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; and CLACKAMAS COUNTY ASSESSOR,

Defendants-Appellants.

Tax Court No. 5054

Supreme Court No. S061133

VILLAGE AT MAIN STREET PHASE, II, LLC,

Plaintiff-Respondent,

v.

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

Defendants-Appellants.

Tax Court No. 5055

Supreme Court No. S061137

VILLAGE RESIDENTIAL, LLC,

Plaintiff-Respondent,

v.

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

Defendants-Appellants.

Tax Court No. 5056

Supreme Court No. S061138

Continued…

VILLAGE RESIDENTIAL, LLC, Plaintiff-Respondent, v. DEPARTMENT OF REVENUE, State of Oregon; and CLACKAMAS COUNTY ASSESSOR, Defendants-Appellants.	Tax Court No. 5057 Supreme Court No. S061139

APPELLANT DEPARTMENT OF REVENUE'S OPENING BRIEF

Review of the Decision of the Oregon Tax Court
Honorable Henry C. Breithaupt, Judge

Opinion Filed: July 11, 2012
Before: Henry C. Breithaupt, J.

Continued…

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APPELLANT DEPARTMENT OF REVENUE'S OPENING BRIEF

STATEMENT OF THE CASE

Nature of the Proceeding

Plaintiff taxpayer, Village at Main Street Phase II, LLC (taxpayer), challenged an assessment of the value of the buildings in the property tax accounts by the Clackamas County Assessor (county). The cases were tried in the Magistrate Division of the tax court on the value of the buildings. Taxpayer was dissatisfied with the magistrate's decision, and appealed to the Regular Division of the tax court, again challenging only the value of the buildings. During the pendency of the proceedings in the Magistrate Division, however, the legislature passed ORS 305.287. Under ORS 305.287, a party in a valuation appeal may seek a determination of the value of all the components of a tax account or simply one component of it. But unlike the law that existed before ORS 305.287's enactment, a reviewing body is not limited to deciding only the value of the component that the appealing party chose to challenge. Relying on ORS 305.287, the county moved to amend its answer, seeking a determination of the value of the land, in addition to the determination of the value of the buildings that taxpayer sought.

The tax court issued a preliminary order concluding that ORS 305.287 applies only to appeals in the Magistrate Division of the tax court and not to

appeals in the Regular Division, and denied the county's motion to amend the answer. The court then issued limited judgments in each case to that effect.

Nature of the Order to be Reviewed

In the limited judgments, the tax court ruled that ORS 305.287 does not apply to appeals in the Regular Division. It therefore denied the county's motion to amend its answer to add the counterclaim based on ORS 305.287. The Department of Revenue (department) and the county now appeal from the limited judgments.

Statutory Basis for Jurisdiction

This court has jurisdiction over this appeal pursuant to ORS 305.445.

Timeliness of Appeal

The limited judgments were entered on January 31, 2013. (ER 39-46). The department timely filed its notices of appeal on February 28, 2013, and the cases are now consolidated for appeal.

Questions Presented on Appeal

1. Under ORS 305.287, "[w]henever 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 from the body or tribunal 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." The tax court concluded that the term "appeals," as used in ORS 305.287, applies only to appeals in the

Magistrate Division of the tax court, and not to appeals in the Board of Property Tax Appeals (BOPTA) or the Regular Division. Did the tax court err in construing ORS 305.287?

2. Because the tax court concluded that the term "appeals" in ORS 305.287 applies only to appeals in the Magistrate Division, it conducted a retroactivity analysis and concluded that the legislature did not intend for ORS 305.287 to have retroactive effect. Did the tax court err in conducting a retroactivity analysis, based on its construction of the statute?

3. Based on its conclusion that ORS 305.287 applies only to appeals in the Magistrate Division and is not retroactive, the tax court denied the county's motion for leave to amend the answer with a counterclaim based on ORS 305.287. Did the tax court err in denying the motion?

Summary of Argument

In this valuation dispute, taxpayer challenged only the improvement component of the tax accounts and not the land component, which it was entitled to do under *Nepom v. Dept. of Revenue*, 272 Or 249, 536 P2d 496 (1975). That opinion by this court preceded the constitutional limitations imposed by Ballot Measure 50. Under Measure 50, the county has only one opportunity to place the maximum assessed value (which is based on real market value) of new properties or new improvements to property on the tax assessment roll—the first year that the property or improvements are taken into

account for tax purposes. Thus, under *Nepom* and Measure 50, a taxpayer could litigate only the valuation of the improvements and potentially gain a reduction in the value of that component without any risk of the county challenging the valuation of the land component—even though the land component was initially undervalued, as it was in this case.

The legislature eliminated that strategic advantage by passing House Bill (HB) 2572, which is now codified as ORS 305.287. Under that statutory provision, "whenever a party appeals" the real market value of one or more of the components of the tax account, any party to the appeal may seek a determination from "the body or tribunal" of the total real market value of any or all of the components. ORS 305.287 became effective during the pendency of the appeal of this case in the Magistrate Division, and before the appeal to the Regular Division. The tax court construed ORS 305.287 to apply only to proceedings in the Magistrate Division, and then determined that it was not retroactive. As a result, the court denied the county's motion to amend its answer to include a counterclaim based on the statute.

But that was error. The text of ORS 305.287, when read to give effect to all the words the legislature chose to use, reveal the legislature's intent: at any time a party appeals the real market value of one or more components of a property tax account to a BOPTA, to the Magistrate Division of the tax court, or the Regular Division of that court, any other party to the appeal may seek a

determination of the total real market value of the tax account, the real market value of any or all of the other components of the account, or both. That construction also is consistent with context of ORS 305.287, which includes the structure of the tax appeals system and the problem that the legislature sought to address—the limitations of *Nepom* and Measure 50. Further, the legislative history confirms that the legislature intended ORS 305.287 to apply to all levels of appeals in the tax appeals system. Nothing in either the text and context of the statute, or in the legislative history, supports the tax court's conclusion that it applies only to the Magistrate Division.

