on appeal are:

1. A plaintiff can voluntarily dismiss a complaint under TCR 54A(1) “if no counterclaim has been pleaded.” Did the tax court err as a matter of law in concluding that the Assessor did not request affirmative relief, i.e. plead counterclaims, in his original answers?

2. This court reversed the tax court’s reason for denying the Assessor’s motion for leave to amend his answers to add a counterclaim under ORS 305.287, and remanded the case for “further proceedings.” Did the tax court err as a matter of law in dismissing the complaints under TCR 54A(1) when this court reversed the denial of leave to amend to add a

counterclaim and remanded for further proceedings? Were the motions to amend to add a counterclaim “pending” on remand to preclude voluntary dismissal?

3. The tax court construed the statutes governing appeal and held that the only proper way to raise a claim for an increase in real market value is by filing a separate complaint, not by way of a counterclaim. Did the tax court err as a matter of law in construing the statutes and tax court rules to conclude that Appellants lack the right to plead a counterclaim for a change in value, and in concluding that a party can only raise a claim for an increase in real market value in a separately-filed complaint?

#### **F. Summary of Arguments.**

In the Assessor’s original answers he pleaded a claim for an increase in the real market value of the improvements for all but one of the cases; in that case the Assessor asked that the Magistrate’s values for the various accounts be affirmed, which request higher real market values than that requested by Village on appeal. The requested values are affirmative claims for relief which the tax court should have deemed counterclaims, preventing voluntary dismissal.

In addition, the tax court’s decision is contrary to this court’s earlier decision and ORS 305.287. The statute grants the Assessor an affirmative

right to raise all components of value on appeal, which is most effectively raised by filing a counterclaim. The Assessor filed a motion for leave to amend his answers to add counterclaims under ORS 305.287. This court reversed the tax court's basis for denying the Assessor's motions, and remanded for further proceedings. This court's decision effectively removed any discretion from the tax court. The motion to amend was "pending" and the counterclaims should have been allowed, preventing voluntary dismissal. A contrary decision thwarts the meaning and purpose of this court's decision and remand. While this is an issue of first impression in this court, appellate courts in other states have held that a pending motion to amend precludes voluntary dismissal.

Finally, the tax court erred as a matter of law in deciding that a party seeking an increase in value can only do so by filing a separate complaint. This conclusion is contrary to the tax court rules and statutes, which permit counterclaims, as well as ORS 305.287. The court's conclusion is also contrary to the court's *de novo* status conferred by the legislature, and its own precedent. *Strawn v. State Tax Comm.*, 1 OTR 98 (1962), *modified by* 236 Or 299 (1964). It is also inconsistent with this court's decision, which recognizes that a claim under ORS 305.287 "neither requires nor

authorizes other parties to file a separate notice of appeal” to assert the rights granted by the legislature. *Village*, 356 Or at 181.

**G. Statement of Facts and Procedural Background.**

Village owns several apartment properties in Wilsonville, and challenged the real market value of the improvements to these properties. *Village*, 356 Or at 166. The cases were tried in the Magistrate Division on the improvement values only.<sup>1</sup> *Id.* Plaintiffs appealed those decisions to the Regular Division, which are independent proceedings, with trials conducted *de novo*. ORS 305.425(2) & (3).

The Assessor moved for leave to amend his answers to assert his right under ORS 305.287 to bring all components of value (land and improvements) before the court. The tax court denied the motions, opining that ORS 305.287 did not apply to the appeals. *Village*, 20 OTR 524. This court rejected the tax court’s reasoning, and held that the statute applied and the Assessor had the statutory right to challenge both components of value in the Regular Division. *Village*, 356 Or at 166. The court reversed the limited judgments denying the motion to amend the answers, and remanded the cases to the tax court for “further proceedings”. *Id.* at 185.

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<sup>1</sup> Before the legislature passed ORS 305.287 in 2011 a party could appeal only one component of value for the property under this court’s decision in *Nepom v. Dept. of Rev.*, 264 Or 195 (1972). ORS 305.287 was enacted to allow a party to an appeal to raise all components of value.

On September 18, 2014, the day that this court's opinion was issued, plaintiffs filed notices of voluntary dismissal of their complaints in the tax court pursuant to TCR 54A(1). The Assessor filed objections to the notices. (CC ER 1-4.)

