

OHIO BOARD OF TAX APPEALS

Kirk & Ackley Enterprises #2,)
)
 Appellant,) CASE NOS. 2002-R-2557
)
 vs.) (REAL PROPERTY TAX CAUV)
)
) DECISION AND ORDER
 Franklin County Board of Revision and)
 Franklin County Auditor,)
)
 Appellees.)

APPEARANCES:

For the Appellant - Havens Willis Law Firm, LLC
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For the County Appellees - Ron O'Brien
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Entered June 4, 2004

Ms. Jackson, Ms. Margulies, and Mr. Eberhart concur.

This matter is before the Board of Tax Appeals pursuant to a notice of appeal filed by Kirk & Ackley Enterprises #2 (“K&A”). K&A appeals from a decision of the Franklin County Board of Revision (“BOR”), in which the BOR denied the subject property Current Agricultural Use Valuation (“CAUV”) status for tax year 2001.

The subject property is identified in the Franklin County Auditor’s records as Permanent Parcel Number 080-00319 and is located in the city of Westerville – Westerville

City School District taxing district. The subject property was originally a part of a larger parcel, which was approximately ninety-four acres in size. The parcel at issue, however, is comprised of only approximately twenty-three acres.

The Board of Tax Appeals now considers this appeal upon the notice of appeal, the statutory transcript (“S.T.”) certified to this board by the BOR, and the record of the evidentiary hearing (“H.R.”), including exhibits (“Exs.”). K&A called Mr. Gilman D. Kirk, Jr. and Mr. Kevin L. Scott as witnesses on its behalf. The BOR called Mr. Mark Calhoun, Deputy Auditor for Franklin County, as a witness. The parties waived briefs in this matter.

I. A PRELIMINARY MATTER

Before considering the merits of K&A’s appeal, the board must first address an oral motion made at the evidentiary hearing upon which the board reserved ruling. K&A states that in response to its request for interrogatories, request for admissions, and request for the production of documents, the BOR stated that it was relying solely on the statutory transcript. However, at the hearing before the board, the BOR called Mr. Mark Calhoun, Deputy Auditor for Franklin County, to testify. K&A submits that the BOR had a duty to supplement its discovery. Since it failed to do so, the BOR should now be foreclosed from calling Mr. Calhoun as a witness. The BOR claims that since Mr. Calhoun testified and presented documents at the BOR, K&A cannot be surprised or prejudiced by Mr. Calhoun’s testimony before the board.

Ohio Adm. Code 5717-1-11(A) allows for discovery by deposition upon oral examination or written questions, written interrogatories, production of documents or tangible things or permission to enter upon land or other property, and requests for

admissions. Further, it provides that the “Ohio Rules of Civil Procedure” shall be followed for discovery purposes. Civ.R. 26(E)(2), then, requires that “[a] party who knows or later learns that his response [to discovery] is incorrect is under a duty seasonably to correct the response.” Ohio Adm. Code 5717-1-14 (A)(2) provides that a party’s failure to comply with the discovery rules or an order of the board may result in sanctions, including “[t]he prohibition against introducing matters into evidence ***.” See, also, *ANR Pipeline Co. v. Zaino* (Interim Order, Aug. 23, 2002), BTA Nos. 2001-K-693, 2001-K-694, and 2002-K-43, unreported. This exclusion applies also to expert testimony. *Jones v. Murphy* (1984), 12 Ohio St.3d 84; *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83; *Vaught v. Cleveland Clinic Foundation*, 98 Ohio St.3d 485, 2003-Ohio-2181; *Anderson v. Nunnari* (Nov. 16, 2000), Cuyahoga App. No. 77241, unreported; *Warren Local Schools Bd. of Edn. v. Washington Cty. Bd. of Revision* (June 3, 1994), BTA No. 1992-H-1000, unreported; *Westover Village LTD v. Hamilton Cty. Bd. of Revision* (Nov. 24, 1995), BTA No. 1995-M-345, unreported; *Katz v. Cuyahoga Cty. Bd. of Revision* (Nov. 19, 1997), BTA No. 1997-N-1765, unreported; *Fishland Prop. Corp. v. Cuyahoga Cty. Bd. of Revision* (Interim Order, Dec. 9, 1997), BTA No. 1996-T-1760, unreported.

In the instant case, the BOR failed to supplement its discovery responses with no good cause shown. Therefore, the board will impose the sanction of excluding the testimony of the BOR’s witness, Mr. Mark Calhoun, and will not consider this evidence in rendering its decision. As part of the sanction, K&A also requested that the board prohibit the BOR’s counsel from cross-examining K&A’s witnesses. This the board will not do. The

cross-examination of K&A's witnesses will not be excluded and will be considered by this board.

II. THE MERITS

The subject property has been owned by the Kirk family since 1902. Mr. Kirk testified that it had always been used as a farm. In 1996, the Cooper Road extension dissected the property. Mr. Kirk stated that as part of that construction project, heavy equipment was used and debris was left on the subject property. According to Mr. Kirk, because of the compaction of the soil from the heavy equipment, damage to the drainage for the property resulted and crop production decreased.

