

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

VILLAGE RESIDENTIAL, LLC,  
Plaintiff-Respondent,  
v.  
DEPARTMENT OF REVENUE,  
State of Oregon,  
Defendant-Appellant,  
and  
CLACKAMAS COUNTY  
ASSESSOR,  
Intervenor-Appellant.

TC 5056  
Supreme Court No. S063165

*Continued.....*

VILLAGE RESIDENTIAL, LLC,  
Plaintiff-Respondent,

v.

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

and

CLACKAMAS COUNTY  
ASSESSOR,  
Intervenor-Appellant.

TC 5057

Supreme Court No. S063174

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APPELLANT CLACKAMAS COUNTY ASSESSOR'S REPLY 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.....*

Stephen L. Madkour, OSB #941091  
Clackamas County Counsel  
Kathleen J. Rastetter, OSB #93114  
Senior Assistant County Counsel  
2051 Kaen Road  
Oregon City, Oregon 97045  
Telephone: 503.655.8362  
[kathleenras@clackamas.us](mailto:kathleenras@clackamas.us)

Donald H. Grim, OSB #72278  
Ridgway K. Foley, Jr. OSB  
#063411  
Greene & Markley  
1515 SW Fifth, Ste. 600  
Portland, Oregon 97201  
Telephone: 503.224.8434  
[don.grim@greenemarkley.com](mailto:don.grim@greenemarkley.com)  
[ridgway.foley@greenemarkley.com](mailto:ridgway.foley@greenemarkley.com)

Attorneys for Intervenor-Appellant  
Clackamas County Assessor

Attorneys for Plaintiffs-  
Respondents Village at Main  
Street Phase II and III  
and Village Residential, LLC

Ellen F. Rosenblum, OSB #753239  
Attorney General  
Jona Maukonen, OSB # 043540  
Senior Assistant Attorney General  
Oregon Department of Justice  
1162 Court St. NE  
Salem, Oregon 97301  
Telephone: 503.378.4402  
[jona.j.maukonen@doj.state.or.us](mailto:jona.j.maukonen@doj.state.or.us)

Of Attorneys for Defendant-Appellant Department of Justice

Reply filed January 28, 2016.

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Plaintiffs-Respondents (referred to collectively as “Village”) respond on appeal that: (1) the Assessor’s original answers did not formally plead a counterclaim; (2) the proposed amended answers were not “filed” or pled before Village filed the Notices of Dismissal; and (3) defendants failed to file a complaint. These assertions ignore the procedural posture of this case and the rules, as well as this Court’s decision.

### **1. The Original Answers Pled Counterclaims.**

Village appealed from the real market values on the tax roll in a *de novo* proceeding.<sup>1</sup> The Assessor’s original answers requested an increase in the real market value of the improvements from the values on the tax roll for all but one case.<sup>2</sup> All the requested values were higher than the real market values requested by Village on appeal.

Contrary to Village’s assertion that the claims are “merely statements in opposition”<sup>3</sup>, the answers include requests for affirmative relief which are counterclaims and meet the pleading requirements of Tax Court Rule 18. See the Assessor’s Opening Brief at pp. 10-11.

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<sup>1</sup> See *Village at Main St. Phase II, LLP v. Dept. of Rev.*, 356 Or. 164, 179-80 (2014).

<sup>2</sup> In one case the Assessor asked that the value found by the Magistrate be affirmed, which was higher than the value requested by Village.

<sup>3</sup> See Answering Brief at p. 16.

Village was on notice that the Assessor sought an increase in value from the improvement values on the roll for the properties. The rules do not require a particular form of counterclaim. See the Assessor's Opening Brief at pp. 11-12. Thus, the original answers stated counterclaims which should have prevented voluntary dismissal.

Village also argues that the Assessor "must be aggrieved" to bring a counterclaim. On the contrary, this Court noted the longstanding principle in tax court that either party can improve its position on appeal because the parties receive a "clean slate", and can use new approaches or introduce different evidence to support their claims. See *Village at Main*, 356 Or. at 180, *citing Clark v. Dept. of Rev.*, 14 OTR 221, 224 (1997).

Moreover, nothing in the statutes or tax court rules requires a responding party to be aggrieved by a prior decision to file a counterclaim. See *eg.* TCR 13B, TCR 18A, TCR 22A and TCR 19B. Rather, the tax court recognizes that a claim for an increase in value can be brought by way of a counterclaim. *Strawn v. State Tax Comm.*, 1 OTR 98, 106-108 (1962), *modified by* 236 Or. 299 (1964).

**2. The Proposed Counterclaim Under ORS 305.287 Was Pled or Pending Under the Procedural Posture of the Case.**

Village argues that as a result of this Court's decision the Assessor at best won "permission in further proceedings" to file an amended



pleading asserting its rights under ORS 308.287. Answering brief at p. 24. Under Village's construction of the rules a plaintiff can voluntarily dismiss and effectively block an appellate court's reversal of a trial court's erroneous decision regarding leave to file an amended pleading. The rules of procedure should not be construed to void an appellate court's decision.