After this court entered judgment the tax court dismissed the complaints, concluding that no counterclaims were pled to prevent dismissal. 22 OTR at 55. (ER 72-84.) The Assessor and DOR moved for relief from the judgments, arguing both that the original answers raised counterclaims and that the Assessor's motion to amend its answer to add counterclaims under ORS 305.287 prevented voluntary dismissal. (CC ER 5-33.) After additional briefing and argument the tax court denied the motions for relief. (ER 72-83.) This appeal follows.

## **II. ASSIGNMENTS OF ERROR.**

### **A. First Assignment of Error.**

The tax court erred as a matter of law in concluding that the Assessor did not plead counterclaims in his original answers.

#### **1. Preservation of Error.**

The Assessor filed motions for relief from the judgments of dismissal in which he argued that his answers raised affirmative claims for relief which should be treated as counterclaims, preventing voluntary dismissal.

(CC ER 5-33.)<sup>2</sup> This argument was renewed in the hearing. (Tr. 6; 11; 18-19; 23-26; 28-29.) The Assessor properly preserved this question for appeal.

## **2. Standard of Review.**

The court reviews the tax court's decision for "errors or questions of law or lack of substantial evidence in the record to support the tax court's decision or order." ORS 305.445. The tax court's construction of voluntary dismissal under TCR 54A (1) is a question of law. *See Hewlett-Packard Co. v. Benton County Assessor*, 357 Or 598, 609-10 (2015) (determining the meaning and scope of statutes and rules is a question of law) (construing DOR rules.)

## **3. Argument.**

The tax court denied appellants' motion for relief from the judgments of dismissal because appellants were not "aggrieved" by the Magistrate's decision in TC 5054, thus appellants lacked "standing to appeal." 22 OTR at 55. With respect to the three cases in which the Assessor asked for an increase in the real market value of the improvements to an amount higher than that found by the magistrate, the court concluded that ORS 305.501(5)(a), which provides that a party dissatisfied with a magistrate's

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<sup>2</sup> The Assessor relies on the Excerpt of Record filed by the department (ER), except where noted as "CC ER."



decision “**may appeal** the decision”, required the Assessor to file a separate complaint to address the real market value. 22 OTR at 56-57. (Emphasis added.) The Assessor addresses these aspects of the tax court’s errors in both the first and third assignments of error.

The tax court erred in dismissing the complaints because the Assessor pled a claim for affirmative relief in his answers, which precludes dismissal under TCR 54A(1).

TCR 54A(1) states:

“Subject to the provisions of Rule 32D and of any statute of this state, a plaintiff may dismiss an action in its entirety or as to one or more defendants without order of court: (a) by filing a notice of dismissal with the court and serving such notice on all other parties not in default not less than five days prior to the day of trial if no counterclaim has been pleaded[...] Upon notice of dismissal or stipulation under this subsection, a party shall submit a form of judgment and the court shall enter judgment of dismissal.”

ORS 305.425(3) requires the tax court rules to conform as much as practicable to Oregon rules of equity and practice, thus the rules are based on the Oregon Rules of Civil Procedure (ORCP), and are construed consistent with those rules. See *TVKO v. Howland*, 15 OTR 402 (2002).<sup>3</sup>

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<sup>3</sup> In addition, the preface to the Tax Court Rules notes that although the ORCP are not applicable, “many of the rules reflect provisions of the ORCP. To the extent that the wording of a TCR is the same as that of an

The relevant portion of TCR 54A(1) is identical to ORCP 54A(1).<sup>4</sup> In construing court rules this court “looks first” to the plain language of the rule. *In re Albrecht*, 333 Or. 520, 535 (2002). TCR 54A(1) precludes voluntary dismissal if a counterclaim has been pleaded.

A counterclaim is a request to recover affirmative relief. *Rogue River Mgmt. Co. v. Shaw*, 243 Or 54, 60 (1996) (citing former ORS 16.290, which provided a right to plead a counterclaim in an answer, now provided in ORCP 18, and distinguishing a counterclaim from set-off and recoupment.)

A counterclaim must allege facts which are legally sufficient to allow the defendant to recover in an independent action against the opposing party. *State v. Pacific Live Stock Co.*, 93 Or 196, 207 (1919) (dismissal proper because affirmative defenses did not state sufficiently independent claim for affirmative relief); *Hammer v. Campbell Gas Burner Co.*, 74 Or 126, 135 (1914); *Tokstad v. Daws*, 68 Or 86, 90-91 (1913) (affirming trial

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ORCP, cases interpreting the ORCP may be looked to as authority for interpreting the TCR.”

