COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	DATE FILED: November 26, 2013 4:34 PM FILING ID: DFA7D27FF051B 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 COMPLAINCE

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 3,740 words.

☑ It does not exceed 30 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

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SUMMARY OF REPLY

For more than 30 years, property owned Petitioner-Appellant William L. Coyle's ("Coyle") located at 7800 Crowfoot Valley Road in Parker, Colorado (the "Property") was classified as agricultural. (Doc. 19, pp. 18:19-20:13). From the mid-1980's to the present, Coyle has utilized the Property as a tree farm (Doc. 19, pp. 18:19-20:13). There are approximately 8,000 trees located on the Property which are grown for commercial resale. (Doc. 19, p. 28:22-23). Coyle's use of the Property has not changed in any way from the mid-1980's to the present. (Doc. 19, pp. 20:3-6)

Nonetheless, for the 2010 assessment period, the Respondent-Appellee the Douglas County Board of Equalization ("BOE") abruptly determined that the Property qualified as residential. The BOE's justification for its reclassification was that on two occasions a BOE appraiser, who was only qualified as a residential appraiser, inspected the Property and did not see what she considered to be sufficient evidence that the trees on the Property were being harvested on a regular basis. However, the simple fact is that the trees grown on Coyle's Property are large and intended for purchase by commercial residential developers, which means that the market for the trees fluctuates with the economy. (Doc. 19, p.27:5-28:2). The fact that the trees are not routinely harvested like some other

agricultural products does not disqualify the Property from being designated agricultural.

Further, there is no statutory requirement that trees be harvested within a certain time frame in order for a property to qualify as agricultural. *Aberdeen Investors, Inc. v. Adams County Bd. of County Com'rs,* 240 P.3d 398, 400 (Colo.App. 2009)("agricultural classification is unique in property taxation because using a property as a farm or ranch seldom occurs on January 1 . . . growing seasons vary throughout the counties and each year has its own grazing and growing season.") Colorado law simply requires that to qualify as "agricultural land", the 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). Further, to qualify as a farm the land needs to 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). For the reasons set forth more fully in Coyle's Opening Brief, Coyle's Property meets these statutory requirements and therefore is entitled to agricultural classification.

The BOE's contention is not so much that Coyle's Property does not meet

these statutory qualifications, but rather that it does not meet the definition of a farm contained in the Assessor's Reference Library ("ARL"), a non-statutory source the BOE asks this Court to give judicial defense. (Answer, p. 6). To qualify as a far under the ARL there land must experience a full cycle of agricultural farming activity including planting, growing, harvesting and selling the agricultural product. However, the ARL definition of a farm does not trump Colorado statutory authority. *Boulder County Bd. of Equalization v. M.D.C. Constr.*, 830 P.2d 975, 980-81 (Colo.1992) (agricultural classification for valuation purposes must be based on statutory criteria, rather than on any non-statutory considerations.). Further, even if the Court were to give deference to the ARL's definition of a farm, Coyle's Property qualifies because, as the evidence submitted by Coyle including, without limitation, receipts for tree sales and photographs from 2010 (Docs 8-12), and his testimony at the hearing (Doc. 19, pp. 18:19-20:13) established the Property underwent the full cycle of agricultural farming activity -- Coyle purchased seeds and whips and planted them on the Property for the purpose of growing and harvesting trees and selling them commercially. Because Coyle's use of the Property has never changed (Doc. 19, pp. 20:3-6), the BOE's reclassification of the Property as residential and the Board of Assessment Appeals' ("BAA") affirmance of the BOE's decision were in error and should be

overturned.

In its Answer Brief, the BOE does not deny that this evidence submitted by Coyle supported a finding that the Property was used use as a tree farm during the relevant 2010 assessment period. (Answer, p.7). The BOE simply contends that the evidence was insufficient. (Answer, p.7). However, other evidence which would have further established a full cycle of agricultural farming activity on the Property was improperly excluded from the hearing based on an objection by the BOE that the evidence was untimely submitted. (Doc. 19, pp 3:19-6:9). The BOE asserted this objection and the Board of Assessment Appeals ("BAA") sustained the objection and excluded the evidence at the hearing despite the fact that this evidence had already been made part of the record during the administrative process. (Doc. 19, pp 3:19-6:9).

