

**INDIANA BOARD OF TAX REVIEW**  
**Small Claims**  
**Final Determination**  
**Findings and Conclusions**

**Petitions:** 07-003-06-1-5-00001  
07-003-07-1-5-00001  
07-003-08-1-5-00001  
07-003-09-1-5-00001  
07-003-10-1-5-00001  
**Petitioner:** Curtis Leroy Fiene  
**Respondent:** Brown County Assessor  
**Parcel:** 07-09-31-100-109.000-003  
**Assessment Years:** 2006, 2007, 2008, 2009, and 2010

The Indiana Board of Tax Review (Board) issues this determination, finding and concluding as follows:

**Procedural History**

1. The Petitioner initiated assessment appeals for the subject property with the Property Tax Assessment Board of Appeals (PTABOA) by filing Forms 130.

<u>Petition Number</u>	<u>Form 130</u>
07-003-06-1-5-00001	December 24, 2008
07-003-07-1-5-00001	September 25, 2009
07-003-08-1-5-00001	February 26, 2010
07-003-09-1-5-00001	June 4, 2010
07-003-10-1-5-00001	December 30, 2010

2. The PTABOA mailed notice of its decision, Form 115, for the 2006 appeal on December 29, 2010. The Form 115 decisions for years 2007 through 2010 were all issued on September 28, 2011.

3. The Petitioner appealed to the Board by filing Form 131 Petitions for Review of Assessment.

<u>Petition Number</u>	<u>Form 131</u>
07-003-06-1-5-00001	February 7, 2011
07-003-07-1-5-00001	November 11, 2011
07-003-08-1-5-00001	November 11, 2011
07-003-09-1-5-00001	November 10, 2011
07-003-10-1-5-00001	November 11, 2011.

4. The Petitioner elected to have these appeals heard according to small claims procedures.

5. Administrative Law Judge Paul Stultz held the Board's administrative hearing on September 5, 2012. Neither the ALJ nor the Board inspected the subject property in connection with these appeals.
6. Certified tax representative Milo E. Smith represented the Petitioner and was affirmed as a witness. Dean Layman was affirmed as a witness for the Petitioner, but he did not testify. Kay Schwade of the Nexus Group represented the Respondent and was sworn as a witness. Frank Kelly and Gerald Cox also were sworn as witnesses for the Respondent.

### **Facts**

7. The property has a single family residence and a barn on a parcel of 96.14 acres located at 7544 Ogle Road, Freetown.
8. For 2006, the PTABOA determined the assessed value is \$302,900 for land and \$141,600 for improvements (total of \$444,500). For the years 2007 through 2010, the PTABOA determined the assessed value is \$302,900 for land and \$148,600 for improvements (total of \$451,500).
9. The Petitioner contends the assessed value for land should be priced at the agriculture rate for each year and an 80% negative influence factor should be applied because the land is heavily wooded. The Petitioner did not offer specific values based on those changes.

### **Record**

10. The official record for this matter contains the following:
  - a. The Form 131 Petitions,
  - b. A digital recording of the hearing,
  - c. Petitioner Exhibit 1 – Property record cards (PRCs) showing the assessed values for 2002, 2005, 2006, 2007, 2008, 2009, and 2010 for the subject property,  
Petitioner Exhibit 2 – Indiana Code 32-30-6-1,  
Petitioner Exhibit 3 – Department of Local Government Finance (DLGF) memorandum dated February 12, 2008, "Classification and Valuation of Agricultural Land,"  
Petitioner Exhibit 4 – Geographic information system map of the subject parcel,  
Petitioner Exhibit 5 – REAL PROPERTY ASSESSMENT GUIDELINES FOR 2002 – VERSION A, ch. 2 at 104,  
Petitioner Exhibit 6 – Petitioner's Federal Tax Schedule F, Profit or Loss From Farming, for 2007, 2008, and 2010,  
Petitioner Exhibit 7 – Email dated September 3, 2012, from the Petitioner to Milo Smith,

Respondent Exhibit A – PRC’s showing the assessed values for 2005, 2006, 2007, 2008, 2009, and 2010 for the subject property with photographs attached,  
Respondent Exhibit B – Assessment Change Summary,  
Respondent Exhibit C – DLGF memorandum dated February 12, 2008, “Classification and Valuation of Agricultural Land,”  
Respondent Exhibit D – Aerial views of the subject property,  
Respondent Exhibit E – Petitioner’s Federal Tax Schedule F, Profit or Loss From Farming, for 2007, 2008, 2009, and 2010,  
Respondent Exhibit F – Per acre price analysis,  
Respondent Exhibit G –Board Final Determinations for Barkhimer and King,  
Board Exhibit A – Form 131 Petitions,  
Board Exhibit B – Notice of Hearing,  
Board Exhibit C – Hearing Sign In Sheet,

d. These Findings and Conclusions.

