

IN THE IOWA DISTRICT COURT FOR HARRISON COUNTY

**HARRISON COUNTY BOARD OF
REVIEW,**

Petitioner/Appellant,

vs.

**IOWA PROPERTY ASSESSMENT
APPEAL BOARD
AND
DOUG REISZ,**

Respondents/Appellees.

NO. CVCV030140

**ORDER ON PETITION FOR JUDICIAL
REVIEW OF AGENCY ACTION**

This matter came before the court on December 20, 2016, for telephone hearing on the Harrison County Board of Review's appeal of the decision of the Iowa Property Assessment Appeal Board ("PAAB") classifying Doug Reisz's property as agricultural, rather than residential. The Harrison County Board of Review ("the county") urged that because the zoning ordinance and restrictive covenants on the subject property required that its primary use be "residential," the property tax classification could not be agricultural. PAAB and Doug Reisz argued that Reisz established that the present and primary use of the property was agricultural.

The county appeared by attorney Brett Ryan. The Iowa Property Assessment Appeal Board appeared by attorneys Jessica Braunschweig-Norris and Brad O. Hopkins. Doug Reisz appeared by attorney Deborah Tharnish. The matter was submitted on the record made before PAAB and the written briefs submitted by the parties. The court also heard the oral arguments of the attorneys.

For the reasons set out below, the court concludes that PAAB's order classifying

the property as agricultural was supported by substantial evidence, properly applied the law, and was not arbitrary or capricious. PAAB's order should be affirmed.

STANDARD OF REVIEW

The district court's review of a decision of the property assessment appeal board is "limited to the correction of errors at law" (Iowa Code §441.39) and is governed by Iowa Code Chapter 17A. The burden of proof is on the Harrison County Board of Review to demonstrate that its substantial rights have been prejudiced either 1) by PAAB's erroneous interpretation of law whose interpretation has not clearly been vested with PAAB (§17A.19(10)(c)); or 2) by PAAB's determination of fact that is without basis in substantial evidence when viewing the record as a whole (§17A.19(10)(f)); or 3) by PAAB's determination being "unreasonable, arbitrary, capricious, or an abuse of discretion" (§17A.19(10)(n)).

The court notes that the county's notice of appeal included additional grounds of appeal, including PAAB's decision being unconstitutional on its face or as applied; PAAB's decision being beyond its delegated authority; PAAB's decision resulting from procedural error or a prohibited process; and PAAB's decision being made by persons not properly constituted as a decision-making body, or improperly motivated or subject to disqualification. (Notice of Appeal, ¶2 (a), (b), (d), and (e)). These assignments of error were not briefed or argued by the county, and the court does not consider them.

In contrast, the county's notice of appeal did not specify §17A.19(10)(n) (arbitrary and capricious) as a ground for appeal, yet the county relied upon this ground in its

appeal brief and oral argument before this court. PAAB objected to the court's making a determination regarding this alleged error. The court elected to consider this ground over PAAB's objection, as set out below.

If the court concludes that PAAB's interpretation of law was erroneous, the court may substitute its interpretation of the law for that of PAAB. §17A.19(10)(c).

If the court concludes that PAAB's findings of fact were not supported by substantial evidence, then the court may substitute its own factual findings. "Substantial evidence" is defined as the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person. Iowa Code §17A.19(10)(f)(1). The question for the reviewing court on appeal of an administrative agency's fact-finding decision is not whether the evidence supports a different factual finding from the one made by the agency, but whether the evidence supports the findings actually made. *Meyer v. I.B.P., Inc.*, 201 N.W.2d 213, 218 (Iowa 2006).

Finally, if the court determines that PAAB's action was "arbitrary and capricious," the court may substitute its own findings and apply the law. Action is arbitrary and capricious when it is taken without regard to the law or facts of the case, or taken without regard to established rules or standards. *Soo Line R.R. v. Iowa Dept. of Transp.*, 521 N.W.2d 685, 688-89 (Iowa 1994); *Barnes v. Iowa Dept. of Transp.*, 385 N.W.2d 260, 262 (Iowa 1986). Agency action is unreasonable when it is clearly against reason and evidence. *Id.*

FACTUAL BACKGROUND

There is little dispute about the facts involved.