This Court reversed the tax court's ruling which held that the Assessor lacked the right to plead a counterclaim under ORS 305.287, expressly rejecting the tax court's reasoning for denying leave. The reversal left the tax court with no discretion to deny leave to amend on remand. This Court's order directs the Tax Court to, in effect, act consistently with its decision on appeal. This Court's decision made the amended answers either effective at the time of the reversal, or pending.

Village cites several Court of Appeals cases in support of their right to file a voluntary dismissal while a motion is pending. However, none of the cited cases support their position because none of them involved a filed or pending counterclaim.<sup>4</sup> Rather, the cases addressed the issue of dismissal prior to an entered decision on an ORCP 21

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<sup>4</sup> As the Assessor noted in his Opening Brief this Court has not decided the issue of whether a pending or filed counterclaim precludes voluntary dismissal; the Assessor cited other appellate decisions in which the courts held that a pending decision on leave to add a counterclaim prevents voluntary dismissal.

motion to dismiss or a motion for summary judgment. See *Ramirez v. Northwest Renal Clinic*, 262 Or. App. 317 (2014) (voluntary dismissal effective where filed before filing or entry of summary judgment order); *Sohn v. Lam Thanh Thuy Thi*, 262 Or. App. 313 (2014) (voluntary dismissal effective where summary judgment decision was pending); *Maxwell v. Stebbins*, 180 Or. App. 48 (2002) (voluntary dismissal effective while decision on ORCP 21 motion to dismiss was pending); *Palmquist v. Flir Sys., Inc.*, 189 Or. App. 552 (2003) (upholding dismissal and noting that the legislature rejected a rule denying a party the right to dismiss when summary judgment motion was filed or pending); *State v. Cigtec Tobacco, LLC*, 200 Or. App. 501 (2005) (voluntary dismissal order which intended to bind the parties regarding the personal jurisdiction issue was improper and not “without prejudice” as required by ORCP 54(A)(1).)

A rule allowing voluntary dismissal in those circumstances makes sense because a party is not prejudiced by dismissal before such a motion is decided. However, when a trial court’s ruling denying a motion for leave to add a counterclaim is reversed, the party is prejudiced by a voluntary dismissal notice filed after the appellate decision is entered. Rule 54 recognizes that a party asserting a counterclaim has an affirmative claim for relief which would be prejudiced by voluntary

dismissal. The same is true where the decision denying leave to add a counterclaim is reversed on appeal.

Nor is the Assessor made whole by treating the original answers as counterclaims. The Assessor appealed the tax court's denial of its right to bring the value of both the land and improvements before the court under ORS 308.287. This Court reversed the tax court's decision and its reasoning. Voluntary dismissal on remand deprives the Assessor of the effect of this Court's decision to bring his counterclaims under the statute.

Village also argues that no counterclaim in a pleading was "filed." As the Assessor argued to the tax court,<sup>5</sup> unlike ORCP 23, TCR 23D(2) required the Assessor to file the proposed amended pleading with its motion for leave to amend. "Filing" occurs when a document is give to the clerk with the intent that it be filed. *Stull v Stoke*, 326 Or. 72, 77-78 (1997) (civil action is "filed" for statute of limitations period when the court received the complaint). The counterclaim was filed, and by reversing this Court held that leave to bring the counterclaim should have been granted, which should preclude voluntary dismissal. The amended answers were in a pleading that was "filed" with the court.

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<sup>5</sup> See the Assessor's Reply in Support of its Motion for Relief from Judgment filed April 13, 2015 at pp. 3-4 (Docket No. 47 in ER, at p. 89.)

Nor is TCR 15B(2) in conflict. This rule sets the time period for filing an “allowed or required” amended pleading “unless the order otherwise directs.” The parties filing a proposed amended pleading often rest on the pleading provided to the court with the request for leave. There is no requirement that the parties re-file the amended pleading under TCR 15B(2). Once the motion for leave is decided, the request to amend is effective at that time. Construing the rules otherwise requires the court to ignore TCR 23D(2), which requires the party to file the proposed pleading with the motion for leave to amend.

The effect of the rule proposed by Village is particularly harsh in this case. Village appealed the real market values of the properties from the Board of Property Tax Assessment (BOPTA) to the Magistrate Division; the cases were tried. Village then appealed from the Magistrate’s decisions to the Regular Division. This Court upheld the Assessor’s right to amend his answers to bring a counterclaim under ORS 305.287. Despite the posture of the case and this Court’s reversal of the tax court’s decision on the right to amend to add a counterclaim, Village asserts that they now have a right to walk away from their appeals.