The BAA's affirmance of the BOE's 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 that the Property has, at all times, met the statutory requirements for designation as agricultural.

CLARIFICATION OF ISSUES ON APPEAL

The BOE's Answer demonstrates its steamroller approach to this matter. In its Answer the BOE identifies two "Issues Presented for Review": 1) "Did the Board of Assessment Appeals ("BAA") correctly determine the property tax classification of Petitioner-Appellant's Property to be residential land, rather than agricultural land?"; and 2) "Did the BAA correctly determine the value of Petitioner-Appellant's Property as required under Colo. Const. art. X § 20(8)(c) and C.R.S. § 39-1-1-3(5)(a)?" However, the BOE did not file this appeal. Nor did it file a cross-appeal. This appeal was filed by Mr. Coyle and, in it, he identified the following five issues for his appeal:

1) Whether the BAA erred in affirming the BOE's reclassification of Petitioner's Property when the Property was actually used on the relevant assessment date, and has always been used, as a tree farm and therefore qualifies for an agricultural designation under C.R.S. § 39–1–102(1.6)(a)(I);

2) Whether the BAA erred in affirming the BOE's reclassification of the Property from agricultural to residential given that ground water appropriated under a permit obtained by Coyle was used for the production of agriculture on the Property and therefore the Property qualifies for a agricultural designation under C.R.S. § 39–1–102(1.6)(a)(IV);

3) Whether the BAA's decision must be set aside as arbitrary and capricious because it was not based on competent evidence given that the County appraiser who performed the Property assessment was not qualified to appraise agricultural properties and she did not have an adequate foundation for her opinions with regard to the ongoing agricultural use of the Property;

4) Whether due to numerous procedural irregularities, Coyle was denied the right to due process during the hearing before the BAA with regard to the reclassification of the Property from agricultural to residential; and

5) Whether, even assuming that the BAA did not err in affirming the BOE's reclassification of the Property from agricultural to residential, there was sufficient comparable evidence to support a $530,893.00 valuation for the Property. (Opening Brief, p.3)

The fact that the BOE chose to re-frame the issues before the Court on Appeal reflects its overall approach to this matter. The BOE predetermined what outcome it wanted, i.e. residential classification for the Property, and then it put the burden on Coyle to prove that the BOE's classification was incorrect. When Coyle met this burden by providing evidence that the Property met the statutory requirements for designation as an agricultural property, the BOE simply responded that the evidence submitted by Coyle was insufficient. Clearly the BOE

had made up its mind and did not want to change it. The BOE similarly made up its mind about what issues it felt were before the Court on this appeal and chose only to address the issues it felt like addressing – thereby avoiding having to directly confront the numerous factual and procedural problems with the BAA's affirmance of the BOE's reclassification of Coyle's Property identified in Coyle's Opening Brief.

ARGUMENT

A. On one Hand, the BOE Contends that Coyle Did Not Meet His Burden of Showing that the BOE's Residential Classification of the Property was Incorrect and, on the Other Hand, the BOE Ignores the Fact that it Objected to Coyle's Submission of Such Additional Evidence on the Grounds It Was Untimely Despite the Fact Coyle Had Previously Submitted it to the BOE During the Administrative Process.

The BOE wants to have its cake and eat it too. On the one hand, the BOE contends that Coyle did not produce sufficient evidence to show that his Property qualified as agricultural during the pertinent time period of the years 2009, 2010 and 2011 (Answer, p.7) and on the other hand it fails to even address Coyle's argument that the BAA improperly refused to accept additional evidence offered by Coyle at the hearing that would have shown the Property's active use as a tree farm in 2010.

Specifically, at the hearing, 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 for an example of some of the additional evidence Coyle offered at the hearing but which the BOE objected to and the BAA excluded). 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).1 However, the BOEs' 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, 51:13-22) The BOE was, or should have been, familiar with the evidence Coyle sought to introduce because they had seen it previously. Now, the BOE unfairly contends that the BAA's affirmance of the reclassification was not arbitrary and capricious because Coyle failed to produce enough evidence to demonstrate the Property's use as a tree farm. (Answer, p. 8)

Importantly, the BOE does not deny that certain of the items that Coyle was allowed to offer into evidence, including two receipts for tree sales dated March

1 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).

