COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	DATE FILED: January 17, 2014 4:46 PM FILING ID: E89C2F12AF260 CASE NUMBER: 2013CA907
Appeal from Board of Assessment Appeals, State of Colorado Presiding Judges Diane M. Devries and Amy J. Williams Case No. 59454	**▲COURT USE ONLY▲**
Petitioner/Appellant: **WILLIAM L. COYLE,** **v.** **Respondent/Appellee:** **COLORADO STATE BOARD OF ASSESSMENT APPEALS, DIANE M. DEVRIES and AMY J. WILLIAMS, as members of said Board, DOUGLAS COUNTY BOARD OF EQUALIZATION, DOUGLAS COUNTY ASSESSOR'S OFFICE, TERI COX, as Douglas County Assessor, and VIRGINIA WOOD, as an employee of said Assessor's Office.**	Case Number: 13CA907
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APPELLANT'S REPLY BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

Choose one:

☑ It contains 3,565 words.

☑ It does not exceed 18 pages.

The brief complies with C.A.R. 28(k).

For the party raising the issue:

☑It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R. , p.), not to an entire document, where the issue was raised and ruled on.

For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

CAMPBELL KILLIN BRITTAN & RAY, LLC

s/Margaret R. Pflueger
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PRELIMINARY MATTER

On November 26, 2013, Petitioner-Appellant William L. Coyle ("Coyle") submitted Appellant's Reply Brief in response to Respondent-Appellee the Douglas County Board of Equalization's ("BOE") Answer Brief filed in this appeal ("Coyle's Reply to BOE"). A majority of the arguments presented in Coyle's Reply to BOE are equally applicable to Appellant's reply to Respondent-Appellee Board of Assessment Appeals' ("BAA") Answer Brief ("Answer"). Rather than reiterate the same arguments presented in Coyle's Reply to the BOE's Answer, Appellant instead incorporates those arguments as if fully set forth herein. In this reply, Appellant will address arguments made by the BAA in its Answer which were not previously asserted by the BOE in its Answer Brief.

SUMMARY OF REPLY

"Although a reviewing court gives some deference to an agency's reasonable construction of a statute, the agency's interpretation will be overturned on appeal if it is 'clearly erroneous, arbitrary, or otherwise not in accordance with the law." *Black Diamond Fund, LLLP v. Joseph*, 211 P.3d 727, 730 (Colo.App. 2009), citing *Sigala v. Atencio's Market,* 184 P.3d 40, 42 (Colo.2008).) A "reviewing court must set aside a BAA decision if it reflects a failure to abide by the statutory scheme for calculating property tax assessment." *Aberdeen Investors, Inc. v.*

Adams County Bd. of County Com'rs, 240 P.3d 398, 400 (Colo.App. 2009).

Colorado statutory law governs whether land qualifies for agricultural designation. Pursuant to Colorado statute, to qualify as "agricultural" land must: (1) be presently used as a farm or ranch; (2) have been so used during the two-year period prior to the assessment; (3) have been classified or eligible for classification as agricultural land during the ten years preceding the assessment year; and (4) continue to have actual agricultural use. C.R.S. § 39–1–102(1.6). To qualify as a "farm", the land must be used to "produce agricultural products that originate from the land's productivity for the primary purpose of obtaining a monetary profit." C.R.S. § 39-1-102(3.5). Coyle's property located at located at 7800 Crowfoot Valley Road in Parker, Colorado (the "Property") is properly classified as agricultural because, at all times over the past thirty years, it has been used as a tree farm and has met all of these statutory requirements.

Colorado statutory law further provides that property is properly classified as "agricultural" if it is "used as a farm or ranch" and "the owner of the land has a decreed right to appropriated water granted in accordance with article 92 of title 37, C.R.S., or a final permit to appropriated groundwater granted in accordance with article 90 of title 37, C.R.S., for purposes other than residential purposes, and water appropriated under such right or permit shall be and is used for the

production of agricultural or livestock products on such land." C.R.S. § 39-1-102(1.6)(a)(IV). Again, Coyle's Property is properly classified as agricultural because, as Coyle testified at the hearing, he irrigates his tree farm with groundwater obtained through use of a well on the Property. (Doc. 19, pp. 14:3-5; 18:19-19:6).

