BEFORE THE MONTANA TAX APPEAL BOARD

Carol A. Beyer-Ward, **Michael F. Ward,** Appellant; v. **State of Montana,** **Department of Revenue,** Respondent.	CASE №: PT–2015–4 **FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER, AND OPPORTUNITY FOR JUDICIAL REVIEW**

1. Before the Board is Appellants' Carol A. Beyer-Ward and Michael F. Ward (Byer-Wards) appeal from the Lake County Tax Appeal Board's (LCTAB) split decision upholding Respondent State of Montana, Department of Revenue's (DOR) reclassification from agricultural to residential. Beyer-Ward's property is located at 14533 Grandview Ln., Bigfork, identified as geocode 15-3708-19-2-04-08-0000; legal description S19 T26 N, R19 W, C.O.S. 4602, Tract 2.

ISSUE

2. Whether to classify as agricultural a 1.14 acre parcel of land that contains a dwelling and a cherry orchard of 109 trees. The property had been provisionally classified by DOR as agricultural land which does not yet produce $1,500 per year in gross revenues.

3. The DOR argues that in order to qualify as agricultural the property must be at least 2 acres in size: one acre for the orchard as required by recently revised DOR rules and one acre for the dwelling as DOR interprets and applies the statute. The Beyer-Wards argue the acreage requirement is arbitrary and that they will be able to produce more than $1,500 in revenues once their trees mature and start production.

FINDINGS OF FACT

4. The Board held a hearing on December 9, 2015 at which the following were present:

   a. Carol A. Beyer-Ward, taxpayer;

   b. Michael F. Ward, taxpayer;

   c. Nicholas Gochis, DOR attorney, as counsel for DOR;

   d. Amanda Bertelson, DOR appraiser, as witness for DOR;

   e. Deb Doney, DOR area manager;

   f. Bonnie Hamilton, DOR management analyst, as witness for DOR.

   (MTAB Hrg. Transcr. 2:1-13.)

5. Carol Beyer-Ward's parents originally owned the subject property, purchased in the late 1950's, and operated a cherry orchard on a portion of the land. (MTAB Hrg. Transcr. 9:1-8.)

6. In 2013, the Beyer-Wards decided to clear brush and trees on their property and put an orchard back in. Mrs. Beyer Ward testified their

intent was to generate profits to help pay for increased property taxes and save for anticipated college tuition for their daughter. (MTAB Hrg. Transcr. 6:17-20.) There was no minimum acreage requirement for orchards at that time. (Id. 7:22-25.) They received provisional classification as agricultural land in 2014. (Id. L11:1-13.)

7. The Beyer-Wards testified that they incurred expenses of $13,825 and estimated their own labor costs of $6,000 in rejuvenating the orchard. Id. 18: 1-11. In order to finance their orchard project they obtained a loan in reliance on the envisioned classification as agricultural land and anticipated revenues from selling their cherries. Id.

8. The Beyer-Wards testified that they practiced good orchard husbandry. (Id. 11:21-25, 12:1-8.) They installed fences, gates and an irrigation system. (Id. 19:7-15.) To meet the DOR requirements of 100 living trees they originally planted 110 trees (one later died). (Id. 25:16-24.) They planted the trees to obtain adequate spacing between each tree and each row of trees. The orchard itself takes up approximately one third of an acre. (Id. 31:1-25.) At full production 100 trees were estimated to generate $10,000 in gross revenue ($100 per tree multiplied by 100 trees). (Id. 25:16-24.)

9. The Beyer-Wards testified that they have a ready market available for their Lapin cherries, (Id. 26:23-25), and that they have no doubt "whatsoever" that they will be able to meet the minimum dollar amount for production revenues of $1,500 per year. (Id. 30:14-16.) This testimony was not contested.

10. Their application for agricultural status in 2015 was denied on the basis that the parcel did not meet the minimum acreage requirements of one acre for the orchard and one acre for the residence. (Id. 13:5-16; Ex. 8, 10.) The DOR had adopted new rules in late 2014 which set a one acre minimum requirement for specialty crops such as cherry orchards. (Id. 16:4-13.) There was no provision to grandfather or exempt existing orchards from the new rule. (Id. 68:1-15; *see also* Mont. Admin. R. 42.20.683.)

11. The Beyer-Wards testified that they can not afford to buy additional land to meet the acreage requirements and that if one full acre were fully and efficiently planted it could contain 300 to 330 trees. (Id. 21:16-25, 22:1-14, 31:4-14.)

