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No. 69073-6

COURT OF APPEALS
OF THE STATE OF WASHINGTON

DIVISION I

LEGACY PARTNERS RIVERPARK APARTMENTS BUILDINGS A/B LLC; LEGACY PARTNERS RIVERPARK APARTMENTS BUILDING E LLC, Delaware Limited Liability Corporations

Appellants,

vs.

KING COUNTY, WASHINGTON, a Municipal Corporation,

Respondent.

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

This appeal turns on the meaning of three unambiguous statutes. The first is RCW 36.21.080 which authorizes county assessors to add new construction value to the assessment rolls "up to August 31st" of the assessment year. The second is RCW 84.40.080 which defines when and how assessors may remedy omissions of property or value from an assessment roll. The third is RCW 84.48.065 which authorizes assessors and treasurers to correct specific non-value related errors on an assessment roll.[1]

RCW 36.21.080 is a special, time-limited exception to the general rule that property is to be assessed at its value as of January 1st each year. It authorizes assessors to list new construction at its value as of July 31st (rather than January 1st), but they may do so *only* "up to August 31st." The County asks the Court to read "up to August 31st" right out of the statute and allow assessors to list new construction for up to three years after the assessment roll closes. The Court should decline that request.

RCW 84.40.080 details when and how corrections are to be made if property or value is erroneously omitted from an assessment roll. In the

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[1] In addition to non-valuation errors, RCW 84.48.065 authorizes correction of one type of valuation error: where a value correction is occasioned by "a definitive change of land use designation" and the assessor and property owner agree on the correct value. That provision does not apply to the instant case.

interest of finality and fairness, it strictly limits the circumstances in which omissions can be remedied after the assessment rolls are closed. The County, however, urges the Court to approve its scheme for getting around these limitations by extending the error correction authority in RCW 84.48.065 to overlap and override the express limitations and requirements that RCW 84.40.080 places on omit assessments. The Court should decline that request as well. The plain language and history of RCW 84.48.065 make clear that it was never intended to overlap with RCW 84.40.080. It does not authorize assessors to retroactively change values after the assessment rolls have closed.

RCW 84.48.065 provides a procedure for making corrections that do not change the value of property listed on the assessment rolls. It authorizes both assessors and treasurers to correct erroneous property descriptions, remove duplicate assessments, correct erroneous tax calculations, and correct other listing errors – such as mistakes in the tax status of property – that do not entail a property revaluation. RCW 84.48.065 is not, however, a back door way around either the deadline in RCW 36.21.080 for listing new construction or the limitations in RCW 84.40.080 on when and how omit assessments can made. If these clear statutory provisions are not to the County's liking, the remedy lies with the Legislature, not the Department of Revenue or the courts.

II. ARGUMENT

A. The Deadline for Listing New Construction on the Assessment Roll is August 31st of the Assessment Year.

Statutory construction begins with the language of the statute. "If the language is not ambiguous, we give effect to its plain meaning. If a statute is clear on its face, its meaning is to be derived from the language of the statute alone." *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155, 158 (2006) (internal quotations omitted). RCW 36.21.080 is plain and unambiguous. The County does not argue otherwise. It authorizes county assessors to list new construction on the assessment rolls at a stepped-up July 31st value "*up to August 31st*" but not thereafter.

It is axiomatic that public officers have only those powers granted expressly or by necessary implication. *Utilities System v. PUD 1*, 112 Wn.2d 1, 6, 771 P.2d 701 (1989); *Kabbae v. Department of Social and Health Services,* 144 Wn.App. 432, 440, 192 P.3d 903 (2008). When the grant of authority places limits on its exercise, those limits must be respected. *State ex rel. Linn v. Superior Court for King County,* 20 Wn.2d 138, 153, 146 P.2d 543 (1944). Here, the Legislature placed an explicit time limit on the authority granted to county assessors to assess new construction at a special stepped-up mid-year value. That authority expires, by its terms, on August 31st each year. Assessors have no

authority to list new construction on an assessment roll after that deadline has passed.

