COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

HENRY KOMOSA	**v.**	**BOARD OF ASSESSORS OF THE TOWN OF MONTAGUE**
Docket Nos. F341898, F343460, F343461, F343462		Promulgated: February 24, 2023

These are appeals filed under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 and 65 for fiscal year 2021 and pursuant to G.L. c. 61A, § 19 for fiscal year 2022 (collectively "fiscal years at issue"). Both fiscal years at issue concern real property located in the Town of Montague and owned by Henry Komosa ("appellant"), specifically the refusal of the Board of Assessors of the Town of Montague ("assessors" or "appellee") to value this property under the provisions of G.L. c. 61A.

Chairman DeFrancisco heard these appeals, and Commissioners Good, Elliott, and Metzer joined him in the decisions for the appellee.

These findings of fact and report are promulgated pursuant to a request by the appellant under G.L. c. 58A, § 13 and 831 CMR 1.32.

Henry Komosa, *pro se*, for the appellant.

Ellen Hutchinson, Esq., and *Karen Tonelli*, Assessor, for the appellee.

FINDINGS OF FACT AND REPORT

On the basis of the testimony and exhibits offered into evidence at the hearing of these appeals, the Board made the following findings of fact.

I. Introduction

During the fiscal years at issue, the appellant was the owner of three parcels of land - parcels identified as 51-96, 51-97, and 51-98 – located in the Town of Montague and totaling 5.641 acres ("parcels at issue"). The appellant claimed that the parcels at issue were entitled to valuation based on their value for horticultural use pursuant to G.L. c. 61A ("61A classification"). For purposes of 61A classification, the land under consideration must not be less than five acres in area pursuant to G.L. c. 61A, § 4, amongst other requisites.

II. Jurisdiction

A. Fiscal year 2021 (Docket Nos. F343460, F343461, F343462)

Pursuant to G.L. c. 61A, § 6, the appellant filed a fiscal year 2021 application on September 11, 2019, seeking 61A classification of 6.6 acres of land that comprised the parcels at issue and a parcel identified as 51-100, a parcel that is not at issue in any of these appeals before the Board. The appellant

claimed that he used the 6.6 acres of land for horticultural use, specifically the cultivation and harvesting of hay ("haying"). The parties do not dispute that haying is considered a horticultural use under G.L. c. 61A, § 2.

On December 9, 2019, within three months of the application filing as required by G.L. c. 61A, § 9, the assessors voted to grant 61A classification for fiscal year 2021 for the parcels at issue and parcel 51-100. In early 2020, the appellant notified the assessors of his intention to change the use of parcel 51-100 from horticultural use, effectively removing this parcel from 61A classification and leaving 5.641 acres remaining.

On April 27, 2020, the assessors met and voted to assess roll-back taxes on parcel 51-100 pursuant to G.L. c. 61A, § 13, due to the intended change of use, and to revoke 61A classification pursuant to G.L. c. 61A, § 7 for fiscal year 2021 for the remaining parcels – the parcels at issue - on the basis that, with the removal of parcel 51-100 from classification, the appellant devoted less than five acres of the parcels at issue to haying. The appellant received notice from the assessors of this revocation on April 28, 2020.[1] Nothing in the record reflects that the

[1] The appellant cited to G.L. c. 61A, § 9 to allege defects in the notification process for the revocation, but this section only applies to the original application process. The provisions of G.L. c. 61A, § 9 require that the assessors make an allowance or disallowance on the application for 61A classification within three months of the filing and that if they fail to make such an allowance or disallowance within three months, the application is deemed

appellant challenged this revocation by filing a modification pursuant to G.L. c. 61A, § 19.

As a result of the revocation for fiscal year 2021, the assessors did not assess and tax the parcels at issue on the value of the land for horticultural use under G.L. c. 61A. Instead, the assessors assessed the parcels at issue on their "full and fair value," as required by G.L. c. 61A, § 7. The appellant filed abatement applications - alleging that the assessors overvalued the parcels at issue by not valuing them for horticultural use - on January 27, 2021, pursuant to G.L. c. 59, § 64, which were deemed denied on April 27, 2021. The appellant filed petitions with the Board on June 11, 2021, under G.L. c. 58A, § 7.

Based upon these facts and as discussed further below in the Opinion below, the Board found and ruled that it lacked jurisdiction over the appellant's fiscal year 2021 appeals because the appellant failed to apply in writing to the assessors for modification of their determination to revoke 61A classification, as required by G.L. c. 61A, § 19.