12. The DOR had no issues with the husbandry practices of the Taxpayers. (Id. 47:6-10.)

Rulemaking

13. One statutory requirement for agricultural classification is that "the land is an integral part of a bona fide agricultural operation." Mont. Code Ann. § 15-1-202.

Administrative Rule Definition of Bona Fide Agricultural Operation — Mont. Admin. R. 42.20.601

14. In 2003, DOR proposed and adopted Mont. Admin. R. 42.20.601 which defined bona fide agricultural operation as "an agricultural enterprise in which the land actually produces agricultural crops defined in 15-1-101, MCA, that directly contribute agricultural income to a functional

agricultural business." 13 Mont. Admin. Register 1464 (Jul. 7, 2003); 16 Mont. Admin. Register 1888 (Aug. 28, 2003).

15. The reasonable necessity DOR claimed for the 2003 rule in the notice of proposed rule was to "define the terms used in new sub-chapter 6 of chapter 20. The terms being defined are common in the agricultural field." 13 Mont. Admin. Register 1464 (Jul. 7, 2003).

16. In 2014, DOR proposed and ultimately amended Mont. Admin. R. 42.20.601, adding a requirement that the property total "not less than 1 acre, excluding the 1-acre site beneath a residence." 20 Mont. Admin. Register 2628 (Oct. 23, 2014); 23 Mont. Admin. Register 2994 (Dec. 11, 2014).

17. The reasonable necessity listed by DOR in the notice of proposed amendment in 2014 was "more clearly defining 'bona fide agricultural operation'." 20 Mont. Admin. Register 2628 (Oct. 23, 2014). This description is inaccurate at best. The 2014 amendment does more than clarify the definition, it adds an entirely new requirement: minimum acreage.

18. The notice for both the adoption and amendment of the definition of bona fide agricultural operation state that authority to make the rules is granted by Mont. Code Ann. § 15-7-111, and that the rules implement the following statutes:

    a. Mont. Code Ann. § 15-1-101,

    b. Mont. Code Ann. § 15-6-133,

c. Mont. Code Ann. § 15-7-201,

d. Mont. Code Ann. § 15-7-202.

13 Mont. Admin. Register 1466 (Jul. 7, 2003); 20 Mont. Admin. Register 2629 (Oct. 23, 2014).

19. No statute referenced either by DOR's witnesses nor by DOR's rulemaking notices includes a minimum acreage requirement to qualify for agricultural classification.

Administrative Rule on Specialty Crop: Orchard Criteria — Mont. Admin. R. 42.20.683.

20. As part of the above rulemaking, DOR consolidated several specialty crop rules and adopted a new rule which requires that "the orchard consists of contiguous parcels of land totaling not less than 1 acre." Mont. Admin. R. 42.20.683(12)(a).

21. DOR's notice described the reasonable necessity for this change: "The department proposes adopting New Rule III to reduce confusion regarding the qualifications for agricultural land classification for specialty and unique crops." 20 Mont. Admin. Register 2612 (Oct. 23, 2014). Again, the amendment does more than "reduce confusion regarding the qualifications." It adds a new qualification: minimum acreage.

22. DOR Agricultural Forest Management Analyst Bonnie Hamilton testified that the one acre requirement in the new rule was a combination of two prior rules which was adopted to clarify the

situation for specialty crops and make it easier to understand for both the public and DOR staff. (MTAB Hrg. Transcr. 52:5-15.)

23. The notice for the adoption of the specialty crop rule states that authority to make the rules is granted by Mont. Code Ann. § 15-1-201, and that the rules are implementing the following statutes:

a. Mont. Code Ann. § 15-7-201,

b. Mont. Code Ann. § 15-7-202,

c. Mont. Code Ann. § 15-7-203,

d. Mont. Code Ann. § 15-7-206,

e. Mont. Code Ann. § 15-7-207,

f. Mont. Code Ann. § 15-7-208,

g. Mont. Code Ann. § 15-7-209,

h. Mont. Code Ann. § 15-7-210,

i. Mont. Code Ann. § 15-7-212.

24. No statute referenced either by DOR's witnesses nor by DOR's rulemaking notices includes a minimum acreage requirement to qualify for agricultural classification for specialty crops.

