BOARD OF ASSESSMENT APPEALS, STATE OF COLORADO 1313 Sherman Street, Room 315 Denver, Colorado 80203	Docket No.: 69269
Petitioner: **HIEP & KHANH LAI,** v. Respondent: **DOUGLAS COUNTY BOARD OF EQUALIZATION.**	

ORDER

THIS MATTER was heard by the Board of Assessment Appeals on March 17, 2017, James R. Meurer and Debra A. Baumbach presiding. Petitioners appeared *pro se*. Respondent was represented by Dawn L. Johnson, Esq. Petitioners are protesting the 2016 classification of the subject property.

The Board admitted Petitioners' Exhibits 1-17 and Respondent's Exhibit A.

Subject property is described as follows:

11583 Heidemann Ave, Franktown, CO
Douglas County Schedule No. R0477507

The subject property consists of a parcel containing 39.309 acres, located approximately 16 miles southeast of downtown Castle Rock in Franktown. The terrain is a combination of relatively flat and rolling areas. The subject property is improved with a well for irrigation, fencing and animal shelters.

Respondent assigned vacant land classification and a value of $167,400 for the subject parcel for tax year 2016. Petitioners are requesting agricultural land classification; the value of the subject property is not in dispute.

Petitioners' Evidence

Petitioners' witness, Mrs. Khanh Lai, testified that Petitioners purchased the subject property in May 2013, with the intent of using the property as a farm for growing peonies, mushrooms and for raising chickens, lambs and goats.

Mrs. Lai stated that Petitioners filed for ground water rights in August of 2013; water rights were subsequently granted in February 2014. Well drilling was fully completed on October 21, 2015. According to Mrs. Lai, Petitioners have been using water from the well for their agricultural operations on the subject property.

Mrs. Lai testified that in the fall of 2013, 10 peony roots were planted in the rear section of the property where the water run-off could be used for irrigation. The peonies did not survive.

In the spring of 2014, Mrs. Lai started cultivating mushroom spawns. The mushroom spawns were spread in the front of the property. The mushroom cultivation was unsuccessful. In addition, in spring of 2014, Mrs. Lai purchased 220 peony roots for planting in the fall. Mrs. Lai stated she subsequently planted the 200 peony roots in the fall of 2014; the remaining 20 roots did not get planted.

In August 2015, Petitioners made a down payment on two does and two dorpers. Petitioners began fencing the area and building shelters for the animals. Mrs. Lai testified that she planted additional peony roots by the end of the first week of November, 2015. As the well drilling was completed in October, 2015 she was able to use well water for irrigation. In addition, in October, 2015, Petitioners purchased a purebred white dorper ram from Texas for breeding (this ram never made it onto Petitioners' property and Petitioners' moneys were later refunded). The arrival of the livestock was delayed because of disease and vandalism on the property.

It was not until April 9, 2016 when the livestock animals were brought onto the property (1 buck, 2 adult does and 2 kids). On May 13, 2016, Petitioners brought two more boer does for their breeding program. In July 2016, Petitioners acquired and brought onto the property four white dorper sheep. One of the sheep died in August; Petitioners slaughtered the remaining three in October of 2016, keeping ½ of lamb for personal consumption and selling the rest. Petitioners submitted the bill of sale to Respondent as evidence of farming operations on the subject.

According to Mrs. Lai, Petitioners partitioned an area in the back of the subject for the animals but allowed the animals to graze freely outside the partition on the weekends. Mrs. Lai testified that Petitioners have been using well water for the animals and for irrigation.

Respondent's Evidence

Respondent's first witness, Mr. Steven W. Campbell, a Certified Residential Appraiser with the Douglas County Assessor's Office, presented a market approach consisting of four comparable sales including the sale of the subject property. The sales ranged in a time adjusted sale prices from

$113,243 to $212,929 and in size from 35.01 acres to 39.564 acres. On a price per acre basis, the sales ranged from $3,235 to $5,382. Sale 1 was reported to be an REO sale, Sale 3 included electricity and Sale 4 was considered superior in location. Respondent made time and qualitative adjustments, giving most weight to the sale of the subject property. After adjustments were made, the witness concluded to a value of $167,400 or $4,258 per acre for the subject.

Mr. Campbell provided a timeline of multiple field inspections of the subject that were made by several employees of the Assessor's Office between August 6, 2013 and June 7, 2016.

Mr. Campbell testified that he and Ms. Virginia Wood, another appraiser at the Douglas County Assessor's Office, first inspected the subject on August 6, 2013 and no agricultural use was observed. Mr. Campbell inspected the property again on September 11, 2014 and did not see any agricultural use. He sent a letter to Petitioners on September 25, 2014 stating that agricultural classification would be removed for 2015 tax year. After Ms. Wood spoke with Mrs. Lai on the phone on October 1, 2014, a decision was made to leave the property classified as agricultural for the 2015 tax year to allow Petitioners time to get their agricultural operations going.