B. Fiscal year 2022 (Docket No. F341898)

Pursuant to G.L. c. 61A, § 6, the appellant filed with the assessors a fiscal year 2022 application on September 3, 2020, for

allowed. The next sentence in that section - concerning written notice within ten days by certified mail of an allowance or disallowance - contextually only applies to the original application process, not subsequent actions by the assessors such as a revocation.

61A classification of the parcels at issue. On or about October 19, 2020, within three months of the application filing as required by G.L. c. 61A, § 9, the assessors voted to deny 61A classification for fiscal year 2022. The appellant filed a modification request on November 2, 2020, pursuant to G.L. c. 61A, § 19, which was denied on January 4, 2021, on the basis that the appellant devoted less than five acres to haying on the parcels at issue. The appellant filed a petition with the Board on January 26, 2021,[2] challenging the denial of 61A classification pursuant to G.L. c. 61A, § 19. Based upon these facts, the Board found and ruled that it had jurisdiction over fiscal year 2022.

III. The appellant's case

The appellant contended that "[t]he plain language of the statute merely requires for qualification that the property is at least 5 acres, generates $500 a year in annual sales and that some portion of it is cultivated and devoted to horticulture." Because the total area of the three parcels at issue exceeded five acres and he generated more than $500 in annual sales, the appellant maintained that he was entitled to classification, irrespective of whether at least five acres were devoted to horticultural activity.

The appellant acknowledged the existence of some steep slope on the parcels at issue and admitted that not all the land

[2] The appellant's petition was stamped as received by the Board on February 4, 2021, but the petition was mailed in an envelope postmarked January 26, 2021. Under G.L. c. 58A, § 7, the Board used the postmark date as the date of filing.

comprising the parcels at issue was used for haying, but he asserted that land not used for haying was used for access roads, bad hay compost, and brush piles, uses that allegedly supported horticulture. He stressed that all the 5.641 acres comprising the parcels at issue were related and necessary for growing and harvesting the crop. He testified to the occasional dumping of wet hay at the tree banking on parcel 51-96 and allowing it to decompose, stating that "it holds the banking in place and stuff like that." But he specified that this use was infrequent.

The appellant disagreed with the assessors' calculation of which portions of the parcels at issue were cultivated, alleging that by relying on a satellite map view, the assessors failed to account for the land being used under a canopy of trees and that the assessors could not differentiate trees from shadows in the images. The appellant produced various photos, some of a nebulous timeframe. Most of the photos featured trees that purportedly were not part of the parcels at issue but whose canopies cast indeterminate shadows upon the parcels at issue. He provided no indicia of actual measurement for the shadows and only admitted to the existence of trees on parcel 51-96, though he could not specify the acreage impacted by trees. The appellant also produced various maps that he received from the town through public record requests. He claimed that these maps included inaccurate property lines and

that the photos he produced more accurately represented the property lines and tree canopies.

IV. The appellee's case

The assessors alleged that horticultural use took place on approximately 3.6 acres out of the 5.641 acres comprising the parcels at issue, and that this was insufficient acreage to meet the five-acre requisite of G.L. c. 61A, § 4 for 61A classification. Assessor Karen Tonelli – with more than thirty years of experience as an assessor both in Montague and in various rural towns - offered testimony and documentation, showing that only 3.6 acres of the parcels at issue were put to horticultural use. Assessor Tonelli maintained that she used a sophisticated mapping system and was consequently able to measure areas within the parcels at issue that were heavily treed or had significant slopes preventing those areas from being hayed. Assessor Tonelli testified that she went out to the site to confirm heavily treed areas as well as topography and slope, and she concluded that approximately two acres of the parcels at issue lacked the capacity for haying due to these issues.

The assessors disagreed with the appellant's interpretation of G.L. c. 61A, claiming that it would lead to ambiguity with respect to how many acres must be used for horticultural purposes and that it focuses on ownership of five acres, rather than the number of acres put to horticultural use. They expressed concern

that scenarios might ensue where a miniscule portion of land is put to actual horticultural use but the larger portion of the land receives 61A classification and assessment at lower than fair market value. As support for their contention that this was not the legislative intent underlying passage of G.L. c. 61A, the assessors entered legislative history documents into the record. This history included a letter from the Acting Commissioner of Corporations and Taxation noting the potential for misuse of preferential treatment.

