BOARD OF ASSESSMENT APPEALS, STATE OF COLORADO 1313 Sherman Street, Room 315 Denver, Colorado 80203	Docket Number 56130
Petitioner: **JAMES GORDON TRUST,** v. Respondent: **PITKIN COUNTY BOARD OF EQUALIZATION.**	

ORDER

THIS MATTER was heard by the Board of Assessment Appeals on May 17, 2011, Sondra W. Mercier and Gregg Near presiding. Petitioner was represented by Gregory S. Gordon, Esq. Respondent was represented by Christopher G. Seldin, Esq. Petitioner is protesting the classification of the subject property for tax year 2010.

Docket Numbers 56130 & 56131 were consolidated for purposes of the hearing only.

Subject property is described as follows:

Lot 3, Owl Creek Ranch, Snowmass Village, Colorado
Pitkin County Schedule No. R012301

Petitioner is requesting an agricultural classification for the subject property for tax year 2010. Respondent assigned a residential classification for the subject property for tax year 2010.

The subject is a 69.22-acre lot ("Lot 3") located in the Owl Creek Ranch subdivision. Lot 3 was classified as agricultural land for tax years 2008 and 2009, but was reclassified to residential in 2010. The Owl Creek Ranch consists of approximately 850 acres with several large undeveloped land parcels subdivided from the original ranch and sold to others. Only one of the lots has been improved with a dwelling.

The Protective Covenants of the Owl Creek Ranch require that the land be "held for open space, agricultural, and recreational purposes" to "preserve the agricultural operations within Owl Creek Ranch." (*See* Pet.'s Ex. No. 12, page 176).

To further that intent, the property was further subdivided to delineate the "Irrigated Lands" section. The area included within the "Irrigated Lands" section restricts owners of the individual lots from interfering with or impairing agricultural operations.

The "Irrigated Lands" are served by water rights quit-claimed to the Owl Creek Ranch Homeowners' Association (HOA) by the developer in 1991. The sale was contingent upon the continuation of the agricultural operations. Should the HOA fail to complete their responsibilities, its rights and responsibilities may be assumed by the developer, or if the developer fails to do so, then by Pitkin County.

Petitioner's witness, James J. Snyder, Ranch Manager for the Owl Creek Ranch, testified that he has managed the "Irrigated Land" and farm grounds for 21 years. His responsibilities in this regard include a yearly "burn" of the irrigation ditches, dragging and fertilizing the fields, and applying weed control and new seeds every two years. The ranch formerly completed all the haying operation but has sub-contracted the process of harvesting, bailing and hauling for the previous ten years.

Historically, the ranch produced approximately 300 tons of hay on annual basis. The Owl Creek Ranch would retain 110 to 125 tons for internal use and sell the remainder. Declining output has reduced the annual return to 225 to 250 tons per year.

The HOA hired Mountain Harvesting, LLC ("Mountain Harvesting") in 2008 to harvest hay grown on the "Irrigated Lands." The agreement allows for the harvesting of 300 tons per year, of which 100 tons would be retained by the HOA with the remainder to be stored and sold to other parties by Mountain Harvesting. Mr. Snyder indicated that the HOA pays Mountain Harvesting $100.00 per ton for any shortage. Mountain Harvesting charges $150.00 per ton when selling the product.

Mr. Snyder stated that approximately 90 days of his time each year is devoted to the maintenance of the hay lands. If the ranch were to complete all of the operations to harvest the hay, the cost would be approximately $250.00 per ton.

The hay retained by the HOA is used to feed horses boarded on the ranch.

Petitioner's witness, Mr. Charles A. Vidal, testified that he has served as the manager of the HOA for approximately 30 years. Mr. Vidal indicated that there is insufficient production from the "Irrigated Lands" to justify ownership and maintenance of the equipment needed for harvesting. Mr. Vidal also indicated the arrangement with Mountain Harvesting produces the best possible outcome for the HOA, as it reduces the subsidies required of the members. The haying operation is not monetarily profitable but contributes to a reduction in other expenses such as weed control. The HOA could make a profit from hay sales by foregoing weed control and fertilization, but this is a short term solution ultimately leading to greater problems and potential reversion of the "Irrigated Lands" section to the developer.

Petitioner's witness, Cody Christopher from Mountain Harvesting, testified that his arrangement with the Owl Creek Ranch HOA is intended to allow his operation to acquire hay to sell for a profit. Mountain Harvesting provides the tractors, bailers, rakes and hauling equipment necessary to harvest the hay. Mountain Harvesting's share of the harvest is stored within its own barn. Mr. Christopher indicated that his sales range from $120.00 to $200.00 per ton and the hay from Owl Creek Ranch is the best quality it obtains. From 2009 to 2010, the company acquired an average of 80 tons of hay from Lot 3 which was kept by Mountain Harvesting.