Nonetheless, in 2010, the BOE arbitrarily reclassified the Property as residential based on a drive-by appraisal and a review of aerial photographs of the Property conducted by an appraiser only qualified to appraise residential properties (Doc 15, p.1; Doc. 19, p. 48:2-9; 48:21-23; 49:3-12; 59:9-16). The appraiser's inspections were conducted during a time of year when the trees were not in bloom or being harvested (Doc. 19, p. 46-23:25; Doc. 19, p. 27-16:25) and the appraiser admits that she did even not exit her automobile to inspect the Property. (Doc. 19, p.48:2-9; 49:3-12; 59:9-16).

From the commencement of Coyle's challenge to the BOE's arbitrary reclassification of the Property, the deck has been unfairly stacked against him. By way of example, although Coyle presented evidence including, without limitation, receipts for trees in 2010 and photographs of the Property from 2010 which showed its use as a tree farm, as well as his own expert testimony based on his lifetime working as a farmer (Docs 8-12; Doc. 19, pp. 18:19-20:13), to confirm

that the Property is, and has always been, used as a tree farm, that it undergoes the full cycle of agricultural farming activity because Coyle purchases seeds and whips, plants them on the Property for the specific purpose of growing and harvesting trees and selling them commercially (Docs 8-12; Doc. 19, pp. 18:19-20:13), and that it is irrigated with well water (Doc. 19, 14:3-5; 18:19-19:6), the BAA nonetheless that this evidence was not "sufficient" (Doc. 18, p. 3). However, when Coyle attempted to provide additional evidence to support the Property's use as a tree farm, the BOE objected and the BAA took a hard line approach and excluded the evidence for being untimely provided to the BOE (Doc. 19, pp. 3:19-6:9) – despite the fact that this evidence was actually already part of the administrative record because Coyle had previously presented it to the BOE on numerous occasions. (Doc. 19, 14:3-5). Conversely, over Coyle's objection, the BAA took a lenient approach to evidence offered by the BOE despite the fact it was untimely served on Coyle. (Doc. 19, pp. 3:19-6:20). Further, when Coyle requested a continuance to allow the BOE time to review the additional evidence to remedy any prejudice caused by his serving it late, a request which was made before the commencement of the hearing and then again on the record, the BAA refused his request solely because the hearing had already begun. (Doc. 19, pp 3:19-6:9)

The BOE's and BAA's approach to, and handling of this entire matter makes it abundantly clear that the proper classification of the Property based on its actual use was not the primary objective. Rather, it appears the BOE's objective was to extract the most property taxes it could from the Property, regardless of is actual use and proper classification under Colorado statute, and the BAA's objective was to sustain the BOE's reclassification of the Property regardless as to whether it was correct or not. These improper objectives are exposed by the fact that when confronted with the evidence that the Property is properly classified as agricultural based solely on Coyle's use of groundwater obtained through use of a well to irrigate the Property,[1] while not denying the applicability of this statutory basis for agricultural classification, the BOE and the BAA merely contend that the issue was not preserved for appeal. (This argument ignores the fact that Coyle's testimony at the hearing regarding his use of well water is part of the record (Doc. 19, pp. 14:3-5; 18:19-19:6).

The BAA does not deny that the evidence submitted by Coyle supports a finding that the Property was used as a tree farm during the relevant 2010 assessment period. In fact, in its Answer, the BAA acknowledges that Coyle presented invoices for tree sales showing that he sold approximately two dozen

1 If the BOE's Assessor had performed more than a drive-by inspection of the Property she would have discovered the groundwater irrigation system on the Property.

trees. (Answer, p.12). However, the BAA simply contends that there was not *enough* evidence and that "tree sales are only one factor of many" that an assessor must consider. (Answer, p.12). One is left to wonder what amount of evidence would have been sufficient to overcome the BAA's single-minded objective of sustaining the reclassification of the Property regardless as to whether it was justified.

