TESTIMONY BY DAVID L. CANARY, Esq.
IN SUPPORT OF HB 2731

TO THE CHAIR AND HOUSE REVENUE COMMITTEE MEMBERS:

My name is David L. Canary. I am an attorney with the law firm of Garvey Schubert Barer. I have been in practice for 37 years. I was an Assistant Attorney General in the Tax & Finance Division of the Oregon Department of Justice representing the Oregon Department of Revenue before the Oregon Tax Court, the Oregon Supreme Court, and U.S. District Courts. For the past 25 years my private practice has been limited to property tax litigation before the Oregon Tax Court and Oregon Supreme Court on behalf of taxpayers.

With some modifications, I support HB 2731 which is before this Committee.

There are two parts to HB 2731: (1) first, the bill requires all appraisals of property for purposes of ad valorem taxation comply with the Uniform Standards of Professional Appraisal Practice; and (2) second, the bill gives the tax court judge broader discretion in awarding attorneys fees to taxpayers who prevail in the Regular Division of the Tax Court, overturning a Oregon Supreme Court decision that severely restricted the discretion of the Tax Court in awarding attorneys fees to prevailing taxpayers.

In my opinion, both parts of HB 2731 need to be enacted to correct problems that have arisen in litigation before the Oregon Tax Court.

Allow me to address, first, why all appraisals in ad valorem tax litigation should comply with USPAP.

I. All Appraisals of Property for Property Tax Purposes Should Comply with USPAP.

In the mid-1980s, the Savings & Loan industry collapsed in no small part because the industry had loaned money based upon appraisals of real estate that were greatly inflated. In response, Congress in 1989 enacted the Federal Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) that required appraisals of real estate for federal lending transactions to comply with the Uniform Standards of Professional Appraisal Practice (or "USPAP") published by the Appraisal Foundation to assure that the appraisals accurately reflected the value of real estate. Also, FIRREA required states to adopt legislation that would create state appraisal boards to oversee licensing and enforcement of appraisal laws, regulations and standards. Thereafter, appraisal organizations such as the Appraisal Institute and the International Association of Assessing Officers, as well as most states, adopted the USPAP standards as the standards by which their appraisers must abide.

What is USPAP? USPAP is described as "a minimum set of ethical and performance obligations for all appraisers."

In 1991, Oregon created the Appraiser Certification and Licensure Board that regulated the licensing of appraisers within the state. By rule, the Board required that all appraisers

certified by the state of Oregon comply with USPAP in preparing and presenting their appraisals. Inexplicably, even though USPAP has standards for mass appraisals performed by assessors, the Legislature exempted employees of the state or a political subdivision of the state, such as counties, from having to be licensed by the Board. Oregon is one of the few states that has not required assessors to comply with USPAP or to join the International Association of Assessing Authorities, which requires its members to comply with USPAP.

Thus, even though private appraisers licensed in Oregon must comply with USPAP in preparing appraisals in the state of Oregon, there is no such requirement that state or county appraisers comply with any appraisal standards in preparing their opinions of value for ad valorem tax purposes other than the statutory definition of real market value. Consequently, when a taxpayer challenging a valuation and assessment by a county or state appraiser hires a private appraiser licensed in Oregon, the taxpayer's appraiser must comply with USPAP in rendering his or her opinion of value to the tax court magistrate or judge. The county or the Department of Revenue does not have to comply with any appraisal standards.

This disparity was most evident in two cases I recently tried in the Oregon Tax Court.

In the first case, ***Xerox v. Clackamas County and the Oregon Department of Revenue***, Xerox appealed its 2010-11 tax year assessment to the Oregon Tax Court because the county and the DOR increased Xerox's real market value of its land and buildings ***from $43 million*** in the previous tax year – 2009-10 – to **$100 million** in 2010. Xerox hired a private Oregon licensed appraiser who prepared a USPAP compliant report and determined the RMV of Xerox's land and buildings was **$45 million**. The appraisers from Clackamas County and the Department of Revenue submitted appraisals supporting the $100 million real market value of Xerox's land and buildings that did not comply with USPAP appraisal standards. After a two week trial, the Tax Court Magistrate rendered her decision that Xerox's land and buildings had a real market value of **$53.5 million** – i.e. one-half of the county and state's appraisal and very close to the taxpayer's appraisal.