The County rejects this plain language interpretation of RCW 36.21.080. Relying on *Niichel v. Lancaster*, 97 Wn.2d 620, 647 P.2d 1021 (1982), it argues that RCW 36.21.080 is directory, and that the only real deadline for listing new construction value is three years after the assessment roll has closed.[2] Resp. Br. at 28-30. But *Niichel* does not support the County's argument.

RCW 36.21.080 is a jurisdictional grant of authority. When a time limitation is stated within a jurisdictional context, it is mandatory. *Erection Co. v. Department of Labor and Industries*, 121 Wn.2d 513, 518-519, 852 P.2d 288 (1993). *Niichel* addressed the May 31st listing date for regular assessments in RCW 84.40.040, but that date is not stated in a jurisdictional context. RCW 84.40.040 is not a grant of authority. That is the critical difference. *Niichel* itself recognized this distinction. *Niichel* at 624 (a statute is directory if it serves as "a guide for the conduct of business and for orderly procedure *rather than a limitation of power.*")(emphasis added). Assessors have only the authority to list new construction at a stepped-up value that is granted by RCW 36.21.080.

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[2] The time limit under RCW 84.48.065 for correcting manifest errors is three years, if we assume that that deadline is not merely directory.

They have no power to list new construction after August 31st of the assessment year.

The County argues that the listing deadline in RCW 36.21.080 should be construed as directory because of the way it is referenced in RCW 84.40.040. *See* Resp. Br. at 29-30. But RCW 84.40.040 mentions new construction only to assure that there is no confusion regarding its valuation date. RCW 84.040.040 is *not* the grant of power to list new construction. The grant of power is in RCW 36.21.080, and the express time limit on that grant must be respected.[3]

Next, the County argues that the August 31st listing deadline should be ignored because RCW 84.40.040 and RCW 36.21.080 were adopted in the same legislative act. Resp. Br. at 30. That is a *non sequitur*. The August 31st deadline is stated as a limitation on the grant of power to list new construction, and its plain meaning is not altered by the fact that it was adopted in a statute that also contained non-jurisdictional provisions.

Next, the County argues that the "policy of the law is to insure the collection of all taxes," so the statutes should be construed to uphold the

[3] The language in RCW 84.40.040 itself makes this clear. It expressly recognizes that the listing and valuation of new construction is made "under RCW 36.21.080" (emphasis added). The language in RCW 36.21.080 controls.

tax. Resp. Br. at 31. That is nothing more than arguing that the Court should ignore the statutory language and adopt whatever interpretation allows the collection of more tax. Putting aside the due process concerns with such an approach, this is not, and hopefully never will be, the law of Washington. *See, e.g., Tradewell Stores, Inc. v. Snohomish County,* 69 Wn.2d 352, 356, 418 P.2d 466 (1966).[4]

The procedure for valuing new construction at a stepped up July 1st value is an exception to the general rule that property is assessed at its value as of January 1, each year. In *State v. Wanrow*, 88 Wn.2d 221, 559 P.2d 548 (1977), the Court reaffirmed the common sense rule that such exceptions are "strictly construed and allowed to extend only so far as their language warrants." *Id.* at 232. RCW 36.21.080 only authorizes assessors to list new construction on the rolls "up to August 31st." Under *Wanrow*, the statute means just what it says. The County, however, argues that the rule stated in *Wanrow* only applies if the exception is stated as a "negatively worded limitation." Resp. Br. at 32. But nothing in *Wanrow*, or any other case, suggests that the applicability of the rule depends on whether the limitation or exception is worded negatively or positively.

[4] The County's argument also ignores the more insistent rule that any ambiguity is construed against the taxing power and in favor of the taxpayer. *Agrilink Foods, Inc. v. Dep't of Revenue*, 153 Wn.2d 392, 396–97, 103 P.3d 1226 (2005).

For example, in *State v. Wright*, 84 Wn.2d 645, 529 P.2d 453 (1974), the rule was applied to a *positively* worded exception. *State v. Wright* was cited with approval in *Wanrow*. *See* 88 Wn.2d at 232.