Reclassification

25. On July 7, 2015, DOR mailed the Beyer-Wards an AB-26 Determination Letter stating that an adjustment to the land

classification was not made to the Taxpayers' appeal of the loss of the agricultural classification citing to Mont. Admin. R. 42.20.683 and Mont. Admin. R. 42.20.655, discussed below. (Ex. 10.)

26. Amanda Bertelson, a residential agriculture appraiser with the DOR, denied the Taxpayers agricultural classification because the property did not have one acre for an orchard and one acre for the home site, which she testified was required by Mont. Admin. R. 42.20.683 and Mont. Code Ann. § 15-7-206. (MTAB Hrg. Transcr. 42:7-18.)

27. Bonnie Hamilton testified that DOR could not grandfather in the Taxpayers' orchard because Mont. Code Ann. § 15-7-101 requires the department to maintain current all classifications. (MTAB Hrg. Transcr. 67:24-25, 68:1-15.)

CONCLUSIONS OF LAW

28. To whatever extent the foregoing findings of fact may be construed as conclusions of law, they are incorporated accordingly.

29. DOR supports its reclassification from agricultural to residential on the basis of a series of administrative rules and statutes:

a. Mont. Code Ann. § 15-6-134,

b. Mont. Code Ann. § 15-7-201,

c. Mont. Code Ann. § 15-7-206,

d. Mont. Admin. R. 42.20.601(7),

e. Mont. Admin. R. 42.20.683(12)(a),

f. Mont. Admin. R. 42.20.655.

(MTAB Hrg. Transcr.)

30. DOR argues that when read together these statutes and rules require one acre for bona fide agricultural activity and one acre for the residence, for a total of two acres (MTAB Hrg. Transcr. 38: 10-21 and 46: 5-13)

31. The Board has jurisdiction over this case. Mont. Code Ann. § 15-2-301.

32. "The state [tax appeal] board shall give an administrative rule full effect unless the state board finds a rule arbitrary, capricious, or otherwise unlawful." Mont. Code Ann. § 15-2-301.

33. "The decision of the state board is final and binding upon all interested parties unless reversed or modified by judicial review." Mont. Code Ann. § 15-2-302.

34. "This Board may rule only on the issue before it and the decisions of this Board apply only to the taxpayers bringing the appeal, and not to all similarly situated taxpayers." *Sheehy v. Dept. of Revenue*, 1992 WL 137764 at 10 (Mont. Tax. App. Bd.).

Notice

35. As a preliminary matter, the Board notes that of the six statutes and administrative rules DOR has relied on to reclassify the property, the

Beyer-Wards were provided notice of two in the reclassification letter: Mont. Admin. R. 42.20.683 and 42.20.655. (Ex. 8.)

36. The Taxpayers' inquiry about being able to somehow grandfather their prior classification as agricultural is not possible given the statutory mandate that DOR "maintain current the classification of all taxable lands...." Mont. Code Ann. § 15-7-101

Classification as Agricultural

37. DOR argues that its rules require a parcel be at least one acre in size to qualify for agricultural classification. Taxpayers counter that such a requirement denies agricultural classification on arbitrary criteria.

38. "The power of the government of this state is divided into three distinct branches--legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted." Mont. Const. art III, § 1. "The legislative power is vested in a legislature...." Mont. Const. art V, § 1.

39. "The state shall appraise, assess, and equalize the valuation of all property which is to be taxed in the manner provided by *law*." Mont. Const. art VIII, § 3 (emphasis added).

40. "A valid and enforceable agency rule cannot exceed its enabling statute...." *Glendive Med. Ctr., Inc. v. Montana Dep't of Pub. Health & Human Servs.*, 2002 MT 131, ¶ 29, 310 Mont. 156, 49 P.3d 560.

41. "Administrative agencies enjoy only those powers specifically conferred upon them by the legislature. Administrative rules must be strictly confined within the applicable legislative guidelines. Indeed, it is axiomatic in Montana law that a statute cannot be changed by administrative regulation. We look to the statutes to determine whether there is a legislative grant of authority." *Bick v. State, Dep't of Justice, Div. of Motor Vehicles*, 224 Mont. 455, 457, 730 P.2d 418, 420 (1986).

42. When construing a statute, the reviewing body is to "determine what in terms or substance is contained in it, and not to insert what has been omitted or to omit what has been inserted." *State v. Minett*, 2014 MT 225, ¶ 12, 376 Mont. 260, 332 P.3d 235; Mont. Code Ann. § 1-2-101.