<sup>4</sup> ORCP 54A(1) provides: “Subject to the provisions of Rule 32D and of any statute of this state, a plaintiff may dismiss an action in its entirety or as to one or more defendants without order of court: (a) by filing a notice of dismissal with the court and serving such notice on all other parties not in default not less than five days prior to the day of trial if no counterclaim has been pleaded[...].”

court's denial of dismissal where answer pleaded claim for affirmative relief.)

The tax court rules provide for pleading a counterclaim. TCR 13B provides that an answer may include a counterclaim. TCR 18A requires only that a pleading, including a counterclaim, make “a plain and concise statement of the ultimate facts”, and a demand for relief. TCR 18B further provides that a party seeking a change in the real market value of the property at issue “shall plead the dollar amount of the real market value by that party for each tax year at issue.” TCR 22A (1) allows a defendant to “set forth as many counterclaims, both legal and equitable, as such defendant may have against a plaintiff.” TCR 22A(2) further provides: “A counterclaim may **or may not** diminish or defeat the recovery sought by the opposing party. **It may claim relief exceeding in amount or different in kind** from that sought in the pleading of the opposing party.” (Emphasis added.)

The Assessor requested affirmative relief in the form of an increase in the real market value of the improvements from the value on the tax roll, in three of the four cases.<sup>5</sup> In the fourth case the Assessor asked that the

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<sup>5</sup> In TC # 5055 the Assessor asked for a Real Market Value (RMV) of \$17,146,000 for the improvements and \$6,858,400 in exception value. In TC # 5056 the Assessor requested a RMV of \$2,750,000 for the

Magistrate's decision (affirming the value on the tax roll) be affirmed, which sought a value higher than the value requested by Village on appeal. Under TCR 22(A)(2) a counterclaim "may or may not diminish or defeat the recovery" of the opposing party. Each of the answers asked for a higher real market value for the improvements than the values requested by Village on appeal. The answers included a request for affirmative relief.

The answers pled claims for affirmative relief which should have been treated as counterclaims preventing dismissal because it is undisputed that they were filed before Village filed its notices of dismissal under TCR 54A(1).

While the requests were not pled as counterclaims, it is the facts, not the label, which determines the character of a pleading. *Sugarman v. Olsen*, 254 Or 385, 388 (1969) (holding that an equitable matter designated as a counterclaim adequately raised a claim for equitable relief supporting an award of improvement damages in an ejectment case.) Accord *Rogue River*, 243 Or at 61, citing *Gabel v. Armstrong*, 88 Or 84, 90 (1918) (sufficiency of a pleading tested by its allegations, not by name.) The

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improvements. In TC # 5057 the Assessor requested a RMV of \$1,050,000 for the improvements. In TC # 5054 the Assessor asked that the Tax Court affirm the values found by the Magistrate (on 5 accounts for two tax years), which was a change from the values on the tax roll, and were for values higher than those requested by Village. (ER 67-71.)

Assessor's claims for an increase in value are independent claims which are legally sufficient to allow the Assessor to recover from Village, *i.e.* counterclaims. Under TCR 12A "[a]ll pleadings shall be liberally construed with a view of substantial justice between the parties."

Likewise, TCR 19B provides: "When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation."<sup>6</sup> The Assessor's answers should have been treated as raising counterclaims.

The tax court also erred because under tax court precedent a claim for an increase in value is affirmative relief which precludes dismissal. In *Strawn*, the court noted that such a claim need not, though it can be, pled as a counterclaim. *Strawn*, 1 OTR at 106-108 (separate complaint filed by the taxpayer to assert the value of property was properly considered a counterclaim in a tax appeal filed by the county against the state tax commission.)

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<sup>6</sup> This language is identical to the phrase in ORCP 19B.

The tax court erred as a matter of law in concluding that the elements of TCR 54A(1) were met because the Assessor's answers raise claims for affirmative relief which bar voluntary dismissal.<sup>7</sup>

## **B. Second Assignment of Error.**

The tax court erred in dismissing the complaints because under ORS 305.287 and this court's decision the Assessor has a statutory right to raise a counterclaim asserting its rights under ORS 305.287. The counterclaim was "pending", precluding voluntary dismissal.

### **1. Preservation of Error.**

The Assessor filed objections to voluntary dismissal arguing that this court's remand effectively unwound the case procedurally to the point where the Assessor's motions to amend his answers to add a counterclaim under ORS 305.287 should have been granted, preventing dismissal. (CC ER 1-4.) The Assessor also filed motions for relief from the judgments of dismissal arguing that this court's decision and ORS 305.287 prevent voluntary dismissal. (CC ER 17-27; CC ER 32-33.) The argument

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<sup>7</sup> The original answers do not make the Assessor fully whole after this court's decision on the applicability of ORS 305.287 because the answers relate only to the improvements. The Assessor's motion to amend to add a counterclaim under ORS 305.287 includes values for both the land and improvements, as permitted by the statute.

was renewed in the hearing. (Tr. 6-11; 13-16; 32-34; 43-44.) The Assessor properly preserved these arguments for appeal.