16, 2010 and undated photographs Coyle testified were taken in 2010 (Doc. 19, pp. 23:20-24:25) did, in fact, show that the Property was, as of the time of the assessment, used as a tree farm. (Doc. 19, p. 51:2-16; Answer, p. 7) Rather, the BOE simply argues that this evidence was insufficient.

Because the BOE's justified its reclassification of the Property from agricultural to residential based on Coyle's failure to provide sufficient evidence of the Property's ongoing use as a tree farm while at the same time objecting to the introduction of such additional evidence because it was allegedly untimely provided, even though the BOE had already seen this evidence, the BAA's affirmance of the BOE's reclassification of the Property should be overturned on the grounds that it was arbitrary and capricious.

B. The Property's Reclassification Must Be Overturned Because It Was Based on Incompetent Evidence.

In its Answer Brief, the BOE states that there is "substantial evidence" in the record as a whole to support the BAA's finding that the Property is residential (Answer Brief, p. 13). Although, admittedly, the burden at the hearing before the BAA was on Coyle, tellingly, the BOE does not cite to a single piece of evidence showing that the actual use of the Property during the relevant assessment period was residential. Rather, the BOE's reclassification of the Property and the BAA's affirmance of the reclassification was based primarily on two cursory inspections

of the Property conducted by Virginia Wood, a licensed **residential** appraiser (Doc 15, p.1). However, Ms. Wood's inspections were conducted during a time of year when the trees were not in bloom and Ms. Wood admits that she did even not exit her automobile to inspect any of the trees located on the Property. (Doc. 19, p.48:2-9; 49:3-12; 59:9-16).

The BOE, in its Answer Brief, fails to even address Coyle's contention that Ms. Wood was not qualified and that her opinions lacked foundation because she did not exit her automobile to walk up and down the rows to see if the trees had been harvested, nor did she inspect the buds on the trees. Rather, the BOE merely contends that Ms. Wood's testimony - that she believed some of the trees on the Property were dead and there were weeds growing on the Property - was sufficient justification for the reclassification. The reality is that the trees Ms. Wood thought were dead were only dormant and would bloom again later in the spring. Similarly, any grasses on the Property were left there intentionally in order to help make the land less subject to erosion. Ms. Wood's testimony reveals her ignorance with regard to the cycle of growth on tree farms and farming techniques.

As set forth in Coyle's Opening Brief, an agency action may be set aside on the ground that it was arbitrary or capricious if it is determined that the action is unsupported by competent evidence. *Q & T Food Stores, Inc. v. Zamarripa*, 910

P.2d 44, 46 (Colo.App. 1995). Because Ms. Wood was not qualified as an agricultural appraiser, and because she did not have an adequate foundation based on her limited inspection of 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 on the ground that it was arbitrary or capricious given that it was not based on competent evidence.

C. Coyle's Irrigation System for the Property Was Part of the Record.

In its Answer Brief, the BOE acknowledges that, under C.R.S. § 39-1-102(1.6)(a)(IV), agricultural land may also be land that is "used as a farm or ranch … if 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." (Answer, pp. 8-9). However, the BOE contends that the Record contains no documentation regarding a groundwater permit or decreed right to appropriated water. (Answer, p.9). In making this argument the BOE again reveals that its actual goal is not the proper classification of the Property, but rather to penalize Coyle for his alleged failure to produce enough evidence.

