

**PROPERTY ASSESSMENT APPEAL BOARD
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

PAAB Docket No. 2019-025-10073R

Parcel No. 12-15-100-005

Robert Wilkening,

Appellant,

vs.

Dallas County Board of Review,

Appellee.

Introduction

This appeal came on for hearing before the Property Assessment Appeal Board (PAAB) on August 24, 2020. Robert Wilkening was represented by attorney David Hibbard. Assistant Deputy Assessor Brian Arnold represented the Board of Review.

Robert Wilkening owns a residentially classified property located at 26346 V Avenue, Waukee, Iowa. Its January 1, 2019, assessment was set at \$600,320, allocated as \$268,900 in land value and \$331,420 in dwelling value. (Ex. A).

Wilkening petitioned the Board of Review asserting the subject property was misclassified as residential under Iowa Code section 441.37(1)(a)(3). He believes the correct classification is agricultural. (Ex. C). The Board of Review denied the petition. (Ex. B).

Wilkening then appealed to PAAB reasserting his misclassification claim, and also claiming his assessment was not equitable when compared with assessments of other like property, that there was an error in the assessment, and the assessment was in violation of the Constitution of Iowa, presumably the Equal Protection Clause. Iowa Code § 441.37(1)(a)(1, 3 & 4).

General Principles of Assessment Law

PAAB has jurisdiction of this matter under Iowa Code sections 421.1A and 441.37A (2019). PAAB is an agency and the provisions of the Administrative Procedure Act apply to it. Iowa Code § 17A.2(1). This appeal is a contested case.

§ 441.37A(1)(b). PAAB may consider any grounds under Iowa Code section 441.37(1)(a) properly raised by the appellant following the provisions of section 441.37A(1)(b) and Iowa Admin. Code Rule 701-126.2(2-4). PAAB determines anew all questions arising before the Board of Review related to the liability of the property to assessment or the assessed amount. § 441.37A(1)(a-b). New or additional evidence may be introduced, and PAAB considers the record as a whole and all of the evidence regardless of who introduced it. § 441.37A(3)(a); *see also Hy-Vee, Inc. v. Employment Appeal Bd.*, 710 N.W.2d 1, 3 (Iowa 2005).

Findings of Fact

The subject property is 44.25 acres, 39.04 of which qualify for a Forest Reserve exemption. (Ex. A). It is improved with a two-story home built in 1993. The home has 3192 square feet of gross living area; a walk-out basement with 900 square feet of living-quarter quality finish; a screened porch, a deck, and an attached two-car garage. It is listed as high quality construction (Grade 2-10) and in normal condition. The property is also improved with a 2052 square foot barn built in 1970, with an addition in 2004. A 180-square-foot potting shed was moved to the property in 2004. (Ex. A). The classification of the property was changed from agricultural to residential in the January 1, 2019 assessment.

Wilkening testified he bought the land in 1990 and personally built the home between 1991 and 1996. He stated he is 73 years old and retired from his life-long work as a self-employed plumber and electrician. He stated he has not worked much as a plumber or electrician since the beginning of the COVID-19 pandemic this spring. He currently lives on his social security, retirement savings, and income from his "truck farm." Wilkening indicated his concern over his ability to live on social security and

retirement savings alone and stated he needed to supplement that income with income from selling his produce.

Wilkening described his property as mostly covered with mature trees and not a typical yard. He has received a Forest Reserve exemption for almost 40 of his acres for as long as he has owned the land. He stated his home and immediate yard comprise between one-half to one acre of his property with his barn and garden area comprising about two to three more acres. (Ex. C, page 4). Wilkening testified he has always had a garden, but prior to 2017 the produce was mostly used for personal consumption and for friends and family. He stated he has been increasing the size of his gardens, which are largely located around the barn and potting shed. He also has some fruit trees (pear, apple, cherry, and peach) but has never sold their produce because he does not use chemicals and the fruit is not appealing to most consumers. (Ex. 15). On the west side of his barn Wilkening testified he has a 40 x 40 foot patch where he grows 39 tomato plants of several varieties, cucumbers, zucchini, and basil. (Ex. 13). East of the barn is his pepper patch, which he states measures 40 x 120 feet, where he grows 4-5 varieties of peppers and more tomatoes. (Ex.14). He intends to increase the size of his gardens little by little, depending on the market.

Wilkening testified he uses the heated portion of the barn to start plants in early spring. The record includes no other indication how the barn is used throughout the remainder of the year. Based on a photograph Wilkening submitted, the potting shed appears to be used for both agricultural and non-agricultural storage.