43. "In the construction of a statute, the intention of the legislature is to be pursued if possible. When a general and particular provision are inconsistent, the latter is paramount to the former, so a particular intent will control a general one that is inconsistent with it." Mont. Code Ann. § 1-2-102.

44. "Where a taxing statute is susceptible of two constructions, any reasonable doubt as to persons intended to be within the particular tax should be resolved against the taxing authority." *Nice v. State*, 161 Mont. 448, 453, 507 P.2d 527, 530 (1973).

Statutes on Agricultural Classification

45. DOR must classify all taxable lands, appraise all taxable city and town lots, appraise all taxable rural and urban improvements, and "maintain current" such classification and appraisal. Mont. Code Ann. § 15-7-101.

46. The statute DOR relies on for legislative authorization to make the rules in question requires DOR to "administer and supervise a program for the reappraisal of all taxable property within class three under 15-6-133...." Mont. Code Ann. § 15-7-111.

47. Class 3 property includes "agricultural land as defined in 15-7-202." Mont. Code Ann. § 15-6-133.

48. Agricultural land includes "[c]ontiguous or noncontiguous parcels of land totaling less than 20 acres under one ownership that are actively devoted to agricultural use are eligible for valuation, assessment, and taxation as agricultural each year that the parcels meet any of the following qualifications: .... the parcels produce and the owner or the owner's agent, employee, or lessee markets not less than $1,500 in annual gross income from the raising of agricultural products as defined in 15-1-101."[1] Mont. Code Ann. § 15-7-202(2).

49. Agricultural products include fruit. Mont. Code Ann. § 15-1-101(1)(a)(i).

50. Montana Code Annotated § 15-7-201 states the legislative intent for valuing agricultural property: "Because the market value of many agricultural properties is based upon speculative purchases that do not reflect the *productive capability* of agricultural land, it is the legislative

[1] Mont. Code Ann. § 15-7-202(2)(a) includes an exception for grazing land that is inapplicable here.

intent that bona fide agricultural properties be classified and assessed at a value that is exclusive of values attributed to urban influences or speculative purposes." (emphasis added).

51. Statue allows for agricultural classification on land parcels totaling less than 20 acres if they are "actively devoted to agricultural use" and produce "not less than $1,500 in annual gross income from the raising of agricultural products as defined in 15-1-101." Mont. Code Ann. § 15-7-202.

52. In *Northwest Airlines, Inc. v. State Tax Appeal Bd.*, 221 Mont. 441, 445, 720 P.2d 676, 678 (1986), the Montana Supreme Court struck down DOR's decision to tax an airline on miles flown over Montana nonstop. The Court concluded "[t]he language of the statutes expresses no intent to consider activity other than that in Montana. Construing this language in favor of the taxpayer, as we must, we find that DOR had no statutory authority to include nonstop flyover miles in the numerator of the apportionment formula." *Northwest Airlines*, 221 Mont. at 445, 720 P.2d at 678.

53. As the Court found in *Northwest Airlines*, the plain language of the statute here is clear that for parcels smaller than 20 acres there is one and only one criterion for classification as agricultural land: "$1,500 in annual gross income from the raising of agricultural products." *See* Mont. Code Ann. § 15-7-202.

54. Furthermore, the negative-implication cannon (*expressio unius est exclusio alterius*) requires interpreting "the expression of one thing in a statute to imply the exclusion of another." *Dukes v. City of Missoula*,

2005 MT 196, ¶ 15, 328 Mont. 155, 119 P.3d 61. By only including annual revenue in the statute the legislature excluded acreage from consideration.

55. The Board is unable to find any statutory support for DOR's minimum acreage requirement. The legislature neither authorized nor directed DOR to makes rules requiring a minimum acreage for agricultural classification, specialty crop or otherwise, and the adoption of entirely new criteria for classification is an exercise of power constitutionally reserved to the legislative branch.

56. From the above we conclude that the legislature intended and authorized one criterion for agricultural classification of parcels smaller than 20 acres: $1,500 in annual gross agricultural income.

Valuation of Improvements on Agricultural Land

57. DOR argues that statute and rules require one acre of land (with improvements) in addition to at least one acre that could be devoted to agricultural cultivation. (MTAB Hrg. Transcr. 50, 51, 52:5-15.) DOR admitted that under its reading the total area devoted to agriculture could be less than one acre. (Id. 54:12-20.)

Statutes on Valuation of Improvements on Agricultural Land

Mont. Code Ann. § 15-7-206.