Moreover, the substance of the exception in *Wanrow* is indistinguishable from the exception here. In *Wanrow*, the statutory scheme generally prohibited nonconsensual recordings of private conversations but contained an exception which *allowed* recordings of "incoming telephone calls to police and fire stations for the purpose and only for the purpose of verifying the accuracy of reception of emergency calls." 88 Wn.2d at 227. The State argued that this language allowed the recordings to be used as evidence in a criminal case. The Court disagreed, ruling that the statute only allowed recordings to be used for the specific purpose identified in the statute, *i.e.,* "verifying the accuracy of reception of emergency calls." The same analysis applies here. The special authorization to value new construction as of July 31st extends only so far as the statute allows, *i.e.,* "up to August 31st" and no later.[5]

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[5] The County's theory also is at odds with *Erection Co. v. Department of Labor and Industries*, *supra*, and *State ex rel. Linn v. Superior Court for King County*, *supra*, both of which enforced conditions placed on *affirmative* grants of authority. Indeed, in *Erection Co.,* the Court made clear that the *Niichel* analysis urged here by the County does not apply to express limitations on a grant of authority such as that contained in RCW 36.21.080. *See* 121 Wn.2d at 519-520.

Finally, the County argues that the August 31st deadline for listing new construction should not be enforced because doing so would result in a "gross and unintended hardship" and the "utter perversion" of the tax system. Resp. Br. at 33-34. Hyperbole aside, that is an argument for the Legislature, not the courts. It is the Legislature's prerogative to place limits on grants of authority. The courts' function is to apply the law as written, not to amend it to accommodate the County's policy preferences.[6]

The Assessor did not timely list the new construction value on Legacy's parcels for either 2009 or 2010. Therefore, the properties are to be assessed each year at their value as of January 1. The original assessments presumptively did that. Reversing the Assessor's unauthorized assessment revisions reinstates the original January 1 assessments made by the Assessor.[7]

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[6] The County also argues that the August 31st new construction deadline does not apply to much of the 2010 assessment because "only a portion" of the 2010 improvement value was actually attributable to new construction that occurred in 2010. Resp. Br. at 34, n.21. That misses the point entirely. According to Kent Walter, the County's CR 30(b)(b)(6) witness, the revised values entered on the roll on November 3, 2010 reflected the new construction value of the improvements as of July 31st 2010. CP 80. Those untimely new construction listings were invalid. Reversing them leaves the original assessments issued on July 15, 2010 in place.

[7] The County refers to the original $1,000 improvement assessments as "placeholder" values that did not reflect anyone's determination of actual improvement value. Resp. Br. at 4. Assessors have no authority to list "placeholder" values on the official assessment rolls. Assessors must certify that, to the best of their knowledge and belief, all values placed on the rolls are "true and fair value." RCW 84.40.320. The County's casual disregard of this legal obligation is troubling.

B. The Assessor's Failure to Assess the New Construction Value in 2009 is not Correctable under RCW 84.48.065.

1. A failure to timely list new construction value is not correctable under RCW 84.48.065.

The error that occurred in 2009 was the Assessor's failure to meet the August 31st deadline for listing new construction value. As a result, that value was omitted from the original assessment roll. That, however, is not an error that is correctable under RCW 84.48.065. RCW 84.48.065 does not extend the new construction listing deadline. Even if the Court were to hold that strict compliance with the August 31st deadline is not required, May 2010 was far too late to revise a long closed assessment roll. The May 2010 revisions did not even substantially comply with the August 31st new construction listing deadline.[8]

The County argues that the Assessor's failure to timely list the new construction was a clerical error that can be corrected under RCW 84.48.065 without regard to the listing deadline itself. But nothing in RCW 84.48.065 purports to extend the deadline for listing new construction or excuse a failure to strictly or substantially comply with the

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[8] *Niichel* made clear that substantial compliance with the May 31 listing date for regular assessments requires, at a minimum, that the assessment be made "in the year before taxes are to be levied, including an allowance for time in which to appeal." 97 Wn.2d at 624. Even if the new construction deadline were considered directory, there would be no reason to allow new construction to be listed at a later time than prescribed by *Niichel* for regular assessments. May 2010 was too late to constitute substantial compliance.

listing deadline. To hold otherwise would nullify the plain language of RCW 36.21.080.