Because the tax court erroneously construed ORS 305.287 to apply only to appeals in the Magistrate Division, it then sought to determine whether ORS 305.287 applied retroactively to this case, which was now on appeal to the Regular Division. That, too, was error. Because ORS 305.287 applies to appeals in the Regular Division, retroactivity is not at issue in this case. Based on its erroneous construction, the court also erred in denying the county's motion to amend its answer.

Factual and Procedural Background

The background and procedural facts, as found by this court and the tax court, are undisputed. In 2004, taxpayer began developing adjacent parcels of real property in Clackamas County into a multi-building apartment complex. As part of that project, taxpayer made "site developments" to the land that

included, among other things, grading, sewer lines, roads, sidewalks, and street lights. *Clackamas County Assessor v. Village at Main St.*, 352 Or 144, 146, 282 P3d 814 (2012). In 2005 and 2006, when the site developments were complete but the apartment complex still was under construction, the county assessor placed the value of the land on the tax roll, but assigned no value to the site developments. As required by ORS 308.215(1)(e) and (1)(f), the assessor separately listed the real market value of the land from the real market value of the improvements—here, the buildings. *Id*. at 146 n 1. (ER 23).

Taxpayer then appealed to the BOPTA. The BOPTA affirmed the assessor's values, stating separate values for the land and the improvement components of the property tax accounts. Taxpayer then appealed only the value of the improvements to the Magistrate Division of the tax court. (ER 23).

The tax court stayed the cases regarding the valuation of the improvements before they came to trial in the Magistrate Division, so that a related issue could be litigated. (ER 23). After that issue was resolved, the tax court lifted the stay on the valuation dispute of the improvements. The cases proceeded to trial in the Magistrate Division of the tax court, which issued a decision on December 13, 2011. Taxpayer was dissatisfied with that decision and filed a complaint in Regular Division under ORS 305.501(5)(a) on January 26, 2012, after the date ORS 305.287 became effective. (ER 23-24).

ORS 305.287 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 from the body or tribunal 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.

The department was the initial defendant in the proceeding in the Regular Division, under ORS 305.501(5)(c), and the county intervened as a defendant. (ER 24). The county and taxpayer each requested a preliminary ruling on the applicability of ORS 305.287. (ER 21-34). The county also moved for leave to amend its answer by adding a counterclaim based on ORS 305.287, in which it sought to have the entire value of the property determined by the tax court. (ER 13-20).

The county argued that ORS 305.287 applies to "appeals" in the Regular Division, which would allow it to litigate the value of the land component of the tax account, where previously it would have been limited to litigating only the value of the improvements, as raised by taxpayer. (ER 4-6).

The tax court disagreed. The court construed ORS 305.287 to apply only to "appeals" in the Magistrate Division, not to appeals either to the BOPTA or to the Regular Division of the tax court. The court first focused on the word "whenever," and concluded that the two possible meanings of the word conflict. (ER 26). The court then turned to the word "appeals" to determine legislative intent. It reasoned that, of the four possible times for an "appeal" in the

statutory framework, "the mechanisms of the Magistrate Division and those of ORS 305.287 fit well together." (ER 27-28, 29). The court acknowledged that the legislature intended to expand the scope of an appeal to correct inequities in the valuation process created by *Nepom* and Ballot Measure 50, which amended the Oregon Constitution to limit when valuation determinations may be changed.[1] But, in the court's view, that does not concern when the legislature "intended the neutralization of *Nepom* to take effect." (ER 30 & n 5, 31).

The tax court further concluded that its construction is "the only construction that is consistent with the expressed legislative goal that tax disputes first be addressed, with only limited exceptions, in the Magistrate Division." (ER 29). However, the court did not consider the legislative history directly related to ORS 305.287 in construing that statutory provision, nor did it consider the language in ORS 305.287 as a whole.

Because the tax court determined that ORS 305.287 applies only to appeals in the Magistrate Division, it concluded that the appeal in this case had already occurred. (ER 32-33). Thus, the court determined if the legislature had intended ORS 305.287 to apply retroactively to appeals that had commenced before the date on which the statute became effective. Because the legislature

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[1] *See* Or Const Art XI, § 11(1) (imposing an overall limitation on property taxes by establishing the concept of "maximum assessed value" for each "unit of property" and by establishing a permanent tax rate).

did not include language indicating that ORS 305.287 had retroactive effect, the tax court concluded that it did not. (ER 33-34).

Accordingly, the tax court denied the county's motion to amend its answer to include a counterclaim under ORS 305.287, and set the cases for trial only on the value of the building improvements in the tax accounts. (ER 35-38). The court then entered limited judgments to that effect. (ER 39-46).

ASSIGNMENT OF ERROR

The tax court erred in ruling that ORS 305.287 applies only to "appeals" in the Magistrate Division of the tax court, and not to appeals in the BOPTA or the Regular Division.

Preservation of Error

The department was the initial defendant in this proceeding, under ORS 305.501(5)(c), and the county intervened as defendant, under ORS 305.560(4)(b). At a case management conference, the county and the taxpayer each requested a preliminary ruling on the applicability of ORS 305.287. (ER 24). The defendants decided that the county would file the pleadings on the issue. The county then presented all the relevant arguments in its motion for a preliminary ruling and reply to taxpayer's motion, and in its motion for leave to file an amended answer and counterclaim. (ER 1-12, 13-20; TCF 72-74). Thus, the purposes of the preservation requirement have been satisfied. *See State v. Walker*, 350 Or 540, 547-49, 258 P3d 1228 (2011)

(explaining the preservation requirement and concluding that, where the purposes of the requirement are sufficiently served, this court will determine that the claim is preserved).