According to Mr. Campbell's testimony, Ms. Wood performed another inspection of the property on November 6, 2014 and observed one nursery tag at the back of the property. No other agricultural uses were observed at the time. Mr. Campbell again inspected the property on July 15, 2015 and August 27, 2015 and did not see any agricultural activities on the property. On May 11, 2016, Mr. Campbell inspected the subject property without driving to the rear of the subject due to muddy conditions. No agricultural use was evident from the front of the property. Virginia Wood attempted an inspection on May 27, 2016 but did not drive to the rear of the property due to muddy conditions. No agricultural use could be seen from the front of the property.

Further, Mr. Campbell testified that Ms. Wood performed another inspection on June 7, 2016. She observed five adult goats and two kids that were fenced into approximately the rear 25% of the property. She observed two grape vines and some flowers planted near the well. She also noted that the well was drilled and a solar panel was mounted near the well. Ms. Wood also observed an irrigation line that ran to the north of the well and a bee hive at the east side of the property.

Respondent's second witness, Ms. Virginia Wood, land appraiser with Douglas County Assessor's Office, testified that she made multiple field inspections and spoke with Petitioners several times explaining the criteria for agricultural classification. Ms. Wood testified that she inspected the property in November 2014 and found only one nursery tag located in the back of the property. There was no other agricultural activity observed on subsequent inspections until June 2016.

According to Respondent, the agricultural classification for tax year 2016 was removed because Petitioners did not use the subject as a farm or a ranch during 2013, 2014 or 2015 tax years. Respondent has been assigning agricultural classification to the subject parcel during 2013, 2014 and 2015 tax years to give Petitioners time to get their farming and ranching operations going.

Respondent contends that since the livestock was not brought onto the property until April of 2016, which was well beyond the January 1, 2016 assessment date, the subject was not eligible for agricultural classification for tax year 2016.

Respondent classified the subject property as vacant land and assigned an actual value of $167,400 for tax year 2016.

Analysis

There are several ways in which a parcel of land can qualify for agricultural classification per Section 39-1-102(1.6)(a), C.R.S. As relevant here, the parties dispute whether the subject meets the definition of "agricultural land" under either subsection (I) or subsection (IV) of Section 39-1-102(1.6)(a).

In order for a parcel to qualify as agricultural land under subsection I of Section 39-1-102 (1.6)(a), C.R.S., the property must be used as a farm or ranch during each of the preceding two years and the present tax year:

> (I) A parcel of land, whether located in an incorporated or unincorporated area and regardless of the uses for which such land is zoned, that was used the previous two years and presently is used as a farm or ranch, as defined in subsections (3.5) and (13.5) of this section, or that is in the process of being restored through conservation practices.

At the hearing, Petitioners presented testimony and evidence concerning limited agricultural activities that took place on the subject parcel during 2013, 2014 and 2015 tax years. Specifically, Petitioners testified to their attempts to grow peonies and mushrooms on the subject parcel. Petitioners' growing attempts were largely unsuccessful. On cross-examination, Petitioners could not state definitively to the Board what portion of the subject parcel was used for peony and mushroom production. Respondent conducted multiple property inspections during the 2014, 2015 and 2016 tax years but did not observe any peony or mushroom growing activities on the subject except for a single nursery tag found at the back of the property during the November, 2014 visit. In Respondent's estimation, if there were mushrooms and peonies growing on the subject, only about 1/40th of the subject parcel was so used.

The Board finds that only a very small portion of the subject's 39 acres was used for the peony and mushroom growing efforts. Considering that Petitioners' peony and mushroom growing operation on the subject parcel for tax years 2014 and 2015 was *de minimis*, the Board finds that the subject parcel does not meet the definition for "agricultural land" for tax year 2016 per Section 39-1-102 (1.6)(a)(I), C.R.S.

Subsection IV of Section 39-1-102 (1.6)(a), C.R.S., states that if the owner of the land has a decreed water right or a permit to appropriated water, and water under such right or permit is actually used for production of agricultural or livestock products, then the property is agricultural land:

> A parcel of land, whether located in an incorporated or unincorporated area and regardless of the uses for which such land is zoned, used as a farm or ranch, as defined in subsections (3.5) and (13.5) of this section, 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[.]

Assessor's Reference Library, Vol. 3, at pages 5.22-23 interprets Section 39-1-102(1.6)(a)(IV), C.R.S. to include the following qualifying criteria:

- The land must be used as a farm or ranch on the assessment date, and
- The owner of the land must have a decreed right to appropriated water granted in accordance with article 92 of title 37, C.R.S., or
- A final permit to appropriated ground water granted in accordance with article 90 of title 37, C.R.S., and
- The water must be for purposes other than residential purposes, and
- The water appropriated must be used for the production of agricultural or livestock products on the land.
- If the criteria are met, the land will qualify the first year of use as a farm or ranch. (Emphasis added).