Once the deadline for listed new construction passed, Legacy's parcels were to be assessed at their value as of January 1, 2009, just like all other property. RCW 84.48.065 does not grant a three-year extension of time for listing new construction at a July 31st value. The original assessments issued on June 18, 2009 are the only evidence of the value of the improvements as of January 1, 2009. They are the only lawful assessments of Legacy's property for 2009.

2. RCW 84.48.065 does not authorize corrections of omitted value or erroneous valuations.

Putting aside the fact that RCW 84.48.065 does not provide a cure for the Assessor's failure to timely list Legacy's new construction value, the County's argument also fails because RCW 84.48.065 does not authorize valuation changes to correct omitted value or erroneous values. Legacy's Opening Brief explains: (1) the history and policy of RCW 84.48.065 and RCW 84.40.080; (2) why retroactive valuation changes are subject to the strict limitations of RCW 84.40.080; and (3) how RCW 84.48.065, as language that originally applied solely to county treasurers, concerns the errors treasurers can address without invading the valuation function of county assessors. Opening Br. at 17-28.

This analysis shows that assessors' authority to revise assessed values after the rolls are closed is limited to the specific circumstances set out in RCW 84.40.080 and that RCW 84.48.065 is limited to correcting non-valuation errors.[9]

The County does not dispute the statutory history presented by Legacy. Resp. Br. at 21 ("Legacy's legislative history discussion ... makes no point that the County does not readily concede"). It asserts, however, that the "very point" of RCW 84.48.065 is to authorize retroactive changes to value. Resp. Br. at 15. There is nothing in the language or history of the statute to support that assertion.

a. RCW 84.48.065 must be harmonized with RCW 84.40.080.

The County's argument – that RCW 84.48.065 authorizes assessors to retroactively add improvement value that was omitted from the original assessment roll – places RCW 84.48.065 in direct conflict with RCW 84.40.080. Such a construction is to be avoided. Courts are to harmonize statutes, not draw them into conflict or adopt constructions that

[9] The exception, of course, is that RCW 84.48.065 expressly authorizes revaluations which results from a "definitive change in land use designation." *See supra* note 1. Because this exception does not apply to this case, it is only mentioned where specifically relevant to the analysis.

nullify or render superfluous specific statutory language.[10] Yet the County's argument does just that. It renders all but meaningless the express limitations on retroactive valuation changes in RCW 84.40.080. Under RCW 84.40.080, improvement value that is omitted from an assessment roll may only be retroactively assessed if the omission is evidenced by the assessment roll itself and an intervening *bona fide* party has not acquired an interest in the property before the assessment is made. The County would nullify these limitations and allow assessors to use RCW 84.48.065 to make the very retroactive valuation changes that are expressly barred under RCW 84.40.080.

The County's theory undermines the finality of the assessment rolls. That finality is important. It provides certainty, protects *bona fide* parties from *ex post facto* tax increases, and limits opportunities for corrupt practices by tax officials. The importance of assessment finality has long been recognized:

> [T]he desirable finality of assessments and the established law preclude the assessor's reassessing omitted value, once the taxing process has come to a close for the year in question. To hold otherwise would be to introduce but another uncertainty into an already uncertain area.

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[10] *Shafer v. Department of Labor and Industries*, 166 Wn.2d 710, 717-718, 213 P.3d 591 (2009); *AOL, LLC v. Washington State Dept. of Revenue*, 149 Wn.App. 533, 542, 205 P.3d 159 (2009).