## **2. Standard of Review.**

The court reviews the tax court's decision for "errors or questions of law or lack of substantial evidence in the record to support the tax court's decision or order." ORS 305.445. Whether this court's reversal unwound the cases to the procedural point where the Assessor's motions to add a claim under ORS 305.287 should have been granted, *i.e.* were "pending" to prevent voluntary dismissal, is a question of law.

## **3. Argument.**

The tax court conceded that a counterclaim pled under ORS 305.287 would likely bar voluntary dismissal. 22 OTR at 60. However, the tax court denied appellants' motions for relief because the "pleading of Defendants for relief based on ORS 305.287 was not filed prior to the filing by Plaintiffs of the notices of dismissal." *Id.* The tax court erred because this court's decision and remand left the tax court with no discretion other than to allow the motions to add a counterclaim under ORS 305.287, which was pending, to prevent dismissal.

The tax court denied the Assessor's motions to amend its answers to raise a counterclaim under ORS 305.287 to include both components of

value on appeal because it believed the statute did not apply. This court rejected the tax court's reasoning as lacking merit, and remanded for further proceedings. The tax court's dismissal while the Assessor's motion for leave to amend was pending circumvents this court's decision and the Assessor's ability to amend the answers to assert his statutory rights under ORS 305.287.

Voluntary dismissal is inconsistent with the "further proceedings" ordered by this court. The effect of this court's decision procedurally unwound the process to the point of decision-making on the motion to amend. Because the tax court's reason for denying the motions to amend was reversed, this court's decision left the tax court with no discretion to deny the Assessor's motion to amend the answers. The effect of this court's reversal is that the Assessor's motions should have been granted, precluding voluntary dismissal by plaintiffs. The remand order directs the tax court to, in effect, act consistently with this court's decision.

The "further proceedings" ordered by this court means the amended answers were "pending", which should have prevented voluntary dismissal. While this issue is one of first impression in this court, other appellate courts have concluded that a pending motion to amend to add a counterclaim precludes voluntary dismissal. In *Our Gang, Inc. v. Commvest*



*Secur., Inc.*, 608 So.2d 542, 544 (Fla. Ct. App. 4<sup>th</sup> Dist.1992), the plaintiff filed a voluntary dismissal one day before the hearing on the defendant's motion to add a counterclaim. The trial court dismissed the action because no counterclaim was pending. In reversing the trial court, the Florida Court of Appeals held that proper and timely action under the rules of civil procedure, including filing a motion to add a counterclaim, was a pending matter which precluded voluntary dismissal.

Similarly, the Tennessee Appellate court reversed the trial court's order on voluntary dismissal, and held that the defendant's proposed counterclaim in its pending motion for leave to amend was "a pleaded counterclaim" precluding voluntary dismissal. *Salsman v. Texcor Indus., Inc.*, 2002 Tenn. App. LEXIS 580, at \*7, 2002 WL 1838135, at \*4 (2002). As here, in *Salsman* it was undisputed that the motion to add the counterclaim was filed before the plaintiff filed the voluntary dismissal. See also *Mariner Health Care, Inc., v. PricewaterhouseCoopers, LLC*, 282 Ga. App. 217, 218, 638 S.E.2d 340, 342 (Ga App 2006), in which the court noted that "[t]he purpose of the counterclaim limitation on voluntary dismissals is to prevent a plaintiff from invoking the jurisdiction of the court and then withdrawing when the defendant seeks affirmative relief from the

plaintiff.”<sup>8</sup> The same reasoning applies here. Because this court’s reversal removed any discretion from the tax court the Assessor’s counterclaims were pending, making voluntary dismissal improper.

Such conclusions are consistent with Oregon law, which has allowed voluntary dismissal only where no affirmative relief was requested or pending. See *e.g.*, *Maxwell v. Stebbins*, 180 Or App 48, 53 (2002) (dismissal with pending Rule 21 motion should be without prejudice); *Palmquist v. Flir Systems, Inc.*, 189 Or App 552 (2003) (dismissal with summary judgment pending); *Sohn v. Lam Thanh Thuy Thi*, 262 Or App 313 (2014) (dismissal with pending summary judgment should have been without prejudice); and *State ex rel. Myers v. Cigtec Tobacco, LLC*, 200 Or App 501, 504 (2005) (voluntary dismissal appropriate where not five days before trial and no counterclaim or class action interests present.) In each of these cases dismissal was proper because no claim for affirmative relief was raised before the voluntary dismissal was filed.