### Contentions

11. Summary of the Petitioner’s case:

- a. Indiana Code § 32-30-6-1 defines “agricultural operation” as including any facility that is “used for the production of crops, livestock, poultry, livestock products, poultry products, or horticultural products, or for growing timber.” *Smith testimony; Pet’r Ex. 2.*
- b. The Petitioner’s email, dated September 3, 2012, explains important facts about the subject property and how it is used. Mr. Smith also paraphrased most of the correspondence into the record:

Shortly after moving to Columbus area in 1986, I began saving and looking for acreage for a small farm.

I purchased my property in 92, it was 95+ in dense woods. Only the utility right-away along the road was not wooded. Most of the wooded area was an upper canopy of scotch pine and lower canopy of dog wood with an occasional hardwood. I would estimate there is 15-20 acres along the creek that is traditional Indiana native forest.

I talked to the state forester about the pine, and he said they were planted back in the 30s. He further added that the scotch pine, would not propagate and would eventually die off. Scotch pine is not considered good for lumber and is usually just used for pulp. When I described the health of the pine to the foresters at Purdue they suggested that the pine sawyer beetle was spreading pine wilt

disease to the pines and the pines would further decline as they are near the typical life-span.

I purchased various tractors including a feller-buncher/tree shear and a 16' GMC 5500. I mounted a log bed on the truck. I harvested the pine hauled it, and sold it to Seymour Pulp Wood operated by Johnny Chapman. I did this for a few years. The only pine pulp mill in this area is in Chillicothe, OH. Often Seymour Pulp had to suspend purchasing pulp, based on demand from this plant. Johny eventually retired and shutdown operation.

I built my home with my father between 96-98. I then built the barn in the follow year or so. I spent a few years learning about raising goats by purchasing a few wethers or cull buck in the spring and raising them to slaughter in the fall. In about 2007, I purchased some breeding stock of pedigreed Myotonic (fainting) goats, to raise for meat. I started with 5 goats. I now have 1 breeding buck, 1 junior buck, 17 breeding does, 7 junior does, and 9 wethers for a total of 35 goats. I usually sell wethers for meat in Dec. Most of this growth has been internal with only 2 breeding goats added from external sources.

The goats also help significantly with the maintenance of my woods, they keep the vines, roses and other underbrush under control. I also occasionally feed some of the pine trees to the goats in the winter. They eat the needles and newer bark.

2011 was the first time I noticed that the native hardwood trees were getting to be about as high as the remaining pine. It will still take 10-15 years for most of these trees to achieve marketable size. There are a few trees of marketable size, but not in high enough number for a commercial logger to be interested in harvesting them. At least that is my conclusion based on the lack of interest when I contacted a logging appraiser.

I have sold off or scrapped most of the logging equipment, although I converted the feller-buncher to a large round hay bale mover to aid in feed the goats in the winter (and during drought).

Most of the improvements to the farm have been adding fenced area every year to growing goat herd. This year during the drought I had to increase the area in July when the currently fenced area had been grazed out. Over the last 2 winters I have been clearing along the perimeter of the property to re-establish fence lines. While the fencing has not been completed the clearing for the fence is essentially complete. This include nearly all my property

south of the creek. This should give me 70+ acres of fenced area. I currently estimate that I have around 25 acres fenced.

*Pet'r Ex. 7; Smith testimony.*

- c. The DLGF memorandum gives an example that is similar to the Petitioner's operation. The most pertinent part states as follows:

Various wooded parcels, both large and small, within a county have been reclassified from the agricultural productivity method of calculation to a flat excess acre rate. The following are examples:

(1) An 81 acre parcel has a one acre home site, 61 acres of woods, and 20 acres of tillable land. The county classified the 61 acres of woods using an excess acreage rate. The 61 acres of wooded area is determined to be land capable of producing timber or other wood products and has 50% or more canopy cover.