To the west of his home Wilkening has a hosta garden with several hundreds of plants that he propagates. (Ex. 12). He testified he has increased the number of plants in the last 4-5 years and in 2018 acquired more hostas from another property owner. He stated he has 15-20 varieties in an area approximately 20 x 120 feet that he intends to split and sell at farmer's markets for \$4-5 per plant. The plants were not ready to sell last year (2019), but Wilkening anticipates they will be next year (2021).

In late 2017, Wilkening testified he began incurring significant costs for his operation; he overhauled a tractor motor, purchased a large garden tiller, purchased a portable greenhouse and other garden equipment, seeds and fertilizer. These costs

totaled approximately \$3654. He also owns a disc and a rotary mower. Wilkening testified he first filed a Schedule F-Profit and Loss from Farming for the 2018 tax year. His tax preparer believed it was not necessary, but he did so by way of an amended 2018 return because he believed the Board of Review was solely focused on this document. In 2018 he reported gross sales of \$917 and expenses of \$4,185 for a net loss of \$3268. (Ex. 9). He contends his repair and other costs were all lumped into the seeds and plants expense category. According to Wilkening, he filed a Schedule F for 2019, which reflects more gross receipts, but still a net loss despite lower expenses.

In addition to his truck garden, Wilkening described his future plan for harvesting basswood trees from his property. He stated basswood trees were desired by woodcarvers who would pay \$225 per cord, which is equivalent to two trees. He testified he had made a couple of contacts with potential customers, but there was no testimony indicating he had previously sold or immediately intended to sell any of the basswood trees. His other trees, such as oaks and hickory trees, were described as having no real market value. He has cut and sold some firewood in the past, but has no intention to continue with such efforts. He did not indicate what expenses may be involved in this endeavor.

Wilkening stated he was not computer savvy and did not have a website to market his produce. He also stated he did not sell produce from his property and he did not produce a business plan. He testified his significant other assists with the marketing and selling of his produce by sending text messages or emails regarding availability and meets customers in town interested in buying. The volume of his sales was unclear. Although Wilkening referred to farmer's markets, he did not identify which, if any, he has participated in. Most recently he donated substantial amounts (one bushel) of produce to a food pantry. He stated he had tried to develop a relationship with Hy-Vee for the sale of his peppers, but to date has not been successful. We found Wilkening to be knowledgeable and sincere about his horticultural efforts, despite his multiple protestations that he is not a farmer.

Wilkening provided aerial photographs and maps of his property and surrounding properties. (Exs. 1-4). A half-mile east of his property there is a residential subdivision,

but otherwise the property surrounding his is all classified agricultural. To the north of the subject property Wilkening identified a 14.5-acre parcel with a residence. (Exs. 6-8). He testified he has been on this property and it is not crop ground, but the owners may have had horses, cows, and one rooster. According to Wilkening, this property owner also owns adjacent land to the west that is used for hay. He estimated it produced about 20 round bales annually at a price between \$40 to \$75 each. Directly east and south of his property Wilkening described a parcel used as a tree farm, owned by a business that also owns several other parcels, portions of which consist of tillable farm ground. There is no residence on the property. (Ex. 7). To the west of the subject property Wilkening described another parcel with a residence, where hay is also produced. He estimated about 10-20 round bales were produced there annually. (Ex. 8). Also, north of that property is a property where 40 bales are estimated to be produced annually.

Wilkening contends his property is similarly situated to these agricultural-classified properties and, as a result, his residential classification constitutes inequity in the assessment and violation of the Iowa Constitution. He believes his sales rival those of his neighbors, that he has a profit motive, and that the classification of his property is not uniform with similar properties. He contends the lack of guidelines for agricultural classification has resulted in non-uniform classification decisions.

Assistant Deputy Assessor Brian Arnold testified for the Board of Review. Arnold acknowledged he had not physically inspected the subject property, but rather relied on aerial photography to identify its primary use. He testified he could not locate the gardens on the property as of January 1, 2019 from Wilkening's photographs and submitted aerial photographs taken between November 2019 and March 2020 which still are difficult to make out the garden areas. (Exs. 3, 14 & D-H). In response, Wilkening testified he broke soil on his property in 2018. Nonetheless, we are convinced of their existence today based upon Wilkening's testimony and photographic evidence, including recent photos submitted after hearing. (Ex. 16-19). Arnold also acknowledged the many grey areas in classifying property as well as his understanding of the IDR

memorandum¹ spelling out the factors which assessors must consider in making their classification decision. In his opinion, the subject property's primary use was as a residence with incidental agricultural use. In his view, if the subject property was offered for sale, it would be considered residential. Arnold also registered his concern over Wilkening's plan to harvest basswood trees for income as it may jeopardize his Forest Reserve exemption. He suggested that Wilkening visit the County Conservation Office regarding this issue.