It is also not clear under the Tax Court Rules what level of appeal governs value upon withdrawal. The values likely default to the BOPTA

values, despite Village's repeated appeals of those values. The Magistrate's decision is not final if the decision is appealed to the Regular Division, as in this case. See ORS 305.501 sections (5)(a) and (7). Thus, the taxpayer can game the system by appealing the BOPTA values to the Magistrate, appeal to the Regular Division if the taxpayer receives an adverse decision from the Magistrate, and then voluntarily withdraw to avoid the Magistrate decision. This result is particularly unfair when the taxpayer has received an adverse decision from the appellate court and withdraws on remand.

For example, an appeal to BOPTA which is withdrawn maintains the value on the tax rolls. An appeal from BOPTA to the Magistrate Division which is withdrawn defaults to the BOPTA values for the property. An appeal from values determined by the Regular Division to this Court, if withdrawn, returns the values to those found by the Regular Division. It makes no sense, then, to allow appeal to the Regular Division which, if withdrawn, voids the Magistrate decision and reverts to the values in the BOPTA decision. The dismissal rule should not be construed to allow a party to negate an appellate decision by acting between the time of the decision and the directed actions on remand.

Such a result is a waste of judicial resources which is neither contemplated nor encouraged by the rules. Village's proposed rule

twists the rules of procedure to void an appellate decision upholding the right to amend to add a counterclaim.

**3. The Tax Court's Decision Erroneously Requires an Answering Party to File a Complaint Rather Than a Counterclaim.**

The Assessor appeals the tax court's holding that a party can only request an increase in value by way of filing a separate complaint, not by way of a counterclaim. ER 74-78.

This Court held that the Assessor could assert his rights under ORS 305.287 in **response** to an appeal: "The statute neither requires nor authorizes other parties to file a separate notice of appeal to obtain that determination." *Village*, 356 Or. at 181. The ultimate issue on appeal is the appropriate real market value of the property. *Id.* See also ORS 308.205 (real market value definition and determination) and ORS 308.232 (property "shall be valued" at 100% of its real market value.<sup>6</sup>) There is no other way for the Assessor to assert its rights under ORS 308.287 on remand if voluntary dismissal is permitted and the Assessor loses its right to assert its counterclaims.

As noted *supra*, the Tax Court Rules provide for counterclaims. It is contrary to the *de novo* nature of the process to deny a party the right

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<sup>6</sup> The statute further notes that assessment of taxes is subject to the determination of assessed and maximum assessed values per ORS 308.149 *et seq.* and ORS 308.146.

to ask for an increase in real market value, *i.e.* to assert an affirmative claim, by way of a counterclaim. The tax court's decision that an increase in value cannot be raised by counterclaim should be reversed. There is no basis in the rules or statutes for such a requirement, particularly where the legislature provides for a *de novo* proceeding on appeal. See the Assessor's opening brief at pp. 19-30. Such a decision is also contrary to the tax court's recognition of such a counterclaim in *Strawn*. 1 OTR at 106-108.

#### **4. Conclusion.**

For all these reasons the Assessor respectfully requests that the court reverse the tax court's dismissal under TCR 54 and order that the amended answers be entered, giving effect to this Court's decision. The Assessor also requests that the Tax Court's holding that an increase in value cannot be asserted by counterclaim be reversed for the reasons set out in the briefs of the Assessor and the Department of Revenue.

Respectfully submitted this 28<sup>th</sup> day of January, 2016.

BY:

STEPHEN L. MADKOUR  
CLACKAMAS COUNTY COUNSEL  
CLACKAMAS COUNTY, OREGON

/s Kathleen J. Rastetter  
Kathleen J. Rastetter, OSB #931145  
Senior County Attorney

Of Attorneys for Intervenor-Appellant  
Clackamas 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 2,058 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).

s/ Kathleen J. Rastetter  
Kathleen J. Rastetter, OSB #93114  
Of Attorneys for Intervenor-Appellant  
Clackamas County Assessor

## **CERTIFICATE OF SERVICE AND FILING**

I hereby certify that on this date I served the foregoing

### **INTERVENOR-APPELLANT CLACKAMAS COUNTY ASSESSOR'S**

### **REPLY BRIEF on the attorneys of record for Respondent and Appellant**

Department of Revenue by notification of eFiling to:

Donald H. Grim, OSB # 06341	Jona Maukonen, OSB #043540
Ridgway K. Foley Jr., OSB#630242	Oregon Department of Justice
Greene & Markley, P.C.	1162 Court St. NE
1515 S.W. Fifth Ave., Ste. 600	Salem, Oregon 97301
Portland, OR. 97201	Attorney for Defendant-Appellant
Attorneys for Respondent	Department of Revenue

I hereby certify that on this date I filed the foregoing **INTERVENOR-APPELLANT CLACKAMAS COUNTY ASSESSOR'S REPLY BRIEF** by eFiling, addressed as follows:

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

Dated this 28<sup>th</sup> day of January, 2016.

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

Of Attorneys for Intervenor-Appellant  
Clackamas County Assessor