The Assessor raised affirmative claims for relief by filing for leave to amend his answers. Voluntary dismissal deprives defendants of an opportunity to fully litigate their claims. Because a counterclaim is meant to

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<sup>8</sup> In *Mariner* no counterclaim was pending at the time the voluntary dismissal was filed.

provide affirmative relief as if the defendant had sued for the relief directly, it makes no sense to obtain a decision from this court holding that the claim for affirmative relief should have been allowed, yet permit a litigant to voluntarily dismiss the lawsuit at that stage of the litigation. Any other conclusion moots this court's decision, and supports gamesmanship, which is contrary to the notion of judicial economy.

### **C. Third Assignment of Error.**

The tax court erred as a matter of law when it held that appellants lack the right to plead a counterclaim for an increase in value, and by concluding that the only proper way to raise a claim for an increase in value is in a separately-filed complaint.

#### **1. Preservation of Error.**

The tax court raised the issue of requesting an increase in value in a complaint in its decision denying relief from judgment. However, the Assessor asserted his right to bring a counterclaim asking for an increase in the real market value of both the land and the improvements for the property in both his objections to dismissal and in the motions for relief from the judgment. (CC ER 1-4; 17-27; & 32-33.) This issue has been properly preserved by the Assessor.

## 2. Standard of Review.

The court reviews the tax court's decision for "errors or questions of law or lack of substantial evidence in the record to support the tax court's decision or order." ORS 305.445. Whether a party must request an increase or change in value only by way of filing a separate complaint, rather than in a counterclaim, requires construction of the statutes and court rules, which is a question of law. *Hewlett-Packard*, 357 Or 598.

The tax court held that the Assessor lacked standing and was not aggrieved to appeal under ORS 305.570 if its counterclaim requested that the court sustain the Magistrate's determination of value. *Village*, 22 OTR at 55-56.

In addition, although the tax court acknowledged that the Assessor was aggrieved when he requested an increase in value for the other properties on appeal, the court held that even aggrieved defendants cannot circumvent the statutory appeals process by filing counterclaims. Instead, the court concluded that ORS 305.501(5)(a) and ORS 305.560(l)(a) require defendants to file separate complaints to raise a claim for an increase in value.<sup>9</sup> *Id.* at 57. *Id.* The tax court held:

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<sup>9</sup> After its decision in this case the Tax Court posted a notice on its homepage noting that the decision addresses issues regarding procedures

“Whatever may have been, up to this time, the practice of litigants in the court, the statutes do not permit a party who disagrees with a magistrate decision to raise that disagreement by counterclaim. Where two parties disagree with the decision of the magistrate, two complaints appear to be statutorily required.”

22 OTR 57. The tax court’s decision is not limited to a party’s right to raise a counterclaim under ORS 305.287, but applies to any affirmative claim for relief made by way of a counterclaim. This decision is being used by the Magistrate Division to deny parties the right to claim an increase in real market value of a property on appeal by way of counterclaim. (See CC ER 36-38.) The court’s reasoning would also apply to a claim that an exemption did not apply under other tax statutes, or that a party was not entitled to the full extent of a requested tax refund.

**a. The tax court confuses the ability to appeal with the right to claim affirmative relief by way of a counterclaim.**

The tax court mistakenly concludes that the issue is standing to appeal and disagreement with a magistrate’s decision. 22 OTR at 58. Rather, the issue is a party’s ability to make an affirmative claim and put on evidence of the real market value of the property when faced with an appeal.

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which should be considered by appealing parties, and sent an e-mail to tax court practitioners notifying them of the decision. (CC ER 34-35.)

The tax court confuses the ability and “standing to appeal” with the right to raise an affirmative claim for relief, *i.e.* to file a counterclaim. The tax court relied on ORS 305.501(5)(a), ORS 305.570 and *Bear Creek Plaza, Ore., Ltd. v. Dept. of Rev.*, 12 OTR 272 (1992) to conclude that the parties “were statutorily required to raise the matter by filing a complaint.” 22 OTR at 56-59. However, requirements for standing and the right to appeal do not govern a party’s right to raise a claim for affirmative relief.