Standard of Review

Generally, this court reviews decisions of the 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. Here, whether the tax court erred in construing ORS 305.287 is a question of statutory construction, which this court reviews as a matter of law. *See PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993) (reviewing lower court's decision and applying rules of statutory construction); *State v. Gaines*, 346 Or 160, 164, 206 P3d 1042 (2009) (same).

ARGUMENT

A. The legislature intended ORS 305.287 to correct the problem that *Nepom* and Measure 50 caused, and that it apply to all three levels in the tax appeals system.

This case calls upon this court to determine the applicability of ORS 305.287, which became effective while the case was pending in the Magistrate Division of the tax court, but before taxpayer's appeal to the Regular Division. Because the tax court employed incorrect statutory construction principles, it misconstrued ORS 305.287, concluding that it applies only to appeals in the Magistrate Division. But the correct construction, examining the

text, context, and legislative history, leads to the correct result: ORS 305.287 applies to appeals in the BOPTA, the Magistrate Division, and the Regular Division.

1. Property valuation in Oregon, and the impact of *Nepom* and Measure 50.

When the legislature enacted ORS 305.287, it intended to correct a particular problem in the property tax scheme that was created by the intersection of Ballot Measure 50 and existing case law. An understanding of that problem, as well as the structured tax appeals system in Oregon, provide context to the legal issue presented by this case.

In 1975, when this court issued *Nepom*, Oregon's *ad valorem* property tax scheme was a "levy based" property tax system, in which each taxing unit (such as the county, city, or special district) reported to the county assessor the revenue to be raised for that unit. The assessor then calculated a rate of levy for each taxing unit based on the assessment value of the taxable property in that unit. *Dennehy v. Dept. of Rev.*, 305 Or 595, 598, 756 P2d 13 (1988). Under that system, if a taxpayer appealed a tax assessment in any given year and obtained a reduction of one of the two components of the tax account, the county assessor could reassess the value of the other component the next year. *Nepom*, 272 Or at 255-56. This court held in *Nepom* that, because the statutory scheme requires that the land and improvement components of the tax account

be separately assessed, a taxpayer could elect to appeal either or both.[2] However, if the taxpayer elects to appeal just one component, the other component is not at issue in that appeal, and the tax court cannot reduce the value of the non-contested component. *Id*. at 256. But under the property tax scheme in effect when this court issued *Nepom*, there was no permanent effect from an appeal of just one component of the tax account because the county assessor could adjust the value of the other component the following year. In 1997, Ballot Measure 50 changed that.

The legislature referred Measure 50, which established the concept of "maximum assessed value" by amending Article XI, section 11, of the Oregon Constitution, to the voters to replace a property tax limitation measure that the voters had approved in 1996, known as Ballot Measure 47. As this court explained,

> Measure 47 was a short-lived constitutional amendment aimed at closing what its supporters considered to be a significant loophole in the property tax limitation goal of Measure 5 [an amendment to the Oregon Constitution adopted in 1990]. Certain practical and technical difficulties in the application of Measure 47 led the legislature to propose, and the people to adopt, Measure 50 as its effective replacement.

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[2] ORS 308.215 requires the county assessor to separately assess the real market value of the land from the real market value of the improvements.

Shilo Inn v. Multnomah County, 333 Or 101, 107 n 6, 36 P3d 954 (2001), *modified on recons.*, 334 Or 11, 45 P3d 107 (2002) (citations omitted). Measure 50 was superimposed on the *ad valorem* property tax system, resulting in a change from the levy-based system to a rate-based system. *Id*. at 107. Among its other effects, Measure 50 reduced the assessed value of property to 10 percent below 1995 levels, limited the amount of any increase in assessed value to three percent per year, and required each local taxing unit, or "taxing district," to certify a permanent limit on the rate of *ad valorem* property taxes imposed by the district for tax years beginning after July 1, 1997, to be applied to each property in that district. *Id*. at 107-08 (citing Or Const Art XI, § § 11(1)(a), (1)(b), (3)). Under Measure 50 and the statutes implementing it, there is no linkage between the real market value and the maximum assessed value. Instead, each value is determined, and the lesser of the two values becomes, in any given year, the assessed value of the property.[3] *Gall v. Dept. of Rev.*, 17 OTR 268, 270 (2003). Thus, if the real market value of the property exceeds its

[3] Assessed value, therefore, is a creation of statute, and is determined by a mathematical formula—the lesser of the property's maximum assessed value and real market value. ORS 308.146(2). In the first year of implementation (the 1997-98 tax year) after the passage of Measure 50, maximum assessed value was 90 percent of the property's real market value on the tax rolls for the 1995-96 tax year. Or Const, Art XI, § 11(1)(a). Thereafter, maximum assessed value is the greater of "103 percent of the property's assessed value from the prior year or 100 percent of the property's maximum assessed value from the prior year." ORS 308.146(1). Real market value is the amount of money the

Footnote continued…

maximum assessed value, then property tax is based on the maximum assessed value, not the real market value. *Flavorland Foods v. Washington County Assessor*, 334 Or 562, 565, 54 P3d 582 (2002).

Under ORS 308.146(3)(a) and ORS 308.153(1), which implement Measure 50, there is only one opportunity for the county to place the maximum assessed value on the tax assessment roll for new properties or new improvements to property (called "exception value")—the first year that property or improvements are taken into account for tax purposes.[4] *See* ORS 308.153(1) (the county is permitted to add to the tax roll new property and improvements made to the property "as of January 1 of the assessment year"); *see also Douglas County Assessor v. Crawford*, __ OTR __, 2012 WL 3204674,

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(...continued)
property would sell for on the open market. *See* ORS 308.205(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.").