The truth is Coyle did provide evidence, through his testimony at the hearing, that he has a decreed right to use appropriated water to irrigate his tree farm. (Doc. 19, p. 18:19-19:6). At the hearing before the BAA, Coyle testified that he used groundwater obtained through use of a well on the Property to irrigate the trees located on the Property. (Doc. 19, p. 18:19-19:6). Further, Coyle had repeatedly advised the BOE of this fact throughout the administrative process. Additionally, if the BOE's Assessor had performed more than a very cursory inspection of the Property she would have realized that there was an irrigation system that used groundwater from a well on the Property. Coyle's right to use appropriated water to irrigate his farm should have considered by the BOE in determining the proper classification for the Property because on that basis alone, pursuant to C.R.S. § 39–1–102(1.6), the Property qualifies as agricultural. The fact that Coyle's right to use appropriated water to irrigate his farm was not even considered by the BOE during its classification of the Property is further evidence that the BOE's sole objective was to reclassify the Property.

D. The BOE Improperly Excluded Evidence of an Income Approach to Valuation of the Property and Improperly Considered the Property's Potential Future Value.

The BOE contends that the BAA's exclusion of evidence offered by Coyle with regard to an income approach to valuation of the Property (which approach is

appropriate for agricultural properties) was proper because the Property was classified as residential. The BOE's contention reveals the chicken and egg problem with the BAA's decision. It would only have been proper for the BAA to refuse to allow Coyle to present evidence concerning an income approach to valuation if the Property was already determined to be properly classified as residential (Doc. 19, pp.63:17-68:3). By excluding evidence regarding the income approach to valuation, the BAA improperly predetermined that the Property was correctly classified as residential.

The BAA further erred by affirming the BOE's valuation despite the fact that it was based on the Property's speculated potential future value. As set forth in Coyle's Opening Brief, the BOE's appraiser, Mr. McLeland, admitted in his testimony 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). Nonetheless, Mr. McLeland testified that in preparing his valuation he considered the Property's "potential possibly for commercial-type property later on, multi-res type property later on, it could be, you know, a couple of different things possible there. But it's development potential for sure in comparison to where some of the other properties are located." (Doc. 19, p.72:7-14). Mr. McLeland's consideration of the property's development potential was

improperly speculative. (Doc. 19, pp.73:3-74:1).

While the BOE cites to *Colorado Board of Assessment Appeals v. Colorado Arlberg Club*, 762 P.2d 146,153 (Colo.1988) as support for its proposition that "the reasonable future use of real property is an element of its fair market value under its technical definition as well as its common law interpretation in Colorado and elsewhere", the *Colorado Arlberg Club* case also holds that "speculative future uses cannot be considered in determining present market value." *Id.*, citing *Board of County Comm'rs v. Vail Assocs.*, 468 P.2d 842, 845 (1970); *Department of Highways v. Schulhoff*, 445 P.2d 402, 404-06 (1968). The Supreme Court in *Colorado Arlberg Club* found that it would be *inappropriate* for a Board to assess property at the value which it will have after being subdivided and developed to its highest and best use. *Id.* An anticipated development cannot be viewed "as an accomplished fact," because such an approach would ignore the substantial but unknown costs involved in such a development. *Id.*, citing *Schulhoff*, 167 Colo. at 77, 445 P.2d at 405 (because cost of subdividing is speculative, cannot value property as if subdivision had been accomplished); *City of Aurora v. Webb*, 585 P.2d 288, 292 (1978).

Therefore, regardless of the propriety of the reclassification of the Property from agricultural to residential, there was simply insufficient competent evidence

upon which the BAA could affirm the BOE's valuation of the Property at $530,896.00.

V. CONCLUSION

The BAA's decision must be set aside as arbitrary and capricious. As set forth in Coyle's Opening Brief, the Property meets all of the statutory requirements for designation as agricultural land. Colorado statutory law does not require that the produce grown on a property must be annually, or even regularly, harvested for the property to qualify as agricultural land. Coyle, at all times, has used the Property as a tree farm and conducted the full cycle of agricultural farming dictated by the particular nature of a tree farm thereon.

The BAA's decision should be overturned because it 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.

Additionally, the fact that Coyle irrigates his tree farm using ground water accessed from a permitted well on the Property is alone a sufficient basis for finding that the Property qualifies as agricultural.

In sum, 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 26th day of November, 2013.

CAMPBELL KILLIN BRITTAN AND RAY, LLC

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of November, 2013, a true and correct copy of the foregoing **REPLY BRIEF** was delivered via ICCES and U.S. mail to the following:

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