The ARL further states that "[e]ven though the 'used the previous two years plus current' provision pursuant to § 39-1-102(1.6)(a)(I), C.R.S., does not apply to this category, the property must be used as a farm or ranch on the assessment date and have one of the two official documented decreed water rights in order to receive the agricultural designation." (Emphasis added). The PTA's interpretation of statutes pertaining to property taxation is entitled to judicial deference as the issue comes within the administrative agency's expertise. *Huddleston v. Grand Cty. Bd. of Equalization*, 913 P.2d 15, 16-22 (Colo. 1996) ("Judicial deference is appropriate when the statute before the court is subject to different reasonable interpretations and the issue comes within the administrative agency's special expertise.")

In a nutshell, Petitioners argue that the subject parcels meets the definition of agricultural land per Section 39-1-102(1.6)(a)(IV), C.R.S. because (1) Petitioners had decreed water rights as of February 2014 and a functioning well on the subject as of October 21, 2015; and (2) Petitioners have been using water from the well for livestock that was placed on the subject as of April, 2016; (3) Petitioners were not required to have agricultural operations on the subject as of January 1, 2016 assessment date per *Aberdeen Investors, Inc. v. Adams County Bd. of Cty. Comm'rs*, 240 P.3d 398 (Colo. 2009).

Although the Board was persuaded that Petitioners were granted water rights as of February

2014 and a functioning well has been operating on the subject property as of October 2015, the Board was not persuaded that the subject was used as a farm or a ranch on January 1, 2016 assessment date. The only evidence of any farming operations on the subject as of January 1, 2016 assessment date was Mrs. Lai's testimony concerning her peony growing efforts. Mrs. Lai testified that she planted 140 peony roots in the fall of 2015. Mrs. Lai could not specify what percentage of the subject was occupied by the peonies; Respondents' appraisers did not observe any evidence of peony growing operations during their visits to the property in May of 2016; and Petitioners did not provide any photographs of the peony plants growing on the subject. Based on the evidence presented, the Board finds that any peony growing efforts on the subject parcel as of January 1, 2016 assessment date, if at all, were *de minimis* and therefore insufficient to qualify the subject's 39 acres for agricultural classification per Section 39-1-102 (1.6)(a)(IV), C.R.S.

Finally, the Board finds that Petitioners' reliance on *Aberdeen* is misplaced. In *Aberdeen* case, the court noted that using a property as a farm or a ranch seldom occurs on January 1. *Aberdeen*, 240 P.3d at 401. Per *Aberdeen,* although January 1 is the statutory date for establishing classification on most classes of property, the use of the property to establish the two plus current requirement for agricultural classification per Section 39-1-102 (1.2)(a)(I), C.R.S. may begin mid-year. *Id.* at 403-04.

The *Aberdeen* case is factually distinguishable from Petitioners' case. In *Aberdeen*, the court applied subsection I of Section 39-1-102 (1.2)(a), C.R.S. and concluded that a farm or a ranch operation that begins in July of a given tax year qualifies that year as the first year of use for the two plus current eligibility. Petitioners, on the other hand, are attempting to apply the holding in *Aberdeen* to subsection IV of Section 39-1-102(1.2)(a), C.R.S. that allows for agricultural classification in the first year of use as a farm or a ranch based on decreed water rights.

The burden of proof in BAA proceedings is on the taxpayer to establish the basis for any reclassification claims concerning the subject property. *Home Depot U.S.A., Inc. v. Pueblo Cty. Bd. of Comm'rs*, 50 P.3d 916, 920 (Colo. App. 2002). The Board finds that Petitioners presented insufficient probative evidence and testimony to convince the Board that Respondent's 2016 classification of the subject parcel as vacant land is incorrect.

ORDER:

The Petition is denied.

APPEAL:

If the decision of the Board is against Petitioner, Petitioner may petition the Court of Appeals for judicial review according to the Colorado appellate rules and the provisions of Section 24-4-106(11), C.R.S. (commenced by the filing of a notice of appeal with the Court of Appeals within

forty-nine days after the date of the service of the final order entered).

If the decision of the Board is against Respondent, Respondent, upon the recommendation of the Board that it either is a matter of statewide concern or has resulted in a significant decrease in the total valuation of the respondent county, may petition the Court of Appeals for judicial review according to the Colorado appellate rules and the provisions of Section 24-4-106(11), C.R.S. (commenced by the filing of a notice of appeal with the Court of Appeals within forty-nine days after the date of the service of the final order entered).

In addition, if the decision of the Board is against Respondent, Respondent may petition the Court of Appeals for judicial review of alleged procedural errors or errors of law within thirty days of such decision when Respondent alleges procedural errors or errors of law by the Board.

If the Board does not recommend its decision to be a matter of statewide concern or to have resulted in a significant decrease in the total valuation of the respondent county, Respondent may petition the Court of Appeals for judicial review of such questions within thirty days of such decision.

Section 39-8-108(2), C.R.S.

DATED and MAILED this 16th day of May, 2017.

BOARD OF ASSESSMENT APPEALS

James R Meurer

Debra A. Baumbach

Debra A Baumbach

I hereby certify that this is a true and correct copy of the decision of the Board of Assessment Appeals.

Milla Lishchuk

SEAL

69269