IN THE OREGON TAX COURT
MAGISTRATE DIVISION
Property Tax

JOY A. GUIDRY,	)	
	)	
Plaintiff,	)	TC-MD 050663B
	)	
v.	)	**DECISION GRANTING**
	)	**DEFENDANT'S MOTION FOR**
	)	**SUMMARY JUDGMENT AND**
MULTNOMAH COUNTY ASSESSOR,	)	**DENYING PLAINTIFF'S**
	)	**MOTION FOR SUMMARY**
Defendant.	)	**JUDGMENT**

I. INTRODUCTION

This appeal concerns Plaintiff's claim for an exemption from the recapture of deferred taxes under ORS 197.754.[1]

The complaint was filed on June 13, 2005. A Motion for Summary Judgment was filed by Plaintiff on December 29, 2005. Defendant filed a Motion for Summary Judgment on February 2, 2006. P. Stephen Russell III represented Plaintiff. John S. Thomas represented Defendant.

Oral arguments were made on April 18, 2006.

II. ISSUE PRESENTED

Plaintiff contends that the real property in this case should receive the benefit of ORS 197.754, which allows for an exemption from the recapture of deferred specially assessed taxes on farmland. (Ptf's Compl at 1.) Plaintiff argues that the statute applies to all nonexclusive farm use zoned (Non-EFU) farmland even if the zoning and services were provided before the effective date of the law. (*See* Ptf's Mot for Summ J.) Plaintiff claims that under ORS 197.754,

[1] All references to the Oregon Revised Statutes (ORS) are to 2003.

she should, at most, only pay for the 3.5 acres still being farmed as of October 23, 2004. (Ptf's Mot for Summ J at 5-6.) Alternatively, Defendant contends that ORS 197.754 does not apply (Def's Mot for Summ J at 3.) and that Plaintiff owes $192,737.84 for the recapture of the deferred real property taxes under ORS 308A.703. (Ptf's Compl at 2.)

III. STATEMENT OF FACTS

The parties stipulated to certain material facts. Plaintiff owned 22.43 acres within Multnomah County, Oregon (the property).[2] (Stipulated Statement of Facts (Stip Facts) No 1.) The property, historically assessed under the non-EFU zoned farmland special assessment provisions in ORS 308A, was sold to a residential developer pursuant to an agreement executed in 2001 and closed in early 2005. (Stip Facts No 2.) On March 17, 2005, Plaintiff was informed by Defendant that the property had been disqualified from special assessment under ORS 308A.116 and that the deferred taxes could not be waived under ORS 197.754(3)(a). (Ptf's Compl at 2.)

Before the sale, the property was actively farmed as part of a commercial nursery operation; however, by October 23, 2004, all but approximately 3.5 acres, 16 percent of the property, was no longer farmed. (Stip Fact No 7.) The property was first zoned low-density residential (LDR) by the City of Gresham as early as 1980 and continues to be zoned under that designation. (Aff of Tammy J. Richardson at 1.) Police and fire protection is available to all properties within the City of Gresham and, since at least 1998, sewer and water service sufficient to allow development has been available to the property. (Aff of Tammy J. Richardson at 2.) ORS 197.754, which allows for an exemption from the payment of deferred taxes under ORS 308A.700 to 308A.733, became effective October 23, 1999.

[2] Property identified as Account R342005.

IV. ANALYSIS

A special assessment for Non-EFU zoned land can be disqualified for various reasons.[3] *See* ORS 308A.116. When property is disqualified, the recaptured tax is added to the next assessment. *See* ORS 308A.703(2). The tax is "equal to the difference between the taxes assessed against the land and the taxes that would * * * have been assessed against the land." *Id.* This is done for either the number of consecutive years the land qualified for the special assessment program or five years, whichever is the lesser. *See* ORS 308A.703(3).

There is a key exemption to the recapture provision of ORS 308A.703. Under ORS 197.754(3)(a): "Land in an area zoned for urban uses under this section shall not be subject to additional taxes under ORS 308A.700 to 308A.733 if the land ceases to be used for farm use within the five years following the date the area is zoned for urban uses." To qualify for the exemption,

> "(1) A local government may identify land inside an urban growth boundary for which the local government intends to provide urban services within the next five to seven years. The local government may evidence its intent by adopting a capital improvement plan reasonably designed to provide the urban services.
>
> "(2) A local government that identifies an area for planned urban services and adopts a capital improvement plan may zone the area for urban uses. * * *"[4]

ORS 197.754.