Star Iron & Steel Co. v. Pierce County, 5 Wn.App. 515, 520, 488 P.2d 776 (1971)(*opinion adopted* 81 Wn.2d 680, 504 P.2d 770 (1972)). *See also*, *Tacoma Goodwill Industries Rehabilitation Center, Inc. v. Pierce County,* 10 Wn.App. 197, 199, 518 P.2d 196 (1973) ("Once specific properties are brought to the attention of the assessor, it is desirable that his determinations of valuation or exemption should be final when the assessment deadline passes.").

The County argues that it is improper to even consider RCW 84.40.080 in construing RCW 84.48.065 because doing so improperly "graft[s] omit restrictions onto the assessor's manifest error authority." Resp. Br. at 23. That makes no sense. What is the point of the restrictions on omit assessments if, as the County contends, RCW 84.48.065 renders them largely meaningless?

Here, if no improvement value had been listed initially on Legacy's parcels, the Assessor could have made omit assessments. However, if Legacy had sold the property before the omission was discovered, RCW 84.40.080 would bar omit assessment to protect the buyer. But under the County's theory, the Assessor could use RCW 84.48.065 to get around that bar, retroactively add the improvement value to the rolls and charge the innocent new owner with the back taxes for a time period prior to its purchase! That is an absurd result. Why

insist on finality and fairness to *bona fide* parties in making omit assessments if RCW 84.48.065 allows retroactive revaluations with no concern for finality, no protection for *bona fide* parties, and no protection against the potential for corrupt retroactive value changes? Why have the strict limitations on omit assessments in RCW 84.40.080 if those limitations are rendered largely meaningless by RCW 84.48.065?

Even if the Court were to construe RCW 84.48.065 as broadly as the County would like, the limitations in RCW 84.40.080 on when and how omissions of property or value can be corrected control because RCW 84.40.080 specifically addresses errors of omission, and "[w]here a general statute includes the same matter as a specific statute and the two cannot be harmonized, the specific statute will prevail over the general." *AOL, LLC v. Washington State Dept. of Revenue*, 149 Wn.App. 533, 542, 205 P.3d 159. RCW 84.40.080 specifies when and how omissions can be corrected. Those specific provisions are controlling and bar the Assessor's retroactive revaluation of Legacy's improvements.

b. The plain language of RCW 84.48.065 does not authorize retroactive value revisions.

A result as bizarre and anomalous as that urged here by the County should only be accepted if the statutory language unquestionably compels it. That is not the case here. Neither the statutory language nor the

statutory history supports the County's construction of RCW 84.48.065. Indeed, the County must strain the statutory language and disregard legislative history to make its argument.

In the main, the County does not even address the language of RCW 84.48.065.[11] Rather, it argues from the language of the Department of Revenue's rule, WAC 458-14-005(14). The only statutory provision that relates to the County's argument is the proviso in RCW 84.48.065 which authorizes the correction of "manifest errors in the listing of the property which do not involve a revaluation of property." The sensible interpretation of this statutory language, however, is that it authorizes corrections that do not change value. That interpretation comports with the common meaning of the term "revaluation," and it harmonizes the correction authority in RCW 84.48.065 with that in RCW 84.40.080. *See* Opening Br. at 28-30. The County contends, however, that the language must be interpreted more broadly. It argues that the "very point of RCW 84.48.065 is to correct assessed value errors." Resp. Br. at 15. That is just plain wrong.

RCW 84.48.065 is not directed at correcting valuation errors. Instead, it authorizes the correction of specific non-valuation errors in

[11] Indeed, the County does not even identify the specific statutory language it purports to rely on as its authority to revise values on a closed assessment roll.

information on the assessment rolls. Thus, if the legal description is erroneous, it may be corrected. If property is erroneously listed multiple times, the duplicates may be removed. If there is a clerical error in extending the tax against a property, the tax may be corrected. If there are listing errors that can be corrected without revaluing the property, such as correcting its taxable status, those, too, may be corrected. None of these provisions, however, grant authority to change assessed values on a closed assessment roll.