Although the BAA's decision is premised on a finding that the evidence offered by Coyle was insufficient to establish the Property's use as a tree farm, the BAA denies that its exclusion of additional evidence offered by Coyle which would have further established a full cycle of agricultural farming activity on the Property at the hearing was a denial of due process. (Answer, Doc. 24). The BAA contends that due process is met when an individual is given notice and an opportunity to be heard. (Answer, p. 23). However, fairness demands that the opportunity to be heard include the opportunity to present all probative evidence in support of a party's position. Further, the BAA's contention that Coyle "has not alleged any prejudice due to the BAA's decision not to admit additional evidence and not to allow a continuance" (Answer, Doc. 24) is absurd. Of course, Coyle has alleged prejudice. It is his position that the additional evidence would have further established the full cycle of full cycle of agricultural farming activity (Opening

Brief, pp. 15-16) because the excluded documents reflected the purchase of seedlings and whips and provided photographic evidence of tree harvesting activities on the Property. (Doc. 19, pp. 3:19-6:9). (See Exhibit A for an example of some of the additional evidence Coyle offered at the hearing but which the BOE objected to and the BAA excluded). Further, as Coyle has argued repeatedly, the BAA excluded this evidence despite the fact that the evidence had already been made part of the record during the administrative process. (Doc. 19, p.14:3-5).

The BAA's decision affirming reclassification of the Property from agricultural to residential must be overturned because, even without consideration of the improperly excluded evidence, the evidence submitted by Coyle established the Property has, at all times, met the statutory requirements for designation as agricultural.

CLARIFICATION OF ISSUES ON APPEAL

Like the BOE in its Answer Brief, the BAA in its Answer attempts to reframe the issues presented by Coyle on his appeal. In its Answer, the BAA identifies the "Statement of the Issues" as: 1) "Whether the Board of Assessment Appeals properly affirmed the County's classification and valuation of the property for tax purposes; and 2) Whether the Board of Assessment Appeals afforded due process during the hearing before it." However, neither the BOE nor the BAA

filed this appeal. As such, the five issues identified by Coyle in his Opening Brief are the issues before the Court on this appeal. (See Opening Brief at p. 3)

ARGUMENT

A. Coyle Met His Burden of Proof of Showing a Qualifying Use of his Land as a Tree Farm.

Pursuant to C.R.S. § 39–1–102(1.6), at the hearing before the BAA, Coyle presented evidence that his Property: (1) was presently used as a farm; (2) had been so used during the two-year period prior to the assessment; (3) had been classified or eligible for classification as agricultural land during the ten years preceding the assessment year; and (4) continues to have actual agricultural use. (Docs 8-12; Doc. 19, pp. 18:19-20:13). Pursuant to C.R.S. § 39-1-102(3.5), Coyle also presented evidence that he used the farm to produce trees for the primary purpose of obtaining a monetary profit." (Docs 8-12; Doc. 19, pp. 18:19-20:13). Additionally, Coyle presented evidence that the Property underwent the full cycle of agricultural farming activity in that Coyle purchased seeds and whips and planted them on the Property for the purpose of growing and harvesting trees and selling them commercially. (Docs 8-12; Doc. 19, pp. 18:19-20:13). Finally, Coyle presented evidence that he irrigates his tree farm with groundwater obtained through use of a well on the Property. (Doc. 19, pp. p.14:3-5; 18:19-19:6).

In presenting evidence which established the lining out of the approximately

8,000 trees over at least 8 acres on the Property,2 the harvesting and sale of the trees the digging and spading of holes for replanting, as well as the well water irrigation system for the trees and included photographs taken in 2010 and receipts for the sale of approximately two dozen trees in 2010." (Docs 8-12; Doc. 19, pp. 18:19-20:13), Coyle met his burden of establishing that the Property was properly classified as agricultural. The fact that Coyle does not harvest his trees on an annual basis like some other agricultural products, such as corn, and that his harvest was impacted by the downturn in the economy which resulted in fewer purchases by commercial developers is of no consequence because there is no statutory requirement that an agricultural product be harvested annually in order for property to be designated as agricultural. *Aberdeen Investors, Inc*, 240 P.3d at 400 ("There is no statutory requirement that the property be used throughout the previous two years as a farm or ranch.").