Wilkening believes Arnold is misreading the Forest Reserve provisions and that his Forest Reserve trees constitute an agricultural product or at least woodland.

Analysis & Conclusions of Law

Wilkening asserts the subject property is misclassified as residential and should instead be classified agricultural under Iowa Code section 441.37(1)(a)(3). He also asserts his classification as residential is inequitable under section 441.37(1)(a)(1) and violative of the Iowa Constitution.² We find his error claim is essentially the same as a misclassification claim. He bears the burden of proof. § 441.21(3).

Iowa assessors are to classify and value property following the provisions of the Iowa Code and administrative rules adopted by the Iowa Department of Revenue (IDR) and must also rely on other directives or manuals IDR issues. Iowa Code §§ 441.17(4),

¹ Wilkening asked PAAB to take judicial notice of an Iowa Department of Revenue directive regarding agricultural classification drafted by J.J. Severson. PAAB took judicial notice of the directive and identified it as Exhibit 20. In summary, the directive states that assessors are to use the existing administrative rules, not any other handbooks or manuals inconsistent with the administrative rules, when classifying property.

² Although Wilkening did not directly cite it, we presume he asserts a violation of Iowa's equal protection clause. IA. CONST. art. I, § 6. In *Montgomery Ward Dev. Corp. v. Cedar Rapids Bd. of Review*, 488 N.W.2d 436, 440-41 (Iowa 1992), the Iowa Supreme Court recognized that a "claim of discriminatory assessment in violation of the state and federal constitutions is sufficiently similar to a claim of inequitable assessment so as to require that it be invoked by supplying the necessary information under" Iowa Code section 441.37(1)(a)(1) (citing *Chicago & Northwestern Ry. v. Iowa State Tax Comm'n*, 137 N.W.2d 246, 253-54 (1965)). It went on to state that "[i]n all pertinent respects, [section 441.37(1)(a)(1)] parallels that standard articulated by the United States Supreme Court for evaluating whether property tax assessments are violated of the equal protection clause." *Montgomery Ward*, 488 N.W.2d at 441 (citing *Allegheny Pittsburgh Coal Co. v. County Comm'n.*, 288 US 336, 345 (1989)). Thus, we recognize Wilkening's constitutional claim hinges on a demonstration that his assessment is inequitable under section 441.37.

441.21(1)(h). IDR has promulgated rules for the classification and valuation of real estate. See Iowa Admin. Code r. 701-71.1. The assessor shall classify property according to its present use. *Id.* Classifications are based on the best judgment of the assessor following the guidelines set out in the rule. *Id.* Boards of Review, as well as assessors, are required to adhere to the rules when they classify property and exercise assessment functions. *Id.* There can be only one classification per property, except as provided for in paragraph 71.1(5) “b”. *Id.* The determination of a property’s classification “is to be decided on the basis of its primary use.” *Sevde v. Bd. of Review of City of Ames*, 434 N.W.2d 878, 880 (Iowa 1989).

Under section 441.37(1)(a)(1), a taxpayer may claim that their “assessment is not equitable as compared with assessments of other like property in the taxing district.” Wilkening cites the decision of *Eagle Foods* as a basis for the inequity claim. *Eagle Food Centers v. Bd. of Review of the City of Davenport*, 497 N.W.2d 860, 865 (Iowa 1993), stands for the proposition that assessing methods should be applied uniformly to similarly situated or comparable properties. In that case similar commercial properties were valued in a non-uniform manner and thus the assessment at issue was found inequitable. *Eagle Foods* does not directly speak to uniformity in the methods for assessment classification. Regardless, Wilkening has not presented evidence that the Assessor is employing non-uniform methods when classifying property; rather, his focus is on what he perceives to be non-uniform results.

Wilkening relies on the classification of surrounding properties to support his claim that his classification is inequitable and that he is being treated differently than similarly situated property owners. We typically find evidence of other properties’ classifications neither informative nor relevant when determining the correct classification of a specific property like Wilkening’s. See *Harding v. Dallas Cnty. Bd. of Review*, PAAB Docket No. 2019-025-00159R (March 4, 2020) and *Shaw v. Dallas Cnty. Bd. of Review*, PAAB Docket No. 2018-025-00091R. As use is the basis for classification determinations, often the record lacks the necessary and complete information to properly compare the use of one property as opposed to another.