Doug Reisz grew up on an Iowa farm until his family moved to California when he was about twelve (transcript, p.9). He worked in farming during high school. He returned to Iowa in 2008. Lots in the Harris Grove subdivision in rural Harrison County ranged from three acres to the largest lot of fifteen acres. Reisz and his wife purchased the fifteen-acre parcel for \$150,000 in 2008, built their home, and moved to the property in 2009. He testified that “my intention was to farm so I bought the biggest lot” (*id.*). The developer of the subdivision farmed adjacent ground and several of the undeveloped lots in the subdivision. Corn, beans and alfalfa are common around the development. According to Reisz, every lot in the subdivision has been farmed in some capacity with grasses, alfalfa, or row crops during the seven years he has lived there (*id.*, p. 10).

The Reisz home has 2664 square feet above grade, 2400 square feet of basement, a three-car garage, deck and covered deck. There is a 1200-square-foot outbuilding on the property. The January 2015 assessment was \$359,800, with \$109,513 allocated in land value and \$250,287 in improvement value. After an equalization order, the new 2015 assessment was \$399,378, with \$121,559 allocated in land value and \$277,819 allocated in improvement value. Reisz has a mortgage of \$465,000 on the property and valued it at \$550,000 in disclosures associated with his loan from the U.S. Department of Agriculture (*id.*, p. 43).

The \$10,000 per acre purchase price for Reisz’s parcel in 2008 was higher than

the 2015 average price of farm ground, according to the assessor. Average farm pricing in 2015 was about \$7500 per acre (transcript, p. 54).

The property is zoned R-6, planned residential development, and is subject to restrictive covenants. Before its development, the subdivision and Reisz's parcel were used continually for agriculture and were classified agricultural. Once subdivided, the individual lots continued to be classified agricultural until they were improved. Once improved, the lots were classified as residential. The R-6 zoning ordinance requires that a property's principal use be single-family homes (Ex C, Section 13.41). Accessory uses must be subordinate to the principal use. Permitted accessory uses in the R-6 zone include some agricultural uses. Aronia berry farming is not a prohibited accessory use. Swine are not permitted but cattle and horses are allowed in quantities related to acreage.

Similarly, the restrictive covenants do not prohibit crop production, as long as that use does not create a nuisance. There was no evidence that Reisz's agricultural activity had created a nuisance.

Starting in 2009, Reisz raised alfalfa and corn (transcript, p.36). He incorporated the family farm enterprise as Harris Grove Farms. In 2010 he planted 24 fruit trees on approximately one acre and planted 240 feet of raspberries. Reisz had contemplated raising grapes, but rejected grapes in favor of raising aronia berries. Reisz learned about aronia berries from an aronia expert and nearby farmer, Vaughn Pitz of Sawmill Hollow Farms. In 2014, Reisz began preparing to plant aronia berries. He determined

that the market for organic aronia berries was more lucrative than conventionally raised berries. He undertook the organic certification process by disking 25 truckloads of manure onto his eight-acre aronia plot. He dug a well, installed a five-mile drip-line along each row, planted cover crops, and used three 55-gallon drums of organic vinegar as an herbicide.

About eight acres of the fifteen-acre parcel were planted with 8500 aronia bushes. The berries were in their second year of growth in 2015 and were expected to bear a harvestable crop in 2016. Reisz applied for and received a microloan from the USDA for his aronia operation. His business plan projected that the berries would yield 18-22 pounds per bush in year six. He believed that the wholesale price per pound would be \$2 to \$3 dollars. PAAB determined that the potential wholesale value of his crop when mature would be between \$340,000 and \$510,000 (PAAB order, p. 4). Reisz has a five-year renewable contract to sell his aronia berries to Sawmill Hollow Farms. Because of his startup costs, Reisz had a farming loss of \$55,000 in 2014. He had not profited from farming since he moved to the property.

ANAYLSIS

1. Did PAAB properly interpret the law regarding the classification of property as agricultural?

The parties agree that the classification of property for property tax assessment purposes is governed by Iowa Administrative Code r. 701-71.1 et al. (2011).

Classifications are based on the best judgment of the assessor exercised following the

guidelines set out in the rule. r. 701-71.1(1). Boards of review and assessors are required to adhere to the rules when they classify property and exercise assessment functions. r. 701-71.1(2). There can be only one classification per property. r. 701-71.1(1).