Petitioner contends that the agreement between the HOA and Mountain Harvesting qualifies as a lease which conveys a property right known as a "profit a prendre," *e.g*, the right to enter the land, and to remove a profitable commodity, crop, etc. *Lobato v. Taylor*, 71 P.3d 938, 945 (Colo. 2002).

Respondent indicated the principal issue for agricultural classification for the subject is whether the operation is for the primary purpose of profit, specifically, is the land being used by the HOA for a profit or used by Mountain Harvesting to make a profit. Respondent pointed to the testimony by Mr. Vidal that they had never made a profit from hay sales. Respondent also repeated Mr. Christopher's testimony that he would not have provided the cutting operations to the HOA without the cash guarantees in place.

Respondent suggested that the subject property is not a farm and likened the situation to homeowner growing tomatoes in the back yard. The owner plants the seeds, rents the rototiller, fertilizes, weeds the plants, and then allows a neighbor to pick the tomatoes, sell them on the street, and keep the money. The use by the HOA of the hay for the horse boarding operation is not an agricultural use, as maintenance of "pleasure horses" does not qualify. Respondent also asserted that the HOA's assessment process and use of the hay field results in expenses that are five times the normal cost to develop hay. The HOA and Mountain Harvesting depend upon a subsidy by the landowners for the operation, and there is no evidence that the primary purpose of the operation is to make a profit, in fact, there is no hope of a profit.

Petitioner presented sufficient probative evidence and testimony to show that the subject property was incorrectly classified for tax year 2010.

Section 39-1-102(1.3), C.R.S., provides that a parcel of land must be classified as "agricultural" if, among other things and as relevant here, the land was used the previous two years and presently is used as a "farm" as defined in Section 39-1-102(3.5), C.R.S.

Pursuant to 39-1-102(3.5), C.R.S., a "farm" is "a parcel of land which is used to produce agricultural products that originate from the land's productivity for the primary purpose of obtaining a monetary profit." The statute does not differentiate between, on the one hand, a lessee's primary purpose in using the land and, on the other, the landowner's primary purpose in acquiring and maintaining ownership of the land. *Boulder County Board of Equalization v. M.D.C. Construction, Inc.*, 830 P.2d 975 (Colo. 1992). Further, the landowner need not actually profit or intend to profit from agricultural operations on the land conducted by the owner's lessees." *Id.*

First, the Board was persuaded by Petitioner's argument that the agreement between the HOA and Mountain Harvesting qualifies as a lease which conveys a property right known as a "profit a prendre." Although the lease agreement is not directly between the owners and Mountain Harvesting, the Board was convinced by Petitioner's contention that the statutory language does not require that a lease agreement be directly between an owner and a lessee.

Second, the Board was convinced that the surface use of Lot 3 was for production of hay. Accordingly, the Board is persuaded that the parcel is used to produce "agricultural products" for purposes of Section 39-1-102 (3.5), C.R.S.

Third, the Board was persuaded that monetary profit is the primary purpose behind the production of agricultural products on the subject property as required by Section 39-1-102(3.5), C.R.S. The Board found that a profit is realized in three ways within the lease relationship: (i) the HOA receives crop share payment from the landowner for the production of hay on Lot 3; (ii) Mountain Harvesting holds a "profit a prendre" interest in the subject, receiving a crop share payment of hay in exchange for the removal of the hay; (iii) the landowner receives a reduced HOA fee when operating costs of the HOA are reduced.

The Board recognizes that while "pleasure horse" operations do not qualify for agricultural classification, such operation is the operation of the HOA, not the actual landowner.

ORDER:

Respondent is ordered to change the 2010 classification of the subject property to agricultural.

The Pitkin County Assessor is directed to change his/her records accordingly.

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

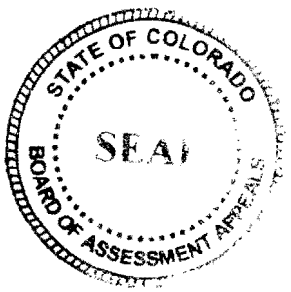
In addition, if the decision of the Board is against Respondent, Respondent may petition the Court of Appeals for judicial review of alleged procedural errors or errors of law within thirty days

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 15th day of September, 2011.



BOARD OF ASSESSMENT APPEALS

Sondra W. Mercier

Gregg Near

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

Milla Crighton

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