ORS 305.501(5)(a) authorizes a party who is dissatisfied with a magistrate’s decision to appeal by filing a complaint in the regular division.<sup>10</sup> ORS 305.570 dictates who has standing to appeal.<sup>11</sup> Neither of these statutes nor *Bear Creek* address or prevent a party from raising a

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<sup>10</sup> ORS 305.501(5)(a) provides: “Any party dissatisfied with a written decision of a magistrate **may** appeal the decision to the judge of the tax court by filing a complaint in the regular division of the tax court within 60 days after the date of entry of the written decision.” (Emphasis added.)

<sup>11</sup> ORS 305.570(1)(a) provides” “Any person, including a county assessor or county tax collector aggrieved by and affected by a written decision of a tax court magistrate[...] or any person seeking a remedy in the tax court provided by statute [...] **may** appeal to the regular division of the Oregon Tax Court, and appeal shall be perfected in the manner provided in ORS 305.404 to 305.560.” (Emphasis added.)

claim for affirmative relief in its answer if another party chooses to appeal the magistrate's decision.<sup>12</sup>

The court's reasoning is contrary to the tax court rules governing pleadings. As noted *supra*, TCR 13B, TCR 18A and TCR 22A recognize a party's right to raise a claim for relief by way of counterclaim. These rules clearly contemplate that a defendant can raise a claim which asks either that the court sustain the magistrate's value, or for an increase in value.<sup>13</sup> The tax court's reasoning renders these rules surplusage, and leads to duplicative appeals.

As this court noted, a statutory deadline for time to file an appeal "does not affect a respondent's time to respond to that appeal." *Village*, 356 Or at 181. Likewise, the statutory right and standing to appeal (ORS 305.501(5)(a) and ORS 305.570) is not the same as and does not govern a

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<sup>12</sup> In *Bear Creek* the county assessor valued a shopping center as one economic unit consisting of 34 separate property tax accounts. The taxpayer appealed the increase in value for only four accounts; the assessor failed to timely appeal the reductions in value of the other accounts, and then tried to cross-appeal. The court held that each tax account had to be separately appealed; the county failed to timely appeal those accounts. The case does not stand for the proposition that a timely filed counterclaim raising all issues in which a party is aggrieved is improper.

<sup>13</sup> As noted, TCR 22A(2) provides that a counterclaim "may or may not diminish or defeat the recovery sought by the opposing party." Thus, a counterclaim asking that the value on the roll be sustained is proper under this rule.

party's ability to respond to claims made by an opposing party on appeal, including the ability to bring a counterclaim for an increase in value.

Requiring a party to file a separate complaint rather than assert its right to request affirmative relief results in duplicative actions and wastes judicial resources. See *eg. Dodd v. Dodd*, 14 Or 338, 339-40 (1886) (husband's claim for affirmative relief in divorce action allowed under Oregon code to avoid inconvenience and delay from two actions.)

**b. The tax court's reasoning is contrary to the *de novo* nature of appeals to the regular division.**

The tax court's reasoning is also contrary to the *de novo* nature of its proceedings. Under ORS 305.425(1) appeal to the Regular Division is an "original, independent" proceeding that is tried *de novo*. See *Village*, 356 Or at 168. For the sake of judicial economy an opposing party should be able to raise a counterclaim asking for an increase in value where the opponent has appealed from a lower court's decision. See *Mack Trucks, Inc. v. Taylor*, 227 Or 376, 386-887 (1961) (purpose of counterclaim is to permit "expeditious and economical disposition" of various claims between litigants in one lawsuit.)

Moreover, in rejecting the tax court's construction of ORS 305.287 this court recognized that the *de novo* nature of the proceedings allows a party to improve its position:



“If either the taxpayer or assessor can improve his case, as he moves from successive administrative hearings to the court, by using new approaches (justified by further study) or offering stronger comparable sales (discovered through greater diligence), these changes in presentation are permitted under the statutory provision for a presentation `de novo,' so long as they aid in reaching the goal of true cash value.”

*Village*, 356 Or at 181, quoting *Price v. Dept. of Rev.*, 7 OTR 18, 23 (1997).

In enacting ORS 305.425(1) the legislature intended that all claims or issues be brought before the Regular Division in an “original” and “independent” proceeding, tried anew. When the issues of the value of property, or the accuracy of an assessment, refund denial or exemption, are raised on appeal, the ultimate issue is the proper value of the property or other right asserted. *Price*, 7 OTR at 23. In fact, the legislature gave the court jurisdiction to determine real market value or to correct value based on the evidence “without regard to the values **pleaded by the parties**”. ORS 305.412. (Emphasis added.) This statute recognizes that a party to an appeal may plead a new value, *i.e.* file a counterclaim.