[4] "Exception value" is a term used to identify certain changes to property for the current tax year that result in additions to both real market value and maximum assessed value. It is an exception to the constitutional and statutory cap of three percent on annual increases to maximum assessed value. *See Zervis v. Dept. of Rev.*, __ OTR __, 2010 WL 107929, *1 n 2 (Jan 13, 2010) (explaining concept of "exception value" under Measure 50). Further, in establishing a new maximum assessed value for property, Article XI, section 11(1)(g) of the Oregon Constitution specifies that there shall not be a reappraisal of the real market value of the property. *Su v. Dept. of Rev.*, 15 OTR 305, 307 (2001).

*3-4 (Aug 7, 2012) (the language in ORS 308.153 provides the end point of the period within which something can qualify as "new" for the annual calculation that is made in preparation of a tax roll). Thus, because of Measure 50's statutory framework, there is only one opportunity for the taxpayer to challenge the new maximum assessed value—in that same first year. *See Georgia-Pacific Consumer Products LP v. Clatsop County Assessor*, __ OTR __, 2010 WL 2854143, *5 (July 21, 2010) (Measure 50 is characterized by limited time periods within which both taxpayers and governments may challenge the annually determined roll values for property; its statutory scheme provides "limited retrospective relief" to taxpayers who "have not availed themselves of challenges in the year of assessment[.]").

Therefore, under *Nepom*, a taxpayer could litigate only the value of the improvement component of the tax account, and so preclude the county from challenging the value of the land component. Before Measure 50, the county could reassess the value of the land component the following year, thereby mitigating the otherwise harsh result of *Nepom*. But the constitutional and statutory limitations of Measure 50 now prevent the county from reassessing the value of the land. Thus, a taxpayer could obtain a strategic advantage under *Nepom* and Measure 50 that amounts to a windfall—a reduction in the value of improvement component by the BOPTA or tax court without any risk of the

county challenging the value of the land component, even though the land component was initially undervalued.

That was the landscape before the legislature enacted ORS 305.287.

2. The statutory framework for appeals of property valuation.

In addition to understanding the historical framework behind ORS 305.287, it is also helpful to understand the statutory scheme governing appeals of the county assessor's valuation of property. Oregon has a structured appeals system for taxpayers to challenge the county assessor's valuation of their property. For most appeals, the first step is to file a petition with a local county BOPTA. *See* ORS 309.026(2) (authorizing BOPTA to hear petitions for reductions in assessed value, real market value, and maximum assessed value); ORS 309.100(1) (property owners and others who hold an interest in the property may petition BOPTA for relief under ORS 309.026); ORS 305.275(3) (precluding appeals to the Magistrate Division of the tax court if a taxpayer may appeal to BOPTA).

The Oregon Tax Court is a court with two divisions—the Magistrate Division and the Regular Division. *Hartman v. Dept. of Rev.*, 19 OTR 571, 575 (2009); ORS 305.404. After the BOPTA issues an order, a taxpayer has 30 days to appeal to the Magistrate Division of the tax court, under ORS 305.280(4). ORS 305.275 governs appeals to the Magistrate Division from orders of a BOPTA. ORS 305.275(1). To have standing to appeal,

ORS 305.275(1)(a) requires a taxpayer to be "aggrieved," which the tax court has interpreted to mean that the requested reduction in value, if granted, would reduce the property taxes. *Paris v. Dept. of Rev.*, 19 OTR 519, 521 (2008).

Following a decision by the Magistrate Division, either party can appeal the decision to the Regular Division of the tax court within 60 days, under ORS 305.501(5)(a). The department then is substituted for the county as defendant. *Id*. That appeal is undertaken by filing a complaint requesting a de novo proceeding, rather than a review of the findings of fact or conclusions of law of a magistrate, because the Magistrate Division is not a court of record. ORS 305.430(1). Rather, the legislature intended the Magistrate Division to be "informal and user friendly." *Dept. of Rev. v. Froman*, 14 OTR 543, 546-47 (1999).

ORS 305.425, which governs appeals in the Regular Division, provides that "[a]ll proceedings before the judge of the tax court shall be original, independent proceedings and shall be tried without a jury and de novo." ORS 305.425(1) requires the Regular Division to "consider all properly admitted evidence and reach its own independent conclusions" in any given case, *Reed v. Dept. of Rev.*, 310 Or 260, 265, 798 P2d 235 (1990), and it fulfills this duty "by allowing the litigants to start over with a clean slate in terms of

arguments made and evidence presented."[5] *Grant County Assessor v. Dayville School District 16J*, __ OTR __, 2011 WL 294445, *2 (Jan 31, 2011).

Accordingly, in a valuation case such as this, there are three opportunities for appeal—to the BOPTA, the Magistrate Division, and the Regular Division.

3. Correctly construed, ORS 305.287 applies to appeals in the BOPTA, in the Magistrate Division of the tax court, and in the Regular Division.

It is against the backdrop of *Nepom* and Measure 50, as well as the tax appeals system, that the legislature passed HB 2572, now codified as ORS 305.287, in 2011. Or Laws 2011, ch 397, § 2. In short, because of the limitations of *Nepom* and Measure 50, a taxpayer could strategically obtain a reduction in the value of the improvement component of the property tax account by appealing only that component, and thus preclude the county from challenging the undervalued land component. This strategy results in the permanent undervaluation of the tax account. The legislature sought to change that inequitable result.

ORS 305.287 provides:

> Whenever a party appeals the real market value of one or more components of a property tax account, any other party to the

[5] Appeal of a decision of the Regular Division is to this court, where review is limited to errors of law and substantial evidence. ORS 305.445. Because of the nature of review, the department does not suggest that ORS 305.287 applies to appeals to this court.