58. "One acre of land beneath agricultural improvements on agricultural land, as described in 15-7-202(1)(c)(ii) [residential use on agricultural

land], is valued at the class with the highest productive value and production capacity of agricultural land." Mont. Code Ann. § 15-7-206.

59. DOR misreads the statute.

60. The statute simply changes the *valuation* of a part of land that is otherwise classed agricultural. The statute takes for granted that such land is still classed the same as the orchard: agricultural. The intent of this statute is simply to impute the highest valuation for agricultural land.

61. The use of the term "one acre of land" in the statute does not create an acreage ownership requirement, but rather delineates the extent to which the statute's effect (revaluation) applies. The one acre is not a threshold to trigger the statute but is instead a ceiling above which revaluation is not applied.

62. In essence, the statute imputes a uniform revaluation on one acre of agricultural classified land if any residential use exists, regardless of the parcel or dwelling's actual size.

63. For example, a 20 acre agricultural parcel with a sprawling 1 acre villa would see one acre revalued at the highest agricultural value. Similarly, a 20 acre agricultural parcel with a 100 square foot cabin would also see one acre revalued. Neither would be reclassified as residential.

Administrative Rule on Valuation of Improvements on Agricultural Land — Mont. Admin. R. 42.20.655

64. Finally, the administrative rule on the subject does not support DOR's argument but rather comports with the Board's understanding and interpretation of Mont. Code Ann. § 15-7-206.

65. "An agricultural valuation will be made for each one-acre area beneath each residence(s) located on [the various types of agricultural land].... Each one-acre area beneath the residence(s) on agricultural land as stated in (1) shall be appraised according to the highest productivity value of *agricultural* land." Mont. Admin. R. 42.20.655(1) (emphasis added).

66. This rule explains more clearly what the statute states unartfully: up to one acre of agricultural land with a dwelling is revalued at the highest productive value. Neither statute nor rule impose a minimum acreage requirement.

* * *

67. The record establishes that Beyer-Wards run a bona fide agricultural operation which more than satisfies the only statutory criteria for agricultural classification: $1,500 annual agricultural revenue.

68. DOR's promulgation of Mont. Admin. R. 42.20.601(7) and 42.20.683(12)(a) unlawfully exceeded the Legislature's intent and grant of authority by adding an acreage requirement where statute explicitly sets only one qualification: $1,500 annual agricultural revenue.

69. The rules arbitrarily deny agricultural status to orchards using modern varietals and growing techniques which despite their small size are

capable of producing many times the statutory revenue requirement of $1,500 annual agricultural revenue. We are unable to give DOR's rules full effect.

70. Neither Mont. Code Ann. § 15-7-206 nor Mont. Admin. R. 42.20.655, impose a minimum acreage requirement for agricultural classification of properties with dwellings, but rather revalue an area up to one acre on such properties, regardless of their acreage.

71. It is not lost on the Board that without agricultural classification the land in question has a much higher tax value as residential property. Until the Montana Legislature passes laws to draw that distinction in land classification, the taxpayers have met the legal requirements under the law as it is written for the parcel to be classified as agricultural, not residential.

ORDER

72. Beyer-Wards' appeal and complaint is **granted**.

73. DOR is **ordered** to classify as agricultural the property at 14533 Grandview Ln., Bigfork, identified as geocode 15-3708-19-2-04-08-0000; legal description S19 T26 N, R19 W, C.O.S. 4602, Tract 2. Up to one acre is to be valued at the highest productive value and production capacity of agricultural land, any remaining acreage is to be valued according to its use as a bona fide agricultural property.

Ordered March 25, 2016.

David L. McAlpin, *Chairman*
MONTANA TAX APPEAL BOARD

Stephen A. Doherty, *Member*
MONTANA TAX APPEAL BOARD

Valerie A. Balukas, *Member*
MONTANA TAX APPEAL BOARD

Notice: You are entitled to judicial review of this Order by filing a petition in district court within 60 days of the service of this Order. Mont. Code Ann. § 15-2-303(2).

Certificate of Service

I certify that I caused a true and correct copy of the foregoing Findings of Fact, Conclusions of Law, and Order to be sent by United States Mail via Print and Mail Services Bureau of the State of Montana on 25th of March, 2016 to:

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Lynn Cochran

Lynn Cochran, *Administrative Officer*
MONTANA TAX APPEAL BOARD