Agricultural property is defined as follows:

Agricultural property shall include all tracts of land and the improvements and structures located on them which are **in good faith** used **primarily** for agricultural purposes except buildings which are primarily used or intended for human habitation as defined in subrule 71.1(4). Land and the nonresidential improvements and structures located on it shall be considered to be used primarily for agricultural purposes if its principal use is devoted to the raising and harvesting of crops or forest or fruit trees, the rearing, feeding, and management of livestock, or horticulture, **all for intended profit**.

. . .

r. 701-71.1(3) (emphasis added).

Residential property is defined as follows:

Residential property shall include all lands and buildings which are primarily used or intended for human habitation [...] including those buildings located on agricultural land. Buildings used primarily or intended for human habitation shall include the dwelling as well as structures and improvement used primarily as a part of, or in conjunction with, the dwelling. This includes but is not limited to garages, whether attached or detached, tennis courts, swimming pools, guest cottages, and storage sheds for household goods. [...] Residential real estate located on agricultural land shall include only buildings as defined by this subrule.

r. 701-71.1(4).

The parties agreed that property is to be classified “according to its present use and not according to any highest and best use.” r. 701-71.1(1). “Under administrative regulations adopted by the . . . Department . . . the determination of whether a particular

property is 'agricultural' or [residential] is to be decided on the bases of its primary use." *Sevde v. Bd. of Review of Ames*, 434 N.W.2d 878, 880 (Iowa 1989). Property classified as agricultural may include a residence.

The county contended that PAAB ignored legal precedent that permitted the assessor to consider not only the property's present use but other factors to determine whether it was being used "in good faith" for agricultural purposes.

In addition to actual use of the property, "good faith" may also include the following: (1) is the parcel set off and awaiting development; (2) what permitted uses does current zoning allow; (3) if the parcel is being offered for sale, or if it were, would it be viewed by the marketplace as other than agricultural; (4) how does the land conform to other surrounding properties; (5) what is the actual amount of income produced and from what sources; and (6) what is the highest and best use of the property.

Colvin v. Story County Bd. of Review, 653 N.W.2d 345, 350 (Iowa 2002); *DFCA Inc., v. Downing ex rel Scott County*, 260 N.W.2d 208, 2008 WL 4877049 (Ia. Ct. App. November 13, 2008) (unpublished opinion). PAAB submitted that the county had not preserved error on the issue of "good faith." Moreover, PAAB urged that the county had misinterpreted *Colvin*, particularly in regard to any analysis of a property's "highest and best use." While the court agrees with PAAB that *Colvin* is not persuasive authority regarding how a property should be classified by an assessor, the *Colvin* factors do appear to assist in determining an owner's good faith use of property as agricultural. The court chooses to address this issue, despite any purported failure of the county to raise it before PAAB.

PAAB's ruling did consider the *Colvin* factors. As to the first *Colvin* factor, there

was no argument that the Reisz property had been improved in 2009 by the construction of their 2664-square foot home worth more than \$500,000 (PAAB order, p. 1). The 2015 assessment was \$399,378, with \$121,599 allocated in land value and \$277,819 in improvement value (*id.*). PAAB noted that the county assessor testified that once a site in the subdivision is purchased and improved, it is reclassified from A-1 agricultural to R-6 residential (*id.*, p. 4).

PAAB also considered the second *Colvin* factor, namely what permitted uses were allowed under the current zoning of the property. PAAB noted the testimony of the assessor and reviewed the county zoning ordinance that required the property's principal use for zoning purposes to be single-family development (*id.*, p. 4-5). PAAB found that permitted accessory uses—including some, but not all, agricultural uses—must be subordinate to the principal residential use (*id.*, p.4). Additionally, PAAB noted that the restrictive covenants on the property restricted some typical agricultural activity, such as forbidding any swine on the premises and limiting placement and types of fencing (*id.*, p. 5). The county agreed that there were agricultural activities taking place on the Reisz parcel but contended that the agricultural activities had to be subordinate to the primary use of the property as residential. There had been no complaints from neighbors about any of Reisz's farming activities, nor had there been any zoning code violations alleged against him.

In addressing the third *Colvin* factor, PAAB considered evidence from the assessor that other properties in the subdivision that were listed for sale were marketed

as residential, rather than agricultural (*id.*, p. 5). One property, an undeveloped twelve-acre parcel adjacent to the Reisz property, was ground that Reisz testified he was considering buying in order to expand his aronia berry operation. PAAB noted that it was marketed as residential and listed at \$120,000, a price that was roughly double the price of typical farm ground, according to the assessor (*id.*, p. 5).