Like the BOE, the BAA does not deny that the evidence Coyle presented at the hearing, including receipts for tree sales dated March 16, 2010 and undated photographs Coyle testified were taken in 2010, as well as his own testimony, (Docs 8-12; Doc. 19, pp. 18:19-20:13; 23:20-24:25) established the Property underwent the full cycle of agricultural farming activity -- Coyle purchased seeds

2 The BAA's statement that the trees are located on five acres of the Property was not based on any evidence presented by either party, but rather solely on argument presented by counsel for the BOE, which does not constitute evidence.

and whips and planted them on the Property for the purpose of growing and harvesting trees and selling them commercially. (Answer, p. 12). Instead, the BAA endeavors to impose a heightened standard of requiring that Coyle provide a "specific figure – either in monetary terms or in volume – of trees sold in the year that he received notice of the reclassification of his property" and evidence of "exact dates he may have harvested or planted trees" and receipts for the purchase of seedling and/or fertilizer. (Answer, pp.14, 15). However, the BAA does not cite to any authority for the imposition of this heightened standard, nor does it explain why the evidence offered by Coyle was establishing the properties use as a tree farm was insufficient. (Answer, p.14). Further, receipts for the purchase of seedlings and whips were amongst the evidence excluded by the BAA.

Because Coyle presented sufficient evidence of his use of the Property as a tree farm, the BAA's affirmance of the BOE's reclassification of the Property as was in error and should be overturned.

B. Additional Evidence Offered by Coyle to Meet His Burden of Proof Was Improperly Excluded.

In its Answer, the BAA complains that Coyle failed to offer certain evidence to establish the Property's use as a farm (Answer, pp.14, 15), but the BAA discounts the fact that it excluded just this type of evidence when it was offered by Coyle at the hearing (Doc. 19, pp. 3:19-6:9). (Answer, p. 14, 15).

Coyle offered records reflecting the purchase of seedlings and whips and certain photographs that showed tree harvesting activities on the Property (Doc. 19, pp. 3:19-6:9). (See Exhibit A). The BOE objected to the admission of such evidence because it contended that it did not have sufficient time to review it. (Doc. 19, pp 3:19-6:9).3 However, the BOE's objection was disingenuous, at best, considering that Coyle had produced these photographs previously at each and every administrative level as part of his protest of the Property' reclassification, and, as such, although the BOE may deny it, this evidence was part of the record. (Doc. 19, pp. 14:3-5; 51:13-22) The BOE was, or should have been, familiar with the evidence Coyle sought to introduce because they had seen it previously.

As explained in its Answer, the BAA's decision was based solely on Coyle's alleged failure to provide "sufficient" probative evidence and testimony to show that the Property was incorrectly classified (Answer at p.3). However, additional probative evidence offered by Coyle as to the Property's use as a tree farm was unfairly excluded by the BAA. Therefore, the BAA's decision should be overturned on the grounds that it was arbitrary and capricious. *Q & T Food Stores,*

3 When Coyle then requested that the hearing be continued in order to give the BOE time to review the evidence, the BAA refused this request. (Doc. 19, pp 3:19-6:9) Yet, when Coyle in turn objected to evidence offered by the BAA on the grounds that it had been untimely submitted in violation of the Administrative Procedures Act, the BAA found that Coyle had not been harmed by the BOE's late submission so the BOE's evidence was admissible at the hearing. (Doc. 19, pp 3:19-6:20).

Inc. v. Zamarripa, 910 P.2d 44, 46 (Colo.App. 1995) (an appellate court may set aside agency action on the ground that it was arbitrary or capricious).

C. Testimony that the Property was not Being Used as a Farm Lacked Foundation and the BOE Did Not Offer Any Evidence to Support a Finding of a Residential Use of the Property.

While the BAA, in its Answer, faults Coyle for not providing "expert" testimony (Answer, p.4), conveniently disregarding the fact that Coyle himself is an expert having worked as a farmer his entire life, it simultaneously ignores the fact that the BOE failed to provide a qualified expert to testify with regard to the Property's use for either agricultural or residential purposes. The BOE appraiser admitted that she was only qualified as a residential appraiser and had only conducting two cursory inspections of the Property during a time of year when the trees were not in bloom. (Doc. 19, p.48:2-9; 49:3-12; 59:9-16).