> appeal may seek a determination from the body or tribunal 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.

The issue in this case is whether the legislature intended ORS 305.287 to apply to all levels of tax appeals, rather than a discrete level of appeal. The tax court concluded that the word "whenever" was ambiguous, and that the word "appeals" meant only appeals in the Magistrate Division. The court did not consider those words in context of the other words in that statutory provision, nor did it consider the relevant context or the legislative history behind the legislature's adoption of HB 2572.

As this court explained in *PGE*, the court's task in construing a statute is to discern the intent of the legislature. *PGE*, 317 Or at 610. The text of the statutory provision itself is the starting point of the first level of analysis "and is the best evidence of the legislature's intent." *Id*. "[W]ords of common usage typically should be given their plain, natural, and ordinary meaning." *Id*. at 611 (citing *State v. Langley*, 314 Or 247, 256, 839 P2d 692 (1992); *Perez v. State Farm Mutual Ins. Co.*, 289 Or 295, 299, 613 P2d 32 (1980)). The court also considers the context of the statutory provision at issue, which includes other provisions of the same statute and other related statutes. *Id*. at 611. In *Gaines*, the court observed:

> This court remains responsible for fashioning rules of statutory interpretation that, in the court's judgment, best serve the paramount goal of discerning the legislature's intent. In that

> regard, as this court and other authorities long have observed, there is no more persuasive evidence of the intent of the legislature than "the words by which the legislature undertook to give expression to its wishes."

Gaines, 346 Or at 171 (internal citation and quotation marks omitted). Nevertheless, the court may consider legislative history, where it appears useful to the court's analysis. *Id*. at 171-72.

Here, the legislature's intent that ORS 305.287 apply to all levels of appeals is clear from its text. The word "whenever" in the phrase "[w]henever a party appeals the real market value of one or more components of a property tax account," is a subordinating conjunction, connecting that dependent clause to the remainder of the sentence. As such, it means "**1:** at any or all times that: in any or every instance in which." *Webster's Third New Int'l Dictionary* 2602 (unabridged 3d ed 2002). *See Walter v. Scherzinger*, 339 Or 408, 416, 121 P3d 644 (2005) (using dictionary to determine plain meaning). Thus, "at any or all times" that a party appeals the real market value of one or more of the components of a property tax account, any other party to the appeal may seek a determination of any or all of the other components.

Under ORS 174.010,[6] this court must construe ORS 305.287 in a manner that will give effect to all its provisions. *Walter*, 339 Or at 422. To that end,

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[6] ORS 174.010 provides:

Footnote continued…

the court must read "whenever" to give effect to the word "appeals" and the phrase "body or tribunal," and read them harmoniously.

If, as the tax court determined, an "appeal" can only be at one time—to the Magistrate Division—then the legislature's choice of the word "whenever" is rendered meaningless because, as used here, it means "at any or all times" a party appeals. Had the legislature intended that a party could seek a determination of the real market value of the other components of the tax account only one time, in an appeal to the Magistrate Division, it would have said just that—as the original draft of HB 2572 by Legislative Counsel did.[7] That original draft used the phrase "[i]n an appeal brought under ORS 305.275" instead of the word "[w]henever." (App 1). ORS 305.275 governs appeals in the Magistrate Division of tax court.

The word "appeals" also must be read to give effect to the words "body or tribunal" in ORS 305.287. If the legislature had intended ORS 305.287 to

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(...continued)

> In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.

[7] The original draft by Legislative Counsel was changed before submission to the legislature (App 2-3), as so does not necessarily reflect legislative intent. Rather, it shows what language the legislature could have chosen, had it intended the result reached by the tax court.

apply only to an appeal in the Magistrate Division, it would not have used the words "body or tribunal." It would have used the words "Magistrate Division" or, as in the original draft by Legislative Counsel, a reference to ORS 305.275. (App 1). To be sure, if an "appeal" is only to the Magistrate Division, then "body or tribunal" is rendered meaningless. Clearly, the legislature's particular choice of words also includes appeals to both the BOPTA, which is a board or "body," and the Regular Division, which also is a "tribunal"—one of the two divisions of the tax court. To conclude otherwise would ignore the legislature's use of two different words to describe the appeal proceedings to which ORS 305.287 applies. *See State v. Stallcup*, 341 Or 93, 101, 138 P3d 9 (2006) (the legislature intends different meanings when it uses different terms in a statute).

The context of ORS 305.287 compels the same conclusion. In the context of the tax appeals system, an "appeal" does not refer only to a proceeding in the Magistrate Division. *See Force v. Dept. of Rev.*, 350 Or 179, 187-88, 252 P3d 306 (2011) (considering the preexisting statutory scheme as context for in a statutory construction analysis); *Fresk v. Kraemer*, 337 Or 513, 520-21, 99 P3d 262 (2004) ("Statutory context includes other provisions of the same statute and other related statutes, as well as the preexisting common law and the statutory framework within which the statute was enacted."). In this type of valuation case, a party first appeals an assessment of valuation by the

county assessor to the BOPTA under ORS 309.100, as the tax court acknowledged.[8] (ER 27). *See* ORS 309.026(2) (BOPTA is authorized to hear petitions for the reduction of the assessed or specially assessed value, maximum assessed value, or real market value of property as determined under ORS 308.146 or ORS 308.428). Thus, when read in context, ORS 305.287 applies to "appeals" to the BOPTA.