The fourth *Colvin* factor—how the tract conformed to surrounding properties—also was scrutinized by PAAB. PAAB’s factual findings included these: the Reisz site and the subdivision were used continually for agriculture prior to their development; after the subdivision was platted, the individual sites were classified agricultural until they were improved; and the original developer row-cropped adjoining agricultural land and some of the undeveloped lots within the subdivision (*id.*, p. 2). PAAB reviewed evidence regarding nearby residences for sale (*id.*, p. 5).

PAAB also analyzed evidence regarding the fifth *Colvin* factor: the actual amount of income produced and from what sources. PAAB paid particular attention to Reisz’s business plan, his microloan from the U.S. Department of Agriculture, his research of and knowledge about aronia berry production and marketing, and his five-year contract to sell his product (*id.*, pp. 3-4). PAAB, like the county, found that Reisz “had recorded losses from the agricultural operation” (*id.*, p. 7) that amounted to more than \$55,000.00 in 2014, his first year of aronia farming. Unlike the county, however, PAAB analyzed Reisz’s projected yields in future years that showed potential wholesale value of his crop after six years to be between \$340,000 and \$510,000 (*id.*, p. 4). The

county argued that given the present agricultural loss of \$55,000, Reisz will never be able to generate a profit on the property, especially compared to his investment in his home valued at more than \$500,000. This claim is not directly supported by any of the record reviewed by the court. Rather, the undisputed evidence showed that after six years, Reisz's aronia operation may be worth as much as or more than his home.

Finally, the sixth *Colvin* factor, the property's highest and best use, was considered but rejected by PAAB. Implicit in the county's stance is the argument that a residential use is the highest and best use of the property, and thus the property should be classified residential. However, the county assessor testified that assessment and classification law forbid assessors from classifying property according to any highest and best use, and instead require classification on present use. r. 701-71.1(1); (transcript, p. 75, ll.13-18). The court's review of the record did not reveal any direct evidence of what the "highest and best" use of the property is.

To the extent that the *Colvin* factors aid in determining whether Reisz's use of the property is in good faith agricultural, some of the factors weigh in favor of an agricultural classification and others seem to favor residential. The property has been developed with a large home, yet a residential structure is permitted on land classified as agricultural. Reisz's aronia plantings, orchard and timber are permitted agricultural uses under the zoning ordinance and restrictive covenants. Properties near Reisz's were both residential and agricultural. Because of the start-up cost of his aronia farm, Reisz had a loss and not a profit in the current tax year. However, the evidence showed he

had carefully planned to reap a profit in future years.

PAAB's analysis directly addressed "the difficulty in classifying a property with multiple uses" (*id.*, p. 7). Ultimately PAAB determined that the law required PAAB not to consider zoning or restrictive covenants alone in determining the tax classification of the property. Relying on the reasoning in *Sevde v. Bd. of Review of Ames*, 434 N.W.2d 878, 880 (Iowa 1989), PAAB concluded that the fact that the Reisz family continued to use the property as their home did not preclude the property from being classified as agricultural. In *Sevde*, the property owner built storage units on 1.4 acres of a 21-acre plot that had historically been used and classified agricultural. The storage units produced more income than the agricultural use. The Supreme Court upheld the district court's determination that the primary use of the property remained agricultural, concluding that "an activity which is not a primary use of the property does not become such because it produces more revenue in a particular year than the dominant activity." *Sevde* at 880.

The court concurs that while zoning and covenants may be factors for consideration, they cannot be the sole or determining factor for classification.

PAAB properly interpreted the law when it deemed the property should be classified agricultural.

2. Does substantial evidence support PAAB's determination that Reisz's use was "agricultural," "present and primary," "in good faith," and with "intent to profit"?

a. Agricultural

There is no real factual dispute that Reisz was engaged in agricultural activities as defined in Iowa Administrative Rule 701-71.1(3) (“devoted to the raising and harvesting of crops or forest or fruit trees, the rearing, feeding, and management of livestock, or horticulture”). At least eight acres were planted in aronia berry bushes, one acre in fruit trees and other space devoted to raspberries. Reisz had a five-year contract to sell his aronia crop.