Why the large disparity between the opinion of value of taxpayer's appraiser and the county and states' appraiser? The county and state appraisers made fundamental errors in their appraisals that, were they held to USPAP standards, would have not occurred. For example, the county appraiser responsible for the appraisal of the land relied upon land sales that were commercially zoned to value a significant portion of Xerox's land that was subject to a BPA easement and Significant Resource Overlay Zone that, like wetlands, could not be developed. The DOR appraiser valued Xerox's 800,000 square foot industrial buildings constructed in the late 1970s in Wilsonville along I-5 based upon sales or leases of much smaller Class A office buildings in the Portland metro-area that had been recently constructed or recently completely renovated. Neither appraiser's appraisal complied with USPAP.

A month later, I tried the ***Hewlett-Packard case*** in the Oregon Tax Court in which the Department of Revenue increased the assessed value of the buildings on HP's 2 million square foot Corvallis campus ***from $79.75 million to $200 million*** after HP appealed the first year of its assessment. HP hired an MAI licensed appraiser, who prepared a USPAP compliant appraisal from which he determined the real market value of HP's buildings were $64-68 million. At the

beginning of the trial, Oregon Tax Court Judge Henry Breithaupt asked how two appraisers could be approximately $150 million apart in value. What became obvious after a 3-week trial is that the DOR's appraiser had skipped the crucial first step required by USPAP of determining what the Highest and Best Use of the buildings would be, and valued the buildings using lease rates paid for smaller 8,000 square foot to 35,000 square foot commercial buildings in the Portland metropolitan area, as opposed to lease rates for HP's large industrial buildings located in the Corvallis community.

Had the county and DOR appraisers in these two cases been properly trained and had been required to prepare appraisal reports consistent with the appraisal standards required of private appraisers in Oregon, I believe there would not have been the wide disparity in value, neither the county nor the taxpayer would have been put to the time and expense of a two or three week trial, and the refunds the county was forced to make in the Xerox case, with 12% interest running for 2-3 years, all could have been avoided.

The county and the DOR may argue that they have neither the time nor the budget to train their appraisal staff to comply with USPAP. In response, I would say the county does not have the time or the budget to have its staff sit in court for 2-3 weeks or make multi-million dollar refunds that bear 12% interest over several years due to inaccurate appraisals.

However, to relieve the county and the DOR of some of its burden, I would propose to this committee, that the scope of HB 2731 requiring all appraisals made for the purpose of ad valorem taxation be limited to only appraisals submitted to the Oregon Tax Court, either the Magistrate or Regular Division, as a result of an ad valorem appeal filed in that court. Thus, the county and the DOR would not have to comply with USPAP in performing annual mass appraisals to determine roll value or in submitting appraisal reports to the county Board of Property Tax Appeals.

II. <u>Granting the Tax Court Broader Discretion in Awarding Attorneys Fees to Prevailing Taxpayers</u>

In 1997, this Legislature created two divisions of the Tax Court – the Magistrate Division and the Regular Division. Any party dissatisfied with a decision rendered in the Magistrate Division could appeal to the Regular Division and have that case heard de novo, or completely anew, by the Tax Court Judge.

In 2001,this Legislature heard testimony that the DOR was abusing this two tiered process by requiring a taxpayer, particularly in large industrial appeals, to try their case twice before the taxpayer obtained relief – once in the Magistrate Division and, again, in the Regular Division. And, as I testified, these cases can take 2-3 weeks to try. And, in the Regular Division, the county is generally represented by the state Attorney General and the taxpayer is represented by an attorney. Consequently, a taxpayer who prevailed in the Magistrate Division only to have the county or the DOR appeal, must endure the time and expense of trying the case all over again. This not only affects large industrial taxpayers, but taxpayers with residential and commercial property who cannot afford to hire an attorney to seek relief in the Regular Division of the Tax Court. Consequently, having to endure the time of expense of litigating the case twice

in the Tax Court is a pretty substantial deterrent to a taxpayer that discourages taxpayers from pursuing their rightful appeal.