The County claims that correcting the errors specified in RCW 84.48.065 *necessarily* involves revising assessed values (Resp. Br. at 15). But again, that is not true. The authority to correct an erroneous legal description does not impliedly authorize the assessor to revalue the property after the description is corrected.[12] The authority to remove duplicate assessments from the assessment roll does not impliedly authorize assessors to revise the value of the property that rightfully remains.[13] The authority to correct "clerical errors in extending the roll" addresses errors in extending taxes on the roll, not errors of valuation.

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[12] A correct legal description is itself critically important to the assessment roll because property taxes are enforced *in rem* against the property assessed. *King County v. Rea,* 21 Wn.2d 593, 596, 152 P.2d 310 (1944).

[13] The County's contention that removing a duplicate assessment works a valuation change (Resp. Br. at 15) is like arguing that removing a duplicate charge from a credit card bill reduces the price of the goods purchased.

Correcting these errors only conforms the amount of tax to what was legally authorized. It does not change the value of the property assessed. Finally, the authority to correct "manifest errors in listing that do not involve a revaluation" does not authorize retroactive value changes. This provision addresses listing errors that can be corrected without revaluing the property. That is made clear by (1) the plain meaning of "revaluation," (2) the statutory context, (3) the two examples of such errors set out in the statute, (4) historical usage, and (5) the special exception that the statute allows for revaluations that result from a "definitive change in land use designation."

The County argues that a value revision is not a revaluation if it can be determined "by reference to the records and valuation methods applied to similarly situated properties, without exercising appraisal judgment." It offers a laundry list of definitions which it claims support this view. Resp. Br. at 17, n.7. None of these, however, supports the County's argument.

The prime definition offered by the County refers to the meaning of revaluation in the context of the cyclical reassessment program in RCW 84.41 for resetting the tax base to current values in a regular, nondiscriminatory fashion. Those valuation updates do revalue property,

but the common meaning of revaluation is not limited to such appraisal updates. It is much broader.

The meaning of revaluation in the context of the cyclical revaluation program in RCW 84.41 is irrelevant to its meaning in RCW 84.48.065. The language in RCW 84.48.065 was adopted forty years *before* Washington adopted its cyclical revaluation statute.[14] The Legislature did not have cyclical revaluation programs in mind when it used the term "revaluation" in what is now RCW 84.48.065. The correction authority in RCW 84.48.065 originated as correction authority given to treasurers. *See* Opening Br. at 25. The phrase "manifest errors in listing that do not involve a revaluation" identified the listing errors that treasurers could address without invading the valuation function of the assessor or disturbing the finality of the assessment roll. It had nothing to do with cyclical reassessment programs.

The two examples given in RCW 84.48.065 of the type of listing errors that do not involve a revaluation of property confirm this analysis. Both are errors in classifying property as taxable or exempt, not valuation

[14] Washington's cyclical revaluation statute, RCW 84.41, was first adopted in 1955 (Laws of 1955, ch. 251). The language in RCW 84.48.065 was adopted in 1915.

errors. If exempt property is erroneously listed as taxable, correcting the error does not revalue the property.[15]

This is also consistent with the meaning given to "revalue" in the context of the longstanding rule that once the assessment rolls are closed and certified, assessors have no authority to *revalue* (*i.e.,* change the value) of property listed on the rolls. For example, in *E. K. Wood Lumber Co. v. Whatcom County*, 5 Wn.2d 63, 104 P.2d 752 (1940), the taxpayer's land had been erroneously assessed as barren land, while in fact it was timbered, but the court held that the county could not "revalue" the property to correct this error – not because doing so involved "appraisal judgment" – but because doing so would change the value of property already listed. *Id.* at 69 ("the authority of county officials to assess omitted property did not include power to ***revalue*** property which had already been assessed.")(emphasis added). Finality matters.