*Conclusion:* The parcel's segmented land use types should continue to be priced using the agricultural productivity method because the parcel was purchased for agricultural use and is utilized for agricultural purposes as described in the Guidelines.

*Smith testimony; Pet'r Ex. 3 at 7.*

- d. The Guidelines, ch. 2 at 104, define woodlands as land with 50% or more canopy cover. *Smith testimony; Pet'r Ex. 5.* Most of the subject property is wooded and qualifies for the 80% negative influence factor after it is classified as farm land. *Smith testimony; Pet'r Ex. 4.*
- e. The land was assessed as agricultural land in 2002. But now it is being improperly assessed as homesite and excess residential acreage. It should be assessed as agricultural land. *Smith testimony.*
- f. In 2006, 2007, and 2008 the Petitioner harvested needles from the pines and sold them to a pulp factory in Seymour. There was no timber management plan in place and the parcel is not registered forest, but those are not requirements for agricultural classification. *Smith testimony.*
- g. The Petitioner purchased trees to plant and eventually harvest when they are mature, but it will be many years before they can be harvested. *Smith testimony.*

## 12. Summary of the Respondent's case:

- a. The subject property is a wooded parcel with a drainage creek running through part of it. During a recent visit, some goats and chickens or possibly ducks were

observed, but there were no signs of a logging operation or other crops.<sup>1</sup> There were no access roads on the property. The Petitioner has acknowledged there was no timber management plan and the parcel is not a registered forest. *Cox testimony; Resp't. Ex. D.*

- b. Evidence of the Petitioner's Profit or Loss from Farming, Federal Tax Schedule F, for years 2007, 2008, 2009, and 2010 reflects minimal farming activity. The 2007 schedule shows no gross income. For the 2008, 2009, and 2010 schedules the gross income is \$405, \$532, and \$600. Each year the schedule reflects a net loss from farming. This evidence establishes the Petitioner only incidentally engaged in agricultural activity. *Kelly testimony; Resp't Ex. E.*
- c. A comparable property of 50 acres sold in April 2008 for \$250,000. That price is \$5,000 per acre. Another comparable property of 44 acres sold in February 2004 for \$250,000. That price is \$5,682 per acre. *Kelly testimony; Resp't Ex. F.*
- d. The Board's Final Determinations in *Jack L. & Shirley A. Barkhimer v. Washington Twp. Assessor* (Ind. Bd. of Tax Rev. Aug. 8, 2007) and *Brian and Triana King v. Washington Twp. Assessor* (Ind. Bd. of Tax Rev. May 22, 2007), held the Petitioner did not provide sufficient evidence to show the parcels were devoted to agricultural use. In the King appeal the Board stated "The relative significance of the timber production is diminished by the Petitioner's admission that selling timber is not a primary source of income for the household. The Petitioners presented no evidence about projected income from additional sales and no other kind of financial data or analysis to support the importance of the agricultural use." *Resp't Ex. G at 6, par. i.*

### Hearsay Objection

- 13. The Respondent initially stated there was no objection to any of the Petitioner's exhibits and they were admitted. But approximately 10 minutes later in the hearing the Respondent objected. At that point the Respondent correctly noted the document and Mr. Smith's paraphrasing from it are hearsay. The Respondent argued that this evidence should not be admitted, even though it already had been admitted without objection.
- 14. "Hearsay" is a statement, other than one made while testifying, that is offered to prove the truth of the matter asserted. Such a "statement" can be either oral or written. "Hearsay evidence, as defined by the Indiana Rules of Evidence (Rule 801), may be admitted. If not objected to, the hearsay evidence may form the basis for a determination. However, if the evidence is properly objected to and does not fall within a recognized exception to the hearsay rule, the resulting determination may not be based solely upon the hearsay evidence." Ind. Admin Code tit. 52, r. 2-7-3. The document is clearly hearsay. And the Petitioner has not established that the document would come within

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<sup>1</sup> Although the time reference was not clear, "recent" appears to be shortly before the hearing that took place on September 5, 2012.

any recognized exception to the hearsay rule. Despite the Respondent's objection, such evidence may be admitted.

15. Accordingly, the Board admits this evidence into the record over the Respondent's tardy objection. Nevertheless, the Board notes that Mr. Fiene's comments were not under oath and he was not subject to cross examination.