The BAA's affirmance of the BOE's reclassification is wholly based on the testimony of the BOE's appraiser that the property was not being operated as a tree farm (Answer, p. 16). The BAA even goes as far as to say that the BAA "implicitly" found the appraiser's testimony "to be more credible." (Answer, p.16). However, the record is devoid of any finding by the BAA that the appraiser's testimony was "more credible". Further, any such implied finding would be unreasonable given that the appraiser admitted that she was qualified as a

residential appraiser and had only conducting two cursory inspections of the Property during a time of year when the trees were not in bloom. (Doc. 19, p.48:2-9; 49:3-12; 59:9-16). The appraiser further admitted that she did even not exit her automobile the Property. (Doc. 19, p.48:2-9; 49:3-12; 59:9-16). Therefore, it was impossible for her to have thoroughly inspected the Property and from her vantage point, there is no way she could have seen the evidence of harvested trees, including the holes left by the tree spades. If the appraiser had actually conducted a proper inspection of the Property she would have discovered the irrigation system for the tree farm and, on that basis alone, any reclassification of the Property as residential would be improper. Of additional significance, the appraiser did not cite to a single piece of evidence which would indicate that the actual use of the Property during the relevant assessment period was residential.4

Because Ms. Woods was not qualified as an agricultural appraiser, and because she did not have an adequate foundation based on her limited inspection of

4 In its Answer, the BAA alludes to the fact that Coyle's daughter lives at the 1,116 square foot residence located on the Property's 35 acres. (Answer, p. 2). In point of fact, Coyle's daughter graduated from Purdue University with a degree in Agronomy and Agricultural economy and is employed by Coyle to, among other things, manage the Property. As such, the residence is properly included within the agricultural designation for the Property. Further, the BAA's reference in its Answer to the fact that the Property sits on the outskirts of Parker, is near residential and commercial properties, and has easy access to nearby highways (Answer, p. 4), is in no way pertinent to the Property's classification. All that matters is the Property's actual use at the time of the classification. *Farny v. Board of Equalization of Dolores County*, 985 P.2d 106, 109 (Colo. App. 1999). Also, the BAA's statement that the residence has been remodeled numerous times is patently false as it was only remodeled once many years ago.

the Property to provide testimony with regard to the ongoing agricultural use of the Property, the BAA's decision to affirm the BOE's reclassification of the Property must be overturned because it was not based on competent evidence. *Q & T Food Stores*, 910 P.2d at 46 (agency action may be set aside as arbitrary or capricious where the action is unsupported by competent evidence).

D. The Use of a Market Approach to Valuation of the Property Was Improper Because the Property is a Farm.

The BAA contends that it was appropriate for the BOE appraiser to only use a market approach to valuation "because he was valuing a residential property." (Answer, p. 20). However, that statement illustrates, in a nutshell, the problem with the BAA excluding evidence offered by Coyle with regard to an income or productive capacity approach to valuing the land. It would only be appropriate for the BAA to exclude evidence of an income or productive capacity approach to valuing the land if it had already decided that the land was properly classified as residential. By excluding the evidence offered by Coyle, the BAA improperly predetermined that the land was appropriately classified as residential.

The BAA further erred by admitting evidence as to the Property's speculated potential future value (Doc. 19, p.72:7-14). The BOE's own appraiser admitted in that the Assessor's Office is required to base its valuation on the Property's use, and not on the fact that it is in a prime development location. (Doc. 19, p.81:25-

82:8). Therefore, regardless of the propriety of the reclassification of the Property from agricultural to residential, the BOE's valuation of the Property at $530,896.00 was not based on competent evidence and should be overturned.

V. CONCLUSION

The BAA's decision must be set aside as arbitrary and capricious. As set forth in Coyle's Opening Brief, and Coyle's Reply to BOE's Answer, Coyle presented sufficient evidence to establish that the Property meets, and has at all times met, all of the statutory requirements for designation as agricultural land. Coyle presented sufficient evidence of his ongoing use of the Property as a tree farm and the additional evidence he could have offered to prove the land's actual use was unfairly excluded. Conversely, the BAA's decision upholding the BOE's reclassification of the Property was improperly based on incompetent evidence presented through the testimony of BOE "residential" appraiser who was not qualified, and did not have an adequate foundation, to testify with regard to the ongoing agricultural use of the Property. Consequently, the BAA's decision must be overturned because it reflects a failure to abide by the statutory scheme for calculating property tax assessments.

Respectfully submitted this 17th day of January, 2014.

CAMPBELL KILLIN BRITTAN AND RAY, LLC

s /Margaret R. Pflueger
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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of January, 2014, a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF** was delivered via ICCES and U.S. mail to the following:

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