The tax court determined that ORS 305.287 cannot apply to this level of appeal because an appeal to the BOPTA is "one-sided" and concerns only the reduction of property value; ORS 305.287, however, refers to appeals taken by either party. (ER 27). Although the tax court was correct that only a taxpayer can petition for a reduction in value before the BOPTA, under ORS 309.026, the county can appear as an interested party under ORS 309.025(3). Therefore,

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[8] Indeed, the tax court was wrong when it concluded that "the expressed legislative goal" is that tax disputes "first must be addressed, with only limited exceptions, in the Magistrate Division." (E.R. 29). A valuation case, such as this, must begin in the BOPTA. *See* ORS 305.275(3) (precluding appeals to the Magistrate Division unless the taxpayer first appeals to the BOPTA). *Wynne v. Dept. of Rev.*, 342 Or 515, 156 P3d 64 (2007), on which the tax court relied, is not to the contrary. There, the taxpayer appealed the county's assessment of her property's valuation first to the BOPTA, and then appealed that decision to both the Magistrate Division and the Regular Division. *Id*. at 517-18. This court concluded that the tax court correctly dismissed her appeal in the Regular Division in that circumstance because she was not entitled to bypass the Magistrate Division. *Id*. at 520-21. That case does not address the situation here—whether a party can challenge the valuation of the total real market value under ORS 305.287 at any level of appeal.

BOPTA proceedings are not "one-sided." And there is nothing in ORS Chapter 309, which governs BOPTA appeals, that limits a BOPTA's authority to reduce one component of the tax account, but increase another component, provided that the total value does not exceed the value on the current tax assessment roll. *See* OAR 150-309.026(2)-(A) (so providing). Accordingly, the mandate of ORS 305.287 is consistent with BOPTA proceedings.

The tax court also determined that the mechanisms of the Regular Division do not fit well with ORS 305.287 because the statutory scheme does not provide for new claims in the Regular Division. (ER 28). On the contrary, the mandate of ORS 305.287 is consistent with appeals in the Regular Division.

As discussed, the legislature intended the Magistrate Division to be "informal and user friendly," and it is not a court of record. *Froman*, 14 OTR at 546-47. Proceedings in the Regular Division begin with a party's complaint—not a notice of appeal—and are original, independent, and de novo, where the issues are tried anew. ORS 305.501(5)(a). Parties may raise new issues and arguments, introduce new evidence, and are not bound by their prior positions—they start over with a "clean slate." *Grant County Assessor*, 2011 WL 294445, *2. *See also Dept. of Rev. v. Kelly*, __ OTR __, 2010 WL 1256058, *1 (Apr 2, 2010) (disagreeing that the department had asserted a new argument in the Regular Division, and thus was attempting only to reverse the decision of the magistrate without "a material change" in its position). The

Regular Division is not a court of review, as the tax court implied.[9] Thus, under the statutory scheme, the county could raise the valuation of the land component for the first time in the Regular Division, even if it had not raised such a claim in the Magistrate Division. Moreover, there is nothing in ORS Chapter 305, which governs appeals in the tax court, that would otherwise restrict the authority of the Regular Division to consider both components of the tax account, even if the Magistrate Division had considered only one component. To be sure, that is exactly what ORS 305.287 was designed to allow.[10]

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[9] In its order on the parties' motion for preliminary ruling, the tax court seemed to imply that ORS 305.287 applies only to the Magistrate Division because the tax court is one court with two divisions. Although the tax court has been described in that way, *see*, *e.g*, *Froman*, 14 OTR at 546, that fact is not particularly instructive, given that an "appeal" to the Regular Division is an independent proceeding in which parties may raise new issues. Indeed, the tax court itself has recognized that proceedings in the Regular Division are separate from those in the Magistrate Division. *Allen v. Dept. of Rev.*, 17 OTR 427, 431 & n 2 (2004). The same is true for the tax court's concern about the time frames for bringing valuation disputes. (ER 31). Parties may raise new issues in the Regular Division—and even change their position—without violating the limitation period for bringing an appeal in the Magistrate Division. Thus, there is no reason to restrict the applicability of ORS 305.287 on that basis.

[10] ORS 305.286, which is the codification of HB 2569 that the legislature passed at the same time as ORS 305.287, also uses the terms "whenever" and "is appealed." Although ORS 305.286 also applies to property tax appeals, it is very different in scope and purpose. ORS 305.286 authorizes a deferred billing credit against a possible future tax refund, and applies to all appeals, including existing appeals that have not been resolved. *See* ORS 305.286(2)(a) (application to "all tax years to which the appeal relates and any tax year during

Footnote continued…

Construing ORS 305.287 to apply to all levels of appeals in the tax appeals system also remedies the inequities created by *Nepom* and Measure 50, which provides the overarching context for ORS 305.287. ORS 305.287 prevents a windfall for a taxpayer who chooses to litigate only one component of the property tax account to avoid valuation of the other component, when that component was undervalued. Said differently, and in the tax court's words (ER 30 n 5), ORS 305.287 was intended to "neutralize" the strategic advantage that a taxpayer could gain under *Nepom*, after the passage of Measure 50. *See Mastriano v. Board of Parole*, 342 Or 684, 693, 159 P3d 1151 (2007) (this court generally presumes that the legislature "enacts statutes in light of existing judicial decisions that have a direct bearing upon those statutes."). When all the words of ORS 305.287 are given effect, that "neutralization" can happen whenever a party appeals a valuation decision—to the BOPTA or either division of the tax court.

In sum, the text of ORS 305.287, when read to give effect to all the words the legislature chose to use, reveal the legislature's intent: at any time a party appeals the real market value of one or more components of a property tax

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(…continued)
the pendency of the appeal"). To that end, ORS 305.286 contains an express retroactivity provision. Or Laws 2011, ch 112, § 1. Because of its different purpose, its similar language is worthy of note, but not dispositive.

account to a BOPTA, to the Magistrate Division of the tax court, or the Regular Division of that court, any other party to the appeal may seek a determination of the total real market value of the tax account, the real market value of any or all of the other components of the account, or both. That construction also is consistent with context of ORS 305.287, which includes the structure of the tax appeals system and the problem that the legislature sought to address—the particular limitations of *Nepom* and Measure 50.