### **Burden of Proof**

16. Generally, a taxpayer seeking review of an assessing official's determination has the burden of proving that a property's assessment is wrong and what its correct assessment should be. *See Meridian Towers East & West v. Washington Twp. Assessor*, 805 N.E.2d 475, 478 (Ind. Tax Ct. 2003); *see also Clark v. State Bd. of Tax Comm'rs*, 694 N.E.2d 1230 (Ind. Tax Ct. 1998). Nevertheless, the Indiana General Assembly enacted Ind. Code § 6-1.1-15-17.2 and in some cases it shifts the burden of proof:

This section applies to any review or appeal of an assessment under this chapter if the assessment that is the subject of the review or appeal increased the assessed value of the assessed property by more than five percent (5%) over the assessed value determined by the county assessor or township assessor (if any) for the immediately preceding assessment date for the same property. The county assessor or township assessor making the assessment has the burden of proving that the assessment is correct in any review or appeal under this chapter and in any appeals taken to the Indiana board of tax review or to the Indiana tax court.

I.C. § 6-1.1-15-17.2.

17. Both parties agree the 2006 assessment increased more than 5%. Therefore, the Respondent has the burden of proof for 2006. Both parties agree the 2007, 2008, 2009, and 2010 assessments did not increase more than 5% from the respective prior years. Therefore, the Petitioner has the burden of proof for 2007, 2008, 2009, and 2010.

### **Analysis**

18. The main question in these cases is the Petitioner's claim for a change to agricultural land classification. The DLGF has been directed to establish rules for determining the true tax value of agricultural land. Ind. Code § 6-1.1-4-13(c). Agricultural land values are based on productivity, but only land actually "devoted to agricultural use" may be assessed as agricultural land. Ind. Code § 6-1.1-4-13(b). A taxpayer seeking to have its land assessed as agricultural cannot prevail merely by showing that agriculture is one of several activities for which it uses the land.
19. The Respondent had the burden of proof for 2006 and the Petitioner had it for 2007-2010, but that distinction does not change the outcome of the agricultural land classification issue because the weight of the evidence for the entire period establishes that the subject

property should have been assessed based on agricultural land classification. The Board reaches this conclusion for the following reasons:

- a. The Petitioner relied on the same evidence for all 5 years.
- b. The Respondent relied on the same evidence for all 5 years.
- c. There is no dispute that the subject property consists of 96.14 acres. Aerial photographs show that it has a somewhat irregular shape with a house and barn located near one corner. A better view of the house and barn area is shown in two photographs, part of Respondent Exhibit A. There are few trees in the house and barn area, but it is a relatively small part of the entire property. The photographs also show a tractor, some other unidentified equipment, some fence, and large, round bales of something. These photographs support the purported agricultural use.
- d. As part of his federal income tax returns, the Petitioner filed Schedule F, Profit or Loss From Farming, for 2007, 2008, 2009, and 2010. These documents state that the main product is “livestock.” The Respondent focused on the minimal farm income and the net losses shown on these schedules as an important indication that the subject property was not devoted to agricultural use. But the Respondents’ point has little significance because the record contains no evidence that the subject property was used for anything else. By itself, the fact that the Petitioner gets very little income from farming and operates at a loss does little, if anything, to prove that the subject property is not devoted to agricultural use.
- e. The aerial photographs also show that much of the subject property has a significant amount of trees, but nothing establishes exactly how much. (Some testimony indicated half of the subject property is wooded.)
- f. The Petitioner harvested pine needles from 2006 through 2008 and sold them to a pulp factory. (The Respondent elicited this testimony from Mr. Smith.)
- g. The Petitioner admitted there is no timber management plan for the subject property and it is not a registered forest. While the existence of either factor is a significant indication that such land is devoted to an agricultural use, the lack of a timber management plan or registered forest status does not necessarily preclude it.
- h. The Petitioner’s email to Mr. Smith provides more background and detail about the use of the subject property. If those statements had been offered as actual testimony from Mr. Fiene at the hearing, the Board’s determination would be much easier. Unfortunately, Mr. Smith chose to rely on the email, which clearly is hearsay. The fact that the Respondent allowed the email to be admitted to the record as Petitioner Exhibit 7 without an objection and then much later in the hearing asserted a hearsay objection complicates our analysis. Much of the



problem with hearsay evidence relates to it being less reliable and less credible than non-hearsay evidence. If there was substantial evidence in the record that contradicted the statements in the email, the email would almost certainly have less weight. But here the Respondent made no attempt to disprove *any* of the statements in the email. In fact, although they focus on different points and draw different conclusions, the facts about the subject property as presented by both sides are entirely consistent. Even though it is hearsay, *under these circumstances* the Board will not entirely disregard the statements in the email. Accordingly, the following points provide additional support for the agricultural land classification.