Substantial evidence supported PAAB’s determination that Reisz was engaged in agriculture.

b. Present and primary use

The county urged that Reisz’s agricultural use of the property could not be the present and primary use, in light of his significant investment in his residence, his farming loss in 2015, and the fact that his property was zoned residential. However, other evidence supported PAAB’s conclusion that the present and primary use of the property was agricultural.

Substantial evidence showed that more than half of the parcel is dedicated to the aronia operation, with a minimum of eight acres and up to ten acres planted in aronia bushes. Reisz also had an acre of fruit trees, 240 square feet of raspberries and 120 linear feet of grapes. Reisz’s work in digging the well, installing five miles of irrigation drip lines, preparing the soil with manure, planting cover crops, qualifying for organic certification, developing a business plan, receiving a USDA loan, and entering a five-

year contract to sell his berries support PAAB's finding that the present and primary use of the property is agricultural.

c. In good faith

As set out in PAAB's brief, "good faith" is not specifically defined in rule 701-71.1. The county argued that whatever Reisz's subjective intention might be to profit in the future, he cannot in good faith presently use the property for agriculture, because he has not yet made a profit. Good faith has been viewed by the Iowa Supreme Court both objectively and subjectively. *City of Riverdale v. Diercks*, 806 N.W.2d 643, 655 (Iowa 2011) (stating that "sometimes [good faith] is viewed objectively and at other times, subjectively"). The Iowa Supreme Court has defined good faith as "honesty of intention" or "subjective honest belief." *Haberer v. Woodbury Cnty.*, 560 N.W.2d 571, 575 (Iowa 1997); *Garvis v. Scholten*, 492 N.W.2d 402, 404 (Iowa 1992). Black's Law Dictionary defines good faith as "a state of mind consisting in (1) honesty in belief or purpose . . . or (4) absence of intent to defraud or seek unconscionable advantage." BLACK'S LAW DICTIONARY (10th ed. 2014).

Substantial evidence supports PAAB's determination that Reisz's use of the property for agriculture was in good faith, whether viewed objectively or subjectively. Reisz grew up on a farm and returned to Iowa with the intent to farm with his children. He purchased the largest lot in the development after talking with the developer about his plan to farm, specifically row cropping. He researched the aronia berry and developed a business plan. He obtained a microloan from the USDA. His testimony

was consistent and showed that significant thought and reasoning had gone into his operation. Reisz compared himself to other farmers who had to start small before they could realize their goal.

d. Intent to profit

Substantial evidence supports PAAB's determination that Reisz intended to profit from his agricultural work. While the county pointed to evidence that Reisz was employed fulltime away from his farm, other evidence showed that he planned his aronia operation with an intent to profit.

Reisz's inputs for the aronia operation were significant. He had a loss of over \$55,000 in 2014 because he installed the well, built the drip-lines, prepared the soil with truckloads of manure, planted 8500 aronia bushes, cultivated, planted cover crops, weeded, and used organic herbicide. Aronia bushes are not productive until their third year. By year six, Reisz's testimony and business plan show that he can anticipate gross revenue between \$300,000 and \$500,000.

In reviewing the factual findings made by PAAB, the court is not concerned with whether the evidence supports a different factual finding from the one made by the agency, but whether the evidence supports the findings actually made.

The court concludes that PAAB's findings that Reisz's present and primary use of the property as agricultural was in good faith.

3. Is PAAB's conclusion that the property is agricultural arbitrary and capricious?

The county posits that PAAB acted irrationally by ignoring the zoning ordinance and restrictive covenants on the property.

The court disagrees. PAAB acknowledged the conundrum faced by assessors and boards of review when dealing with property that accommodates more than one use. This is not a zoning infraction case or a nuisance action. The agricultural uses on Reisz's property are not forbidden by either the zoning ordinance or the restrictive covenants. More importantly, zoning uses alone do not control the tax classification of property.

The court concludes that PAAB's determination that the property's classification is agricultural is reasonable and supported by the evidence.

IT IS THEREFORE ORDERED that PAAB's classification of the property as agricultural is AFFIRMED.



State of Iowa Courts

Type: OTHER ORDER

Case Number CVCV030140
Case Title HARRISON CNTY BRD OF REVIEW VS IA PROPERTY ASSESSMENT ET AL

So Ordered

A handwritten signature in black ink, appearing to read "Kathleen A. Kilnoski".

Kathleen A. Kilnoski, District Court Judge,
Fourth Judicial District of Iowa