Requiring aggrieved defendants to file a complaint rather than a counterclaim, to bring all issues before the court for that tax year is contrary to the *de novo* authority the legislature granted to the court, as well as a

waste of judicial resources. The statutes cited by the tax court do not support its conclusion that the legislature intended to prevent the court from considering all issues in one proceeding, or to preclude the use of a counterclaim to raise a claim regarding the value of a property. Rather, in the past the court has said the “Once a tax year has been placed in issue before the court, both parties are obligated to raise all issues and defenses in connection with that claim so that the claim may be finally resolved.” *U.S. Bancorp & Subs. v. Dept. of Rev.*, 15 OTR 13, 17 (1999) (applying claim preclusion in the tax court, citing *Multistate Tax Comm. v. Merck & Co.*, 289 Or 717, 720-21 (1980).)

Moreover, as this court noted in *Merck*, the doctrine of claim preclusion serves the public interest through judicial economy and protects the parties from the expense and “vexation” of multiple lawsuits. 289 Or at 721. Under the tax court’s construction of the statutes, a non-appealing party would have to file a separate complaint, resulting in both parties being subject to inconsistent decisions and multiple expenses. In a recent case in which the Department is the plaintiff in the regular division the Department asked the tax court to reconsider its decision in *Village*, 22 OTR 52, because a separate complaint would be subject to dismissal under TCR 21A(3) due to another action pending between the same parties for the

same cause. See *Dept. of Revenue v. Rent-A-Center*, TC No. 5224, Plaintiff's Motion to Determine Jurisdiction Over Defendants' Counterclaim filed June 19, 2015, at pp. 15-16. The counterclaim in that case involves a determination of Rent-A-Center's membership in taxable group, not an increase in value.

Importantly, the tax court's decision in these cases is contrary to tax court precedent. In *Strawn* the court treated a claim for an increase in value as a counterclaim. *Strawn*, 1 OTR at 105-107.<sup>14</sup> The court did not conclude that the taxpayer was required to file a separate complaint under the tax statutes. Instead, the *Strawn* court noted that the process of filing an answer and counterclaim affirmatively alleging value is **preferable** to filing a separate complaint. *Id.* at 108.

Moreover, if a party waits until the last day to file an appeal from the Magistrate decision, the opposing party has no opportunity to file a separate complaint, and would be barred from requesting an increase in

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<sup>14</sup> In *Strawn* the county assessor appealed to the Tax Court from the tax commission's order. The taxpayer filed a separate complaint challenging the order and asserting its value for the property. The Tax Court held that the taxpayer had the statutory right to appear as a defendant in the action filed by the county, and thus construed its complaint as raising a counterclaim in the county's case. 1 OTR at 108. The court noted this was preferable because separate suits would subject the taxpayer to "*res judicata*" from the county's suit. *Id.*

value, a fact which both this court and the tax court recognized.<sup>15</sup> *Village*, 356 Or at 181; *Village*, 22 OTR at 57-58. The same reasoning applies to appeals to the Magistrate Division from Board of Oregon Property Tax Assessment (BOPTA); the Magistrate Division is denying counterclaims based on the tax court's decision in this case.

The tax court's decision requires a party to raise an affirmative claim for relief by filing a separate complaint. 22 OTR at 56-57. Such a process is a waste of judicial resources and is contrary to the statutory scheme and tax court rules permitting counterclaims.

**c. The tax court's decision is contrary to ORS 305.287 and this court's decision.**

The tax court's decision is also contrary to ORS 305.287, which provides:

**"Whenever a party appeals** the real market value of one or more components of a property tax account, **any other party to the appeal** may seek a determination... of the total real market value of the property tax account, the real market value of any or all of the other components of the account, or both."

(Emphasis added.)

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<sup>15</sup> Under ORS 305.501(5)(a) any party dissatisfied with a magistrate's written decision has 60 days after entry to appeal to the regular division. Under the Tax Court's decision, if a party appeals on the 60<sup>th</sup> day, the non-appealing party cannot raise an affirmative claim for relief in its answer on appeal, nor can it file a complaint.

The Assessor attempted to exercise his statutory right to have both the land and building components considered on appeal in these cases. This court held that the statute applies, and rejected the tax court's reasoning for denying the Assessor's motions to amend its answers to enforce his rights under ORS 305.287. *Village*, 356 Or 164.