- In 1992 the Petitioner purchased the subject property for a small farm. He and his father built the home in 1996-1998. The barn was built approximately a year later.
- Most of the wooded area has an upper canopy of scotch pine. Along the creek there is 15-20 acres of traditional native forest. The scotch pines were planted in the 1930s and are nearing the typical life-span. The state forester said they will not propagate and will eventually die off. Scotch pine is not considered good for lumber and is just used for pulp. The Petitioner purchased tractors and other equipment. For a few years he harvested the pines and sold them to Seymour Pulp Wood, but eventually that pulp operation closed. Subsequently, most of the logging equipment has been sold or scrapped, although the Petitioner converted the feller-buncher to a large round hay bale mover to aid in feeding the goats.
- It is going to take another 10-15 years for most of the native hardwood trees to achieve marketable size.
- The Petitioner began learning how to raise goats by buying a few wethers in the spring and raising them to slaughter in the fall. In about 2007, the Petitioner purchased breeding stock of Myotonic (fainting) goats to raise for meat. He started with 5 goats. Now he has 35. The wethers still are sold for meat.
- The goats help significantly with maintenance of the woods. They keep vines and underbrush under control. In addition, during the winter they occasionally eat the pine needles and newer bark.
- Currently about 25 acres is fenced for the goats. The Petitioner has been adding fencing over time to increase the area for the growing goat herd. When it is done, south of the creek there will be 70+ acres fenced for the goats.

20. Again, it is significant that the Respondent proved no other use of the property. Merely relying on the lack of income, the lack of current logging operations, lack of other crops, the lack of a timber management plan, and not being a registered forest does not nullify the evidence about raising the goats, harvesting and selling trees for pulp, using the pines to feed the goats, and growing hardwood trees that will be marketable in 10 or 15 years. The record contains adequate support for changing to an agricultural land classification.

21. In addition to the agricultural land classification, the Petitioner claimed the woodland should get a negative 80% influence factor. The record, however, does not establish how much of the land might satisfy the applicable requirements for woodland. The property record cards show the land divided into 3 segments consisting of 1 acre, 19 acres, and 76.14 acres, but none of the information relates to agricultural land classification or woodland classification. Mr. Smith made only a few conclusory statements about the negative influence factor for woodlands, but they do not provide a substantial basis for attributing any specific acreage or dollar amount as woodland, even if some of the land might qualify. And except to the extent the Respondent tried to establish that the subject property is not agricultural land, the Respondent completely ignored the woodlands negative influence factor.
22. Neither party offered any evidence or argument about what the assessed values actually should be when they are based on agricultural land classification. As a result, the Board can only determine that the Respondent must recalculate the assessed values for the subject property for 2006-2010 based on agricultural land classification.
23. Because the evidence is sufficient to prove the subject property should be assessed as agricultural land, the Respondent's attempt to prove a value based on the selling prices of comparable properties is not relevant.

### **Conclusion**

24. The weight of the evidence establishes that the subject property should have been assessed as agricultural land.

### **Final Determination**

25. The assessed values for the subject property for 2006, 2007, 2008, 2009, and 2010 must be changed. The Respondent must recalculate each year's assessment based on the agricultural land classification.

ISSUED: January 14, 2013

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Commissioner, Indiana Board of Tax Review

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Commissioner, Indiana Board of Tax Review

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Commissioner, Indiana Board of Tax Review

**- APPEAL RIGHTS -**

You may petition for judicial review of this final determination under the provisions of Indiana Code § 6-1.1-15-5, as amended effective July 1, 2007, by P.L. 219-2007, and the Indiana Tax Court's rules. To initiate a proceeding for judicial review you must take the action required within forty-five (45) days of the date of this notice. The Indiana Tax Court Rules are available on the Internet at <<http://www.in.gov/judiciary/rules/tax/index.html>>. The Indiana Code is available on the Internet at <<http://www.in.gov/legislative/ic/code>>. P.L. 219-2007 (SEA 287) is available on the Internet at <http://www.in.gov/legislative/bills/2007/SE/SE0287.1.html>