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[3] Reasons for disqualification under ORS 308A.116 include:

> "(a) Notification by the taxpayer to the assessor to remove the special assessment;
> "(b) Sale or transfer to an ownership making it exempt from ad valorem property taxation;
> "(c) Removal of the special assessment by the assessor upon the discovery that the land is no longer in farm use for failure to meet the income requirements under ORS 308A.071 or is no longer in farm use; or
> "(d) The act of recording a subdivision plat under the provisions of ORS chapter 92."

[4] ORS 197.754(3)(b) reads "A lot or parcel in an area zoned for urban use under subsection (2) of this section shall not be assessed at its value for farm use under ORS 308A.050 to 308A.128 unless the lot or parcel was receiving the farm use assessment at the time the area was zoned for urban uses."

A. *Statutory Analysis*

When analyzing a statute, the court construes it according to the framework set out in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993). Under *PGE*, the court is responsible for determining the intent of the legislature. *See id.* at 610. The first step in determining intent is to analyze the statute's text and context. *See id*. Only when the text and context of a statute are ambiguous should the court resort to the legislative history. *See id.* at 611-12. To determine the meaning of a statute, the court first looks to its plain meaning and interprets words of common usage to give them their "plain, natural, and ordinary meaning." *Id.* at 611. In addition, the court should not "insert what has been omitted." *Id.*

The format and language of ORS 197.754 clearly indicate that the legislature intended the three subsections to be interdependent. In order to receive the exemption under subsection (3)(a) of ORS 197.754, the land has to be zoned "under this section." Thus, the local government must first identify an area for urban services and adopt a capital improvement plan under subsection (1) in order for a local government to zone the area for urban uses under subsection (2). Subsection (3)(a) refers back to "an area zoned for urban uses" which occurs in subsection (2) before providing the exemption from the recaptured deferred taxes. Although subsections (1) and (2) are permissive rather than mandatory, the exemption is not available unless a local government has provided the zoning and services of the first two subsections. Subsection (3)(a) provides a property owner with an exemption from the recaptured deferred property taxes; however, unless the mandates of subsections (1) and (2) of ORS 197.754 are met, the property does not satisfy the requirements of the exemption.

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B. *Strict Construction of Tax Exemption Statutes*

A special assessment provides a partial tax exemption to property and is subject to a strict but reasonable construction. *See Meyer v. Lane County Assessor*, TC-MD No 050572E, WL 1132356 at *3 (April 21, 2006) (citations omitted). However, "in case of doubt [the statute] will be construed against the taxpayer." *Eman. Luth. Char. Bd. v. Dept. of Rev.*, 263 Or 287, 291, 502 P2d 251 (1972). There "must be * * * some clear constitutional or legislative provision to that effect," to show that property is exempt from taxation. *Emanuell Lutheran Char. v. Dept. of Rev.*, 4 OTR 410, 415 (1971) (citations omitted). When examining the text, "the court must declare what the legislature has done and not what an omniscient legislative draftsman might well have done." *Shepherd v. Dept. of Rev.*, 8 OTR 122, 127 (1979) (citations omitted).

ORS 197.754 provides a limited exemption from the usual recapture of a deferred special assessment and must be strictly construed. There is no "clear constitutional or legislative provision," which allows prior zoning to be sufficient for the land to receive the exemption. In addition, the text and context do not indicate that prior zoning must receive the exemption. In fact, the statute only references zoning that occurs "under this section." Although a local government may have zoned and provided urban services before the passage of the statute, such actions would not occur under that section because the actions occurred before its passage. Here, the local government zoned and provided services to the property before the effective date. Thus, the zoning and services were not provided "under this section."

Although the statute does not contain a cautionary clause denying the benefits of the statute to the property because tax exemptions are strictly construed, Plaintiff must demonstrate that the property should receive the exemption. The lack of a cautionary clause does not demonstrate that prior zoning should receive an exemption, only that the legislature did not specifically warn against such an interpretation. Without a clear reference to zoning that

occurred before the statute's passage, it is not reasonable to read the law as incorporating prior acts. Furthermore, even if the problem of turning land zoned from non-EFU farmland to residential land was contemplated by the drafters of the legislation, the plain language only addresses land zoned "under this section." Thus, because the statute is "construed against the taxpayer," Plaintiff does not qualify for the exemption, and, unless it applies retroactively, the statute does not apply to the property.