Finally, RCW 84.48.065 makes special provision for one type of correction that <u>does</u> involve a "revaluation" of property, *i.e.,* a value change that results from a definitive change in land use designation. Such

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[15] The County grossly misrepresents Legacy's argument regarding this clause, asserting that Legacy would limit corrections to the two specific exemption examples given in the statute. Resp. Br. at 17-18. That is untrue. The two exemption examples *exemplify* the type of non-valuation listing errors that can be corrected. Legacy' argument is that the correction authority in the clause is limited to errors of that type, not that it is limited exclusively to the two specific examples.

corrections are revaluations because they change the value of the property, not because they cannot be made "by reference to the records and valuation methods applied to similarly situated properties, without exercising appraisal judgment." It is entirely possible that a revaluation to correct for an erroneous land use designation could be made without the exercise of appraisal judgment, simply by applying the established valuation factor used for comparably zoned land. The definition of revaluation that the County asks the Court to adopt is therefore inconsistent with its plain meaning as used in RCW 84.48.065 itself.

The implications of the County's broad assertion of authority to retroactively change assessed values extend far beyond just the listing deadline for new construction. By the County's logic, all assessed values remain contingent for three years, subject to any revisions that do not involve "appraisal judgment." In practice, this amorphous standard would allow almost any retroactive value change. Why? Because assessors generally assess property using mass appraisal methodologies that determine value by applying computerized formulae to property data inputs, such that almost any "mistake" in valuation can be attributed to some sort of mechanical error in formula selection or data input that can be corrected by "reference to the records and valuation methods applied to similarly situated properties, without exercising appraisal judgment."

Accepting the County's argument would broadly undermine assessment and tax finality. That is not what the Legislature intended by the narrow correction authority granted in RCW 84.48.065.

c. The Department of Revenue's definition of manifest error is contrary to statute and entitled to no weight.

In WAC 458-14-005(14) the Department of Revenue defines "manifest error" in a manner that does not track the language of RCW 84.48.065. The rule includes a long list of "manifest errors" that are not explicitly or implicitly included within any of the specific errors mentioned in RCW 84.48.065.[16] It would appear that the intent of the rule is to give assessors far broader correction authority than that granted by the Legislature. *See* Opening Br. at 27-28. The Department has no authority to do that. *Washington Federation of State Employees v. State Dept. of General Admin.*, 152 Wn.App. 368, 377, 216 P.3d 1061 (2009)(agency has no power to promulgate rules that amend or change legislative enactments). There is no basis to give deference to the Department's rule or to substitute the Department's definition of manifest error for the unambiguous language of RCW 84.48.065.

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[16] The Department's definition of "manifest error" in WAC 458-14-005(14) bears little resemblance to the language of RCW 84.48.065. Although some of the errors it identifies fall within the ambit of the statute, many do not, including the catchall provision in subsection (14)(j) that is relied upon here by the County.

The County urges the Court to defer to the Department's definition of manifest error in WAC 458-14-005(14). Resp. Br. at 19-20. But deference is afforded to an agency rule only if the statute in question is ambiguous. *Burton v. Lehman*, 153 Wn.2d 416, 422-423, 103 P.3d 1230 (2005). RCW 84.48.065 is not ambiguous, and the County does not argue otherwise.

Moreover, the Department's definitional rule is, at most, an interpretive rule. As the Supreme Court recently made clear, the Department's interpretative rules are entitled to no deference by the courts.[17] *Association of Washington Business v. Department of Revenue*, 155 Wn.2d 430, 447, 120 P.3d 46 (2005)("Accuracy and logic are the only clout interpretive rules wield.").

Nor does the doctrine of legislative acquiescence support the Department's rule. See Resp. Br. at 20-21. That doctrine only applies where the Legislature has subsequently considered the very issue covered by the rule and not indicated disagreement with the rule. *Children's Hosp.*

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[17] The County asserts that the Department's definition of manifest error is a substantive legislative rule rather than an interpretive rule. Resp. Br. at 19. That is untenable. A legislative rule is one that: (a) adopts substantive provisions of law the violation of which subjects the violator to penalty or sanction, (b) establishes terms for a license, or (c) adopts or amends a policy or regulatory program. RCW 34.05.328(5)(c). The definitions in WAC 458-14-005(14) purport to interpret statutory language. A definition is not a license or a regulatory program, and pointing out that the Department's definition is wrong is not a sanctionable offense.

and Medical Center v. Washington State Dept. of Health, 95 Wn.App. 858, 870, 975 P.2d 567 (1999). The very opposite occurred here. The Department and assessors sought – and failed – to get express legislative authority to assess omitted improvement value where some improvement value is listed on the original roll. *See* Opening Br. at 28, n.14. The Legislature has not acquiesced in a rule that it refused to adopt when it was specifically asked to do so by the Department and assessors.