Consequently, to curb this abuse, in 2001, this Legislature amended ORS 305.490 to provide that the tax court judge could award reasonable expenses and attorneys fees to taxpayers who prevailed in property tax cases in the Regular Division of the Tax Court, including their expenses and attorneys fees that the taxpayer incurred in the Magistrate Division of the Tax Court. And, indeed, in one case before the Oregon Tax Court, ***Village at Main Street v. Clackamas County Assessor***, Judge Breithaupt did award reasonable expenses and attorneys fees to the taxpayer who, first, prevailed in the Magistrate Division and, then, prevailed in the Regular Division of the Tax Court when Clackamas County appealed the Magistrate's decision. Judge Breithaupt noted that the county had a right to appeal to the Regular Division from a decision by the Magistrate Division, but the exercise of that right comes at a cost – and that cost may be reasonable attorneys fees and expenses of an opponent, such as here in which the appealing party has received a well reasoned decision from the magistrate on the merits.

The Oregon Supreme Court reversed the Tax Court's award of attorneys' fees on the grounds that when an award of attorneys' fees is discretionary, as it is in ORS 305.490 which HB 2731 amends, the Tax Court's discretion is limited by ORS 20.075, applicable to all Oregon courts, to factors such as whether the conduct of a party was reckless, willful or malicious; objective reasonableness of the claims; whether award of attorneys fees would deter others from asserting meritless claims in the future. Then, specifically, the Supreme Court held that ***"whether the government sought review of a magistrate's well-reasoned decision is not an appropriate basis for awarding fees."*** Yet, it was the very abuse of the government causing the taxpayer to have to relitigate the same case twice in the Tax Court that gave rise to ORS 305.490 in awarding fees in both personal income tax cases and property tax cases.

Unlike the circuit courts in which you have only one trial and then must appeal to the Court of Appeals, the Oregon Tax Court is unique in that it allows a second trial de novo in the Regular Division of the Tax Court. Consequently, HB 2731 amends ORS 305.490 to provide:

a. The court shall award attorneys fees to a prevailing party against whom a claim, defense or ground for appeal or review was asserted, upon a finding by the court that the nonprevailing party willfully disobeyed a court order or that there was no objectively reasonable basis for the nonprevailing party to assert a claim, defense or ground for appeal or review.

NOTE: this applies to both taxpayer and the government.

b. The court may award attorneys fees to taxpayers prevailing in a personal income tax case, inheritance or estate tax cases, or property tax cases based upon those factors listed in ORS 20.075. However, additionally, HB 2731 provides that:

"In determining whether a claim, defense or ground for appeal or review is objectively reasonable at the time asserted, the tax court judge may consider whether the nonprevailing party had received a reasoned opinion on the merits from the magistrate and in appealing the

magistrate's decision submitted essentially the same materials to the regular division, making no new legal argument or credible argument that the magistrate ignored or misapplied the law."

"In determining whether the position of a county or the Department of Revenue is objectively reasonable for purposes of awarding attorney fees and expenses to a taxpayer under subsection (2) or (3) of this section, the tax court may consider the degree of difference between the value of the property that is the subject to the proceeding as pleaded by the county or the department and as determined by the court."

In fact, in the Xerox case I mentioned, Xerox did prevail in the Magistrate Division after a two week trial when the Magistrate issued her opinion that reduced the real market value of Xerox's land and buildings from $100 million asserted by the county and the Department to $53.5 million, which resulted in a sizeable refund that Clackamas County would have to pay, together with 12% interest. However, the Department appealed the case to the Regular Division of the Tax Court, forcing Xerox to have to relitigate the case all over again to obtain relief. Xerox was forced to settle the case at the Regular Division for a value higher than the Magistrate's decision because Xerox did not want to spend another $300,000 in attorney's fees and expert witness fees in another 2 week trial.

HB 2731 would cause a county or the Department to think twice about causing a prevailing taxpayer to relitigate the case a second time in the Regular Division and from using the threat of another trial as a negotiation tactic as it did in the Xerox case.

HB 2731 would cause a county or the Department to think twice about increasing assessments from $75 million to $200 million in the HP case after HP appealed its initial assessment, or increasing the assessment from $43 million to $100 million in the Xerox case – which has a chilling effect upon a taxpayer's decision to appeal, or to continue with an appeal. If such tactics have a chilling effect upon large companies like Xerox and HP, think what effect it has upon residential and commercial taxpayers who, in good faith, appeal their assessments.

I urge you to pass HB 2731 out of committee. Thank you.