C. *Retroactive Legislation*

To determine whether legislation applies retroactively or prospectively, the court first looks to the language to determine legislative intent. *See Vloedman v. Cornell,* 161 Or App 396, 399-400, 984 P2d 906 (1999), *see also Whipple v. Howser*, 291 Or 475, 479, 632 P2d 782 (1981). If there is no express provision in the statute stating that the legislature intended it to apply retroactively, the court looks for other indications of legislative intent in the text. *See Vloedman*, 161 Or App at 400. A common indicator is the tense used within the statutory language. *See Newell v. Weston,* 150 Or App 562, 569, 946 P2d 691 (1997). As stated in *Newell*, "if the legislature had intended the statute to apply prospectively only, it presumably would have used the present * * * or the future conditional * * * tense." *Id.* at 570.

The question of prospective and retrospective application of a statute has also been determined to be a question of whether a law is remedial or substantive. *See Vloedman*, 161 Or App at 400. A remedial statute is defined as legislation that "pertain[s] to or affect[s] a remedy, as distinguished from those which affect or modify a substantive right or duty." *Perkins v. Willamette Industries*, 273 Or 566, 571 n1, 542 P2d 473 (1975). In *Perkins*, that distinction and model of construction was determined to be a guide to construction rather than a rule of statutory construction. *Id.* at 570-71. As a result, "there is no need to resort to the less precise method of attempting to ascertain legislative intent by the application of 'rules' or

'maxims' of statutory construction when the language of the statute itself reveals the intent of the legislature." *Whipple*, 291 Or at 482.

Plaintiff argues that Defendant's interpretation reads the word "first" into ORS 197.754(3)(a), (i.e., "first zoned for urban uses after the effective date of the statute"). There is no indication, however, that the legislature intended for prior actions by local governments to be folded into the legislation as of the effective date. Following the directive of *PGE* to not "insert what has been omitted," if it was the intent of the legislature to include zoning and services provided before the effective date of ORS 197.754, a savings clause incorporating the prior actions of a local government could have been included. In addition, the context does not indicate that the legislation must apply retroactively. The text, read in context, uses language written in the future conditional. The exemption of the recapture of the deferred taxes is triggered if both subsections (1) and (2) have occurred "under this section." Although the "land in an area zoned for urban uses" is in the past tense, subsections (1) and (2) of the statute, which trigger the exemption, are written in the future conditional tense ("may identify land," "may * * * [adopt] a capital improvement plan," "may zone the area for urban uses."). The formatting and the language used indicate that ORS 197.754 must not be applied retroactively.

D. *Legislative History*

Although there is no requirement to consider the legislative history, the language quoted by Plaintiff indicates that the law was intended to apply prospectively. Jon Chandler (Chandler), Oregon Building Industry Association, spoke to the Senate Water and Land Use Committee and said that the statute applies to areas that do not currently have urban services. Chandler referred to "an area *to be provided* with urban services in the near term * * *," rather than an area already receiving urban services. (Plf's Mot for Summ J at 7 (emphasis added).) In

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the present situation, Plaintiff was already receiving urban services before the passage of the statute and thus Plaintiff's property does not fall under ORS 197.754.

E. *Unfarmed Land*

Although farming had not completely ceased by October 2004, Plaintiff claims the unfarmed land should still receive the exemption under ORS 197.754. The court already determined ORS 197.754 does not apply to the property. Accordingly, the extent or percentage of farming activities is not determinative herein.

V. CONCLUSION

ORS 197.754 does not apply to real property zoned before the passage of the statute. The court, therefore, denies Plaintiff's request and upholds the assessment. Plaintiff's Motion for Summary Judgment is denied. Defendant's Motion for Summary Judgment is granted. Now, therefore,

IT IS THE DECISION OF THE COURT that Defendant's Motion for Summary Judgment is granted; and

IT IS FURTHER DECIDED that Plaintiff's Motion for Summary Judgment is denied.

Dated this ____ day of September 2006.

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JEFFREY S. MATTSON
MAGISTRATE

If you want to appeal this Decision, file a Complaint in the Regular Division of the Oregon Tax Court, by <u>mailing</u> to: 1163 State Street, Salem, OR 97301-2563; or by <u>hand delivery</u> to: Fourth Floor, 1241 State Street, Salem, OR.
Your Complaint must be submitted within <u>60</u> days after the date of the Decision or this Decision becomes final and cannot be changed.

This document was signed by Magistrate Jeffrey S. Mattson on September 26, 2006. The Court filed and entered this document on September 26, 2006.