III. CONCLUSION

The County's core argument is that it is unfair to permit Legacy's improvements to go untaxed. Resp. Br. at 25-26. That, however, is not a reason to disregard the plain language and clear history of the applicable statutes. In the long run, fairness and probity will best be served by honestly construing the statutes and requiring tax officials to conform their conduct to legal requirements.

It is up to the Legislature to decide how and when new construction is to be listed for assessment and what errors may be corrected after an assessment roll is closed. Assessors are human and there are great incentives to timely list new construction. If the rules are clear and certain, assessors will find a way to comply. But if the law is reduced to mere "guidelines" that can be disregarded without consequence, compliance becomes optional and, over time, practices will

diverge ever more from what is specified in the law. That slow erosion of legal standards will inevitably lead to ever greater disparity in the treatment of taxpayers and to greater unfairness.

What the Supreme Court said in *Tradewell* applies equally here:

> The fact that this interpretation allows a taxpayer to escape payment of taxes as a result of error or oversight of the assessor or even because of his inability to keep constantly informed of new construction in his county is unfortunate, but is immaterial. This has long been the law.

Tradewell, 69 Wn.2d at 355. Certainty and finality are critically important to the tax law. Adherence to the plain language of the statutes will promote responsible assessment practices and respect for the law. *Ad hoc* disregard of clear statutory requirements will not.

When taxpayers challenge excessive or illegal taxes, they are denied relief if they fail to strictly comply with all procedural requirements, even if the result is patently unfair. *See e.g., Longview Fibre Co. v. Cowlitz County,* 114 Wn.2d 691, 790 P.2d 149 (1990). King County, like other tax authorities, has not been reluctant to invoke such procedural defenses to defeat taxpayer claims on purely procedural grounds, regardless of merits of the taxpayer's claim. *See, e.g., Transamerica Title Ins. Co. v. Hoppe,* 26 Wn.App. 149, 611 P.2d 1361 (1980); *First Nat. Bank of Chicago v. King County,* 4 Wn.2d 91, 102 P.2d 263 (1940). In arguing here that the Court should bend the law to get to a

"fair" result, the County advocates for a double standard. Justice Brandeis gave what remains the most eloquent explanation for why courts must reject such double standards.[18]

Tax officials need not be hamstrung in executing their duties, but they ought not be licensed to assume powers they have not been given in order to escape the consequences of an embarrassing failure to comply with clear legal requirements. Double standards and contorted, result-oriented legal interpretations have no place in our tax system.

Therefore, plaintiffs respectfully request that the decision of the trial court be reversed, and that the cause be remanded with instructions to enter summary judgment for plaintiffs.

Respectfully submitted this 30th day of November, 2012.

William C. Severson, WSBA # 5816
Attorney for Appellants

[18] "Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that, in the administration of the criminal law, the end justifies the means – to declare that the Government may commit crimes in order to secure the conviction of a private criminal – would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face." *Olmstead v. U.S*, 277 U.S. 438, 485, 48 S.Ct. 564, 72 L.Ed. 944 (1928)(Brandeis dissenting).

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on the date below signed, I caused true and correct copies of the following:

- **Appellants' Reply Brief**

to be served on counsel of record for defendant in the manner indicated below:

Mike Sinsky, Deputy Prosecuting Attorney
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Seattle, WA 98104
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Via legal messenger

DATED AT SEATTLE, WASHINGTON, this 30th day of November, 2015