The legislative history supports that construction, and reveals more fully the legislature's intent—to "neutralize" the effect of *Nepom* and Measure 50. Representative Phil Barnhart was the carrier of HB 2572. During the floor debate before the House of Representatives, on the third reading of HB 2572 and immediately prior to its passage, he explained that, under current law, a party can appeal one component of the valuation of real property and have "various appeals levels" consider only that component. Audio Recording, House Floor Debate, HB 2572, May 16, 2011, at 39:46-42:05 (statement of Rep. Barnhart). According to Representative Barnhart, under normal circumstances, an appeal of this kind might make sense because it limits what the "various appeals bodies" can consider. *Id*. He then explained that under some circumstances, however, a reduction of one component should result in an increase in another component of the real property. But under Measure 50, once a reduction of the value of one component has been made, the value of the

other component cannot be corrected at a later time. In those circumstances, it would be best to consider the value of all the components of the property at the same time. *Id*. Representative Barnhart further explained that HB 2572 allows the assessor to open the other component of the valuation to achieve "a fair and accurate assessment" of the value of the property, and prevent undervaluation that cannot be corrected because of Measure 50's limitations. *Id*.

Thus, in his explanation of HB 2572 immediately prior to its passage, Representative Barnhart in no way limited the applicability of HB 2572 to any time certain in the appeal process, but instead referred to "various appeal levels" and "various appeals bodies," indicating that HB 2572 would apply whenever an appeal of the valuation of the components occurs. As carrier of the bill, his statements carry considerable weight, particularly given that no one contradicted his characterization of the intent of the bill or testified in opposition. *See State v. Roberts*, 231 Or App 263, 272, 219 P3d 41 (2009), *rev den*, 347 Or 608 (2010) (the views of the carrier of a bill, who is knowledgeable about its contents and intended meaning, "are generally regarded as authoritative").

Similarly, in his testimony before the House Committee on Revenue, Multnomah County Attorney Jed Tomkins, counsel for the county assessors,

who were the proponents of the bill,[11] explained that HB 2572 would apply to "appeals," without restricting that term to any particular level of appeal. Audio Recording, House Committee on Revenue, HB 2572, Feb 8, 2011, at 1:03 (statement of Jed Tomkins). *Accord* Audio Recording, House Committee on Revenue, HB 2572, Feb 8, 2011, at 2:48 (statement of economist Christine Broniak) (HB 2572 allows all parties to "a property tax appeal" to seek a determination of the value of the property tax account from "the court"; when the value of one component is reduced, the other parties could then ask the "body or tribunal" to consider the valuation of the property as a whole); Staff Measure Summary, Senate Finance and Revenue Committee, HB 2572, May 27, 2011 ("[p]roperty tax appeals currently cover some or all of a property tax account"; HB 2572 allows other parties to the appeal to seek a determination from "the body or tribunal" of the real market value of the account). (ER 11).

In his explanation of HB 2572 before the Senate Committee on Finance and Revenue, Representative Barnhart stated even more clearly that HB 2572 applies at all levels of appeals. There, he explained that, under the current law,

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[11] The county assessors, who directly participate in the tax assessment and appeals system, were the proponents of HB 2572. Audio Recording, Senate Committee on Finance and Revenue, HB 2572, May 25, 2011, at 36:15 (statement of Rep. Barnhart).

a taxpayer could appeal one component alone, and the limitations of Measure 50 prevent the reassessment of an undervalued component, which results in a real market value and assessed value that is too low. In that circumstance, Representative Barnhart explained, HB 2572 would allow the "local appeals board and the tax court" to consider the entire tax account, not simply the one component the taxpayer sought to appeal. That would prevent an artificially low value, and thereby increase fairness. Audio Recording, Senate Committee on Finance and Revenue, HB 2572, May 25, 2011, at 36:04-38:32 (statement of Rep. Barnhart). "Local appeals board" can only mean the BOPTA. Although "tax court" can mean either the Magistrate Division or the Regular Division of the tax court, additional legislative history confirms that, for purposes of ORS 305.287, it includes both divisions.

Gil Riddell, policy coordinator for the Association of Oregon Counties submitted a statement to the Senate Finance and Revenue Committee on May 25, 2011, in which he described the purpose of the bill:

> The bill permits *the magistrate or judge in a property tax appeal* to ensure the correct final valuation of property in the process of making the component value adjustment requested by the taxpayer.

Testimony, Senate Finance and Revenue Committee, HB 2572, May 25, 2011, Ex DD (statement of Gil Riddell) (emphasis added). (App 4). "Magistrate" refers to a tax court magistrate in the Magistrate Division, and "judge" refers to

a tax court judge in the Regular Division. *See* ORS 305.404 (definitions); ORS 305.498 (appointment of magistrates); ORS 305.501 (appeals).

The Oregon State Association of County Assessors explained that "there are many good reasons for allowing component appeals and this bill does not limit the right to bring such appeals"; rather, it simply allows the assessors or other parties "to defend the total [real market value] in single-component appeals." Testimony, Senate Finance and Revenue Committee, HB 2572, May 25, 2011, Ex EE (statement of Oregon State Association of County Assessors). (App 5-6). Thus, according to the proponents of the bill, the legislature never intended that HB 2572 change in any way the current tax appeals system. *See Ram Technical Services, Inc. v. Koresko*, 346 Or 215, 234-35, 208 P3d 950 (2009) (relying on statements of the proponent of the bill, which explained its purposes).