The legislative scheme comes into play "whenever a party appeals." ORS 305.297 expressly contemplates raising the right to claim all components of value in a counterclaim. The legislature could not have intended that the rights conferred by ORS 305.287 would be subject to the procedures suggested by the tax court, particularly where the legislature provided the right can be exercised "whenever a party appeals" and alleges less than all components of value.

Under the tax court's view, any party wishing to raise all components of value on appeal must file an anticipatory complaint raising a claim under ORS 305.287, even if the taxpayer would not otherwise appeal from a lower level determination of value. It is a waste of judicial resources and inefficient to require the opposing party to file a separate complaint raising both components of value pursuant to ORS 305.287, rather than enforcing its statutory rights by filing a counterclaim. In fact, this court noted that the statutory scheme "means that the parties before the Regular Division are

not limited to the evidence or arguments that they presented in the Magistrate Division” and that the tax court can conduct “any and all necessary factfinding” to address a new issue raised pursuant to ORS 305.287. *Village*, 356 Or 180-181. This court recognized that the rights provided by the legislature in ORS 305.287 would most likely be raised by counterclaim.

This court also noted that ORS 305.287 “**neither requires nor authorizes other parties to file a separate notice of appeal to obtain that determination.**” *Village*, 356 Or at 181. (Emphasis added.) The tax court’s conclusion that the rights conferred by ORS 305.287 cannot be raised by counterclaim is contrary to the rights conferred by the legislature and this court’s construction of ORS 305.287.<sup>16</sup>

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<sup>16</sup> In its order denying relief from judgment the tax court stated “at this point” it did not decide whether a party can ask for an increase in value under ORS 305.287 by way of filing a counterclaim. 22 OTR at 59-60; ER 79. However, the court posted its decision on its website, and urged litigants to abide by its new direction “whatever may have been the practice” in the past, to deny parties the right to ask for an increase in value in a counterclaim. 22 OTR 57; ER 76-77; CC ER 34-35. There is no reason to believe the court will allow a counterclaim under ORS 305.287 when it has held that an affirmative claim for relief must be done by way of a separate complaint. Moreover, if the court allowed such a counterclaim, it would be the only kind of counterclaim allowed under the tax court rules by the court’s reasoning in this case.

For all these reasons the tax court erred as a matter of law in construing the statutes and rules to conclude that a defendant cannot ask for an increase in value by way of filing a counterclaim.

### **III. CONCLUSION.**

Dismissal was improper pursuant to TCR 54A(1) because the Assessor's original answers pled a claim for affirmative relief. Dismissal was also improper because this court reversed the tax court's conclusion that ORS 305.287 did not apply to the appeals. The reversal and remand brought the case to the procedural point where the motion to add the counterclaim was pending, preventing dismissal under TCR 54A(1) (it is undisputed that the motions to amend were filed before plaintiff's dismissal under TCR 54A(1).) In addition, the only basis on which the motion to amend was denied was reversed by this court, thus, the tax court lacked discretion to deny the motion on remand.

Finally, the tax court erred in deciding that a non-appealing party cannot raise a claim for an increase in value by way of filing a counterclaim. Neither the tax statutes nor the court rules support this conclusion. Rather, the court's reasoning makes the rules regarding counterclaims surplusage. The court's conclusion also results in a waste of judicial resources and

prejudices a non-appealing party by subjecting the separate complaint to dismissal under TCR 21A(3).

For all these reasons the Assessor respectfully requests that this court reverse the judgment of the tax court and direct the court to allow the counterclaims to be added on remand.

Respectfully submitted this 30<sup>th</sup> day of September, 2015.

Stephen L. Madkour  
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## **CERTIFICATE OF SERVICE AND FILING**

I hereby certify that on this date I served the foregoing APPELLANT  
CLACKAMAS COUNTY ASSESSOR'S OPENING BRIEF and EXCERPT  
OF RECORD on the attorneys of record for Respondent and Appellant  
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I hereby certify that on this date I filed the foregoing APPELLANT  
CLACKAMAS COUNTY ASSESSOR'S OPENING BRIEF and EXCERPT  
OF RECORD by eFiling, addressed as follows:

State Court Administrator  
Records Section  
Supreme Court Building  
1163 State Street  
Salem, OR 97301-2563

Dated this 30<sup>th</sup> day of September, 2015.

/s/ Kathleen J. Rastetter  
Kathleen J. Rastetter, OSB #93114  
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County Assessor

## **CERTIFICATE OF COMPLIANCE**

### 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 (using word processing information) is 7,108 words.

### Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and the footnotes as required by ORAP 5.05(4)(f).

Dated this 30<sup>th</sup> day of September, 2015.

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