Here, although we have more information about these surrounding properties than is typical, we find there is still inadequate evidence to demonstrate the properties are similarly situated to the subject or that inequity exists. From what we do know about the properties, many contain agricultural buildings or other indicia of agricultural activity taking place on the parcels. Moreover, most are used in conjunction with other parcels that are clearly being used for agricultural purposes. We find this record does not support Wilkening's inequity claim or his Constitutional claim.

Further, the classification of Wilkening's property is ultimately to be based on its own primary use when considered against the classification rules. Pursuant to those rules, residential property "shall include all land and buildings which are primarily used or intended for human habitation." R. 701-71.1(4). This includes the dwelling as well as structures used in conjunction with the dwelling, such as garages and sheds. *Id.*

Agricultural property includes land and improvements used in good faith primarily for agricultural purposes. R. 701-71.1(3). Land and nonresidential improvements

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 and fruit trees, the rearing, feeding, and management of livestock, or horticulture, all for intended profit. Agricultural real estate shall also include woodland, wasteland, and pastureland, but only if that land is held or operated in conjunction with agricultural real estate as defined in the subrule.

Id.

The above requirements bring into play the concepts of primary use, agricultural purposes, good faith and intended profit. Our first focus here is on the subject property's present and primary use, and intent to profit.

PAAB has decided a number of cases that involve challenges to classification of properties as residential versus agricultural. A review of recent decisions demonstrates the inquiry is fact-intensive and based on the unique circumstances of each case. Many of these cases involve both agricultural and residential uses and require an analysis of the primary use.

In *Miller v. Scott Cnty. Bd. of Review*, PAAB Docket No. 2015-082-01024R, PAAB found Miller's 10.22-acre property, which also served as his residence, did not

qualify as agricultural real estate due to insufficient evidence demonstrating an intent to profit. Miller grew pumpkins and corn on 3.6 acres of his property that he sold from his front porch or donated. He made very little money from his produce sales (less than \$1000) and lacked an objective plan to bring the operation into profitability. Like Wilkening, Miller expended considerable time and energy to develop this portion of his site, but consistently had negative cash flow and Schedule F losses. PAAB's Order affirming the residential classification was affirmed by the Iowa Court of Appeals. *Miller v. PAAB*, 2019 WL 3714977 (Iowa Ct. App. Aug. 7, 2019).

PAAB similarly denied classification change requests in *Shaw and Chapman v. Dallas Cnty. Bd. of Review*, PAAB Docket No. 2017-025-10178R. Shaw's property demonstrated multiple uses - residential and agricultural. However, Shaw failed to present evidence showing a present intent to profit from the agricultural uses and PAAB affirmed the residential classification. Chapman raised hay, fruits and vegetables, and a horse on his 9-acre property, which he also used as his residence. PAAB found Chapman did not demonstrate an intent to profit from the agricultural uses because his plans for selling his produce and breeding his horse lacked specificity and his testimony regarding his hay production was contradictory.

In contrast, PAAB changed property classification from residential to agricultural when the evidence demonstrated a good faith intent to profit in *Mays v. Muscatine Cnty. Bd. of Review*, Docket No. 2017-070-010175R (March 23, 2018). Mays supplied detailed documentation of almost \$10,000 of income from the sale of berries, vegetables, eggs, poultry, hogs, and cattle produced on a 2.20-acre parcel to approximately 500 customers.

Similarly in *Reisz v. Harrison County Board of Review*, Docket No. 2015-043-00497R (July 8, 2016), *affd. Harrison County Bd. of Review v. PAAB*, No. CVCV030149 (Harrison County D. Ct. Feb. 26, 2017), PAAB found the evidence of intent to profit substantial. Reisz devoted 8 acres of their 15-acre parcel to aronia berry production. They had extensively researched the profitability of this product, and provided a detailed business plan along with sales contracts demonstrating a potential wholesale value of

their mature crop in excess of \$200,000. Thus, PAAB changed the classification from residential to agricultural.

Here, there is no dispute that Wilkening's property is used for residential purposes. In asserting his property should be classified agricultural, Wilkening bears the burden of demonstrating his property also qualifies as agricultural real estate under rule 701-71.1(3) and the agricultural use is the property's primary use.