In sum, the legislative history confirms that the legislature intended that HB 2572, now ORS 305.287, apply to all levels of appeals in the tax appeals system—the BOPTA, the Magistrate Division, and the Regular Division. Moreover, nothing in either the text and context of the statute or the legislative history supports the tax court's conclusion that it applies only to the Magistrate Division. Because the tax court erred in construing ORS 305.287, the court's retroactivity analysis also is flawed.

B. Because ORS 305.287 applies appeals in the Regular Division, as well as in the BOPTA and the Magistrate Division, an analysis of retroactivity is unnecessary.

ORS 305.287 became effective on September 29, 2011, and, as discussed, applies to all levels of appeals—the BOPTA, the Magistrate Division, and the Regular Division. After pursuing an appeal first in the BOPTA and then in the Magistrate Division, taxpayer appealed to the Regular Division, on January 26, 2012. Thus, ORS 305.287 applies to this case, as ORS 305.287 was in effect at the time taxpayer filed this appeal. Because the tax court erroneously concluded that ORS 305.287 applies only to appeals in the Magistrate Division, it erred in conducting a retroactivity analysis, concluding that ORS 305.287 does not have retroactive effect.

In determining whether a statutory provision applies retroactively, as with the interpretation of any statute, this court's task is to discern the intent of the legislature. *See ZRZ Realty v. Beneficial Fire and Casualty Ins.*, 351 Or 255, 260, 266 P3d 61 (2011) (employing statutory construction methodology in retroactivity analysis) (citing *Whipple v. Howser*, 291 Or 475, 480, 632 P2d 782 (1981)). The starting point is the language of the statute itself. *Whipple*, 291 Or at 479.

ORS 305.287 does not contain an express retroactivity provision. *See* Or Laws 2011, ch 397, § 2 ("This 2011 Act takes effect on the 91st day after the date on which the 2011 session of the Seventy-sixth Legislative Assembly

adjourns sine die."). Consequently, by its plain terms, ORS 305.287 applies only prospectively.[12] *See Black v. Arizala*, 337 Or 250, 271, 95 P3d 1109 (2004) (this court assumes that the statutory scheme applies prospectively, absent a signal from the legislature that it intended retrospective application). But retroactivity is not an issue in this case because, properly construed, ORS 305.287 applies to appeals in the Regular Division. Thus, the tax court's retroactivity analysis was unnecessary.

The tax court concluded that ORS 305.287 applies only to appeals in the Magistrate Division, and so does not apply to appeals in the Regular Division. Based on that incorrect conclusion, the court then reasoned that the legislature did not intend ORS 305.287 to apply retroactively to appeals in the Magistrate Division that had commenced prior to that statute's effective date, as had taxpayer's appeal to the Magistrate Division in this case. But it was unnecessary for the legislature to consider retroactivity because, as discussed, it intended for ORS 305.287 to apply to all levels of appeals, not just to the Magistrate Division. To be sure, there is nothing in the legislative history to suggest that the legislature ever considered whether ORS 305.287 should apply

[12] The department does not dispute that if the tax court is correct that ORS 305.287 applies only to appeals in the Magistrate Division, it does not apply retroactively to this appeal, which had commenced and was pending in the Magistrate Division before its effective date.

retroactively. Although legislative silence is not generally dispositive of retroactivity,[13] it is meaningful in this context.[14] *See Blacknall v. Board of Parole*, 348 Or 131, 140, 229 P3d 595 (2010) ("We previously have observed that, '[d]epending on the context, the legislature's silence can signify a variety of policy choices * * *.'") (quoting *State v. Hess*, 342 Or 647, 660, 159 P3d 309 (2007)).

The tax court's retroactivity analysis was necessitated by its erroneous construction of ORS 305.287. Under the correct construction, it is wholly unnecessary. ORS 305.287 applies prospectively, and so applies to this appeal in the Regular Division, which commenced after the effective date of the statute.

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[13] *See, e.g., Rhodes v. Eckelman*, 302 Or 245, 728 P2d 527 (1986) ("In the absence of express statutory text or indications of legislative policy in the measure's history, this court in other cases has resorted to various labels and formulae.").

[14] In contrast, the legislative history of HB 2569 shows that the proponents of that bill, also the county assessors, intended that ORS 305.286 have retroactive effect. Audio Recording, House Committee on Revenue, HB 2569, Feb 8, 2011, at 8:43 (statement of Randy Walruff, Multnomah County Assessor) (deferred billing credit can be applied at "any time during the litigation"); Audio Recording, House Committee on Revenue, HB 2569, Feb 8, 2011, at 13:55 (statement of Jed Tomkins, Multnomah County Attorney) (explaining retroactivity provision).

C. Amendment of the county's answer to include a counterclaim based on ORS 305.287 is proper because that statutory provision applies to this appeal.

In this appeal, taxpayer challenged only the value of the improvement of the property. Under ORS 305.287, the county filed a motion for leave to amend its answer and add a counterclaim, seeking a determination by the tax court of the real market value of the land, including the site developments. (ER 13-20). The tax court denied the motion, based on its conclusion that ORS 305.287 does not apply to this appeal. (ER 35-38).

Because the tax court erred in that regard, it also erred in denying the county's motion for leave to amend its answer.

CONCLUSION

For the foregoing reasons, this court should reverse the judgments of the tax court, with instructions to apply ORS 305.287, as correctly construed, and allow amendment of the county's answer to add a counterclaim based ORS 305.287.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on July 18, 2013, I directed the original Appellant Department of Revenue's Opening Brief to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Kathleen J. Rastetter, attorney for appellant Clackamas County Assessor; and upon Donald H. Grim, attorney for respondents Village at Main Street Phase II LLC and Village Residential LLC, by using the court's electronic filing system.

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

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 8,773 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

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