In 1997, K&A hired a lifelong farmer, Mr. Scott, to farm this parcel. In an effort to make the property more productive, it was decided that the existing topsoil would be taken off and replaced, and the grade would be raised and leveled. This was to be done in segments of five or six acres at a time. However, Mr. Scott testified that every inch of the subject property that could be planted was planted each year.

In 2000, the auditor's office conducted a routine inspection of the subject property to determine whether the parcel continued to qualify for CAUV status. Mr. Calhoun, Deputy Auditor, determined that the property was no longer being used exclusively for agricultural purposes and sent a letter informing K&A that the land was being removed from the CAUV program. Mr. Kirk contacted Mr. Calhoun, explained that K&A was excavating to correct the damage and to improve the property's productivity, and assured Mr. Calhoun that K&A would be planting winter wheat on the property. It was then determined to leave the property on CAUV status for the year 2000.

Again in 2001, the auditor's office inspected the subject property and again determined that the property had been converted from agricultural use. Thereafter, the land was removed from the CAUV program for 2001. K&A filed a complaint with the BOR. The BOR did not restore CAUV status in its final determination. It is from that determination that K&A appealed.

It was the testimony of both Mr. Kirk and Mr. Scott that at all relevant times, at a minimum, wheat or hay was sown on the subject property in every year, including 2001. In some years, other crops were also cultivated. Because of the type of soil and the damage from heavy equipment, crop production was poor. In addition, this parcel had a problem with damage from geese, deer, and groundhogs. However, the land produced straw, haylage, and forage used to bed and feed horses and buffalos.

Mr. Scott produced evidence of expenses for seed and no-till equipment that were incurred with planting the parcel in November and December of 2000. Exs. 14, 15, and 16. Also, Mr. Scott identified his invoice to Mr. Kirk for his own services. Ex. 17.

Land devoted exclusively to agricultural use is identified by county auditors and appraised under R.C. 5713.03. However, such land is also appraised in accordance with rules adopted by the Tax Commissioner for valuation of such specially used land. R.C. 5713.31.

R.C. 5713.30 identifies the requirements a property must satisfy to qualify as land devoted exclusively to agricultural use:

“As used in sections 5713.31 to 5713.37 and 5715.01 of the Revised Code:

“(A) ‘Land devoted exclusively to agricultural use’ means:

“(1) Tracts, lots, or parcels of land totaling not less than ten acres that, during the three calendar years prior to the year in which application is filed under section 5713.31 of the Revision Code, and through the last day of May of such year, were devoted exclusively to commercial animal or poultry husbandry, aquaculture, apiculture, the production for a commercial purpose of timber, field crops, tobacco, fruits, vegetables, nursery stock, ornamental trees, sod, or flowers or the growth of timber for a noncommercial purpose, if the land on which the timber is grown is contiguous to or part of a parcel of land under common ownership that is otherwise devoted exclusively to agricultural use, or were devoted to and qualified for payments or other compensation under a land retirement or conservation program under an agreement with an agency of the federal government.”

In *Chrisman v. Licking Cty. Bd. of Revision* (Sept. 19, 1986), BTA No. 1985-C-753, unreported, this board interpreted the phrase “land devoted exclusively to agricultural use.” Therein, the board construed the word “exclusively” to mean “primarily.” Hence, where land is devoted primarily to agricultural use, and such use is consistent with one or more of the enumerated purposes set forth in R.C. 5713.30(A), it is clearly entitled to CAUV status.

Land can be converted from its exclusive agricultural use, however. R.C. 5713.30 provides, *inter alia*, that conversion occurs where there is a “failure of such land or a portion thereof to qualify as land devoted exclusively to agricultural use for the current calendar year as requested by an application ***.” R.C. 5713.30(B)(3).

The question before this board is whether K&A’s use of the parcel in question during 2001 constitutes agricultural use pursuant to R.C. 5713.30 and *Chrisman*, supra. Based upon the testimony and evidence received, this board concludes that the subject

property is devoted exclusively to agricultural use, pursuant to R.C. 5713.30, and thus meets the standards for the property to retain CAUV status.

Despite the fact that at the time of the inspections by the county auditor's office there was no evidence of growing crops, K&A produced competent, probative evidence that winter wheat and hay were being grown on the subject property in the year in question and all relevant years. The planting of winter wheat can suffice to establish a right to CAUV status. See *Rocky Fork Hunt & Country Club v. Testa* (Jan. 31, 1995), Franklin App. No. 94APE07-1047, unreported.

III. THE CONCLUSION

Based upon the foregoing, the Board of Tax Appeals finds that the subject property qualifies under R.C. 5713.30 as being "devoted exclusively to agricultural use." Consequently, it is the decision and order of the Board of Tax Appeals that the final determination of the Franklin County Board of Revision must be, and the same hereby is, reversed.

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