We begin by examining Wilkening's agricultural activities to determine whether they are presently being done in good faith with an intent to profit. Having reviewed the evidence and testimony, we are not persuaded his fruit tree, hosta plant, and forestry-related activities³ are being done with a present intent to profit. To date, Wilkening has not sold any of his hosta plants, and his plan to market them in the future was fairly vague. At a potential of \$4-\$5 per plant, substantial sales would be necessary to generate profit from this endeavor. Similarly, Wilkening's stated intent to begin harvesting basswood trees from his forest area for sale to woodcarvers was not accompanied by an analysis of potential profitability.⁴ His research reflected his belief he could sell the wood for \$225 per cord (equivalent to two trees), and his knowledge of two woodcarvers. It did not take expenses or the potential loss of his Forest Reserve Exemption into consideration.⁵ To date, Wilkening has not sold any basswood trees and, in our opinion, his testimony did not reflect an immediate or present intention to do so as of January 1, 2019. Lastly, Wilkening's testimony indicated he had not sold any produce from his fruit trees and offered no indication that he intended to do so. For these reasons, we concluded these activities are not done with an intent to profit as of

³ Even though we examine these activities to determine whether they are an agricultural use with an intent to profit, we also acknowledge the presence of trees, hosta plants, and fruit trees are often seen as beneficial to a property's residential use by providing privacy, shade, beauty, and so forth.

⁴ It is unclear whether Wilkening believes his forest reserve qualifies under the second or third sentence of rule 701-71.1(3)(a). Regardless, we conclude his forest reserve does not qualify as agricultural real estate under either provision. Wilkening's evidence and testimony does not convince us the principal use is devoted to the raising and harvesting of forest or fruit trees for intended profit. Additionally, because we do not find Wilkening's present and primary use of his property satisfies the agricultural use definition, his woodland area is not considered agricultural real estate under the third sentence of rule 701-71.1(3)(a).

⁵ We are not tasked with deciding whether Wilkening's harvesting of trees for income from his Forest Reserve area would jeopardize his exemption for these acres under Iowa Code Ch. 427C. Our focus is whether his intended activity would constitute agricultural use with intent to profit.

January 1, 2019, and do not support an agricultural real estate classification under rule 701-71.1(3).

Wilkening also maintains a garden on the property, from which he sells produce. Wilkening has always maintained a garden for personal use, but only in the last few years has he invested in equipment and other improvements and increased the size of his plots to sell his produce. His produce sales generated \$917 of income in 2018 and perhaps more in 2019. However, his expenses have exceeded his income each year. No information was provided concerning the volume of produce sales but recently much has been donated. Additionally, Wilkening's testimony indicates some of the produce is still used for personal consumption. Wilkening's plan to increase the size of his gardens was fairly vague and the potential for future profitability was not quantified. He demonstrated minimal marketing efforts and did not identify his potential customer base for current and future products with any level of certainty.

We find Wilkening is knowledgeable of raising produce and takes pride in his horticultural efforts. We have no reason to question his desire to supplement his current income sources or the physical effort he expends on his property. Most of Wilkening's testimony focused on his future plans for generating income from his land. These plans may well result in some increase in income at some point in the future, but our focus must be on the present and primary use of the subject property as of January 1, 2019. We are ultimately not persuaded this activity was being done with an intent to profit as of the assessment date.

Moreover, even if we could find an intent to profit from the gardening activities, we would not find the subject property's primary use is for agricultural purposes. By themselves the gardens occupy a relatively small portion of the subject site,⁶ they have generated a minimal amount of income, and the produce raised is also used for Wilkening's personal consumption.

⁶ At hearing Wilkening relied on Exhibit C, pages 4 & 5, to contend the agricultural use area exceeded the area dedicated to residential use. Although our decision does not wholly rely on an area comparison, we also do not believe the record supports a finding the barn and shed are predominantly or exclusively used for agricultural purposes. Thus, we find it would be misleading to place reliance on the area depictions in Exhibit C.

Based upon the record as a whole, we find the subject property is not presently and primarily used as agricultural real estate and thus does not qualify for agricultural classification under Rule 701-71.1. We find the evidence demonstrates that as of January 1, 2019, any profit-motivated agricultural uses of the subject property were secondary, and the primary use of the property was residential.

Viewing the record as a whole, we find Wilkening failed to establish that the subject property is misclassified, inequitably assessed or assessed in violation of the Constitution of Iowa.

Order

PAAB HEREBY AFFIRMS the Dallas County Board of Review's action. This Order shall be considered final agency action for the purposes of Iowa Code Chapter 17A (2019).

Any application for reconsideration or rehearing shall be filed with PAAB within 20 days of the date of this Order and comply with the requirements of PAAB administrative rules. Such application will stay the period for filing a judicial review action.

Any judicial action challenging this Order shall be filed in the district court where the property is located within 30 days of the date of this Order and comply with the requirements of Iowa Code sections 441.38; 441.38B, 441.39; and Chapter 17A.



Dennis Loll, Board Member



Elizabeth Goodman, Board Member



Karen Oberman, Board Member

Copies to:

David Hibbard for Robert Wilkening by eFile

Dallas County Board of Review by eFile