V. The Board's findings and rulings

Based upon the evidence and testimony presented by the parties, and as discussed further below in the Opinion, the Board found and ruled that the parcels at issue were not entitled to 61A classification for fiscal year 2022 due to the failure of the appellant to meet the five-acre requisite of G.L. c. 61A, § 4. While the entirety of the parcels at issue did not need to primarily and directly cultivate hay, the appellant failed to credibly establish that portions not dedicated to haying had some reasonable relationship to the horticultural use. Conversely, the assessors provided credible, detailed testimony and documentation casting doubt on the appellant's assertions and his use of the disputed portion of the parcels at issue. The appellant alleged that the assessors could not distinguish trees from shadows, but he provided no demarcation between trees and shadows. His photos

provided no mechanism to distinguish property lines. He offered no reliable measurements as to how much of parcel 51-96 was comprised of trees. His assertion that land not used for growing hay still supported horticulture (through access roads, bad hay compost, and brush piles) was unsubstantiated and provided no evidentiary link between these activities and haying.

Accordingly, based on lack of jurisdiction for fiscal year 2021 and the failure to establish entitlement to 61A classification for fiscal year 2022, the Board issued decisions for the appellee for both fiscal years at issue.

OPINION

I. Introduction

If land is approved for 61A classification, "[t]he board of assessors of a city or town, in valuing land with respect to which timely application has been made and approved as provided in this chapter, shall consider only those indicia of value which such land has for agricultural, horticultural or agricultural and horticultural uses." G.L. c. 61A, § 10.

"Essentially, c. 61A provides a tax break for landowners who devote at least five acres of their property to agricultural or horticultural use." ***Adams v. Assessors of Westport***, 76 Mass. App. Ct. 180, 181 (2010). "Valuation of land classified under Chapter 61A as agricultural and/or horticultural land must be

based upon its agricultural or horticultural use, rather than on the property's value, if devoted to its highest and best use" and taxpayers "'who choose to have their land so qualified [under Chapter 61A] . . . receive a benefit of a lower tax levy for each year that they qualify by continued agricultural or horticultural use.'" ***Mann v. Assessors of Plymouth***, Mass. ATB Findings of Fact and Reports 2001-858, 868-69 (citation omitted).[3]

II. Lack of jurisdiction for fiscal year 2021 (Docket Nos. F343460, F343461, F343462)

A taxpayer requesting that land be valued, assessed, and taxed based upon the value the land has for horticultural use[4] for fiscal year 2021 was required to apply to the board of assessors of the city or town in which the land is located "not later than October first of the year preceding each tax year for which" the taxpayer requests classification." G.L. c. 61A, § 6.[5]

For fiscal year 2021, the assessors allowed the appellant's timely filed application for 61A classification of parcel 51-100 and the parcels at issue, but the appellant subsequently notified

[3] Authority to enact G.L. c. 61A was derived from Article 99 of the Amendments to the Massachusetts Constitution. *See* ***Town of Sudbury v. Scott***, 439 Mass. 288, 293, n.5 (2003) ("By statute, property must be assessed at its full and fair cash valuation. G.L. c. 59, §§ 2A, 38. Thus, without the amendment, assessment and taxation at use value would be unconstitutional.").
[4] The Board focused on horticultural use based on the facts presented by these matters, but cases involving agricultural use would follow a similar analysis.
[5] The statute was amended by St. 2022, c. 268, § 92, effective November 10, 2022. Amongst the changes to the statute was the application date to "December 1 preceding each tax year for which the valuation, assessment and taxation are being sought."

the assessors of a change of use for parcel 51-100. General Laws c. 61A, § 7, as in effect for fiscal year 2021, provided that

> [i]f a change in use of land . . . occurs between October first and June thirtieth[6] of the year preceding the tax year, the board of assessors shall disallow or nullify the application filed under authority of section six, and, after examination and inquiry, shall determine the full and fair value of said land under the valuation standard applicable to other land and shall assess the same according to such value.

G.L. c. 61A, § 7.[7]

By revoking 61A classification for the parcels at issue for fiscal year 2021, prior to June 30, 2020, the assessors made a determination to nullify the appellant's application that had previously been allowed. Subsequent to such a determination, the procedures of G.L. c. 61A, § 19 control appeals of "any determination"[8] by assessors.

If a taxpayer is "aggrieved by any determination or assessment by the board of assessors under" G.L. c. 61A, the taxpayer "may within 30 days of the date of notice thereof apply in writing to

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[6] The statute was amended by St. 2022, c. 268, § 93, effective November 10, 2022, and changed the dates to "between December 1 and June 30."

[7] Change of use for a portion of land does not necessarily "impair the right of the remainder of such land to continuance of valuation, assessment and taxation" under the provisions of G.L. c. 61A so long as the remainder of the land "continues to qualify under the usage, minimum acreage and other provisions" required for classification. G.L. c. 61A, § 17. But that was not the case here with the parcels at issue when parcel 51-100 was removed from horticultural use by the appellant.

[8] The term "determination" is not defined but it is not limited to a specific determination. The language states "any determination or assessment . . . under this chapter." G.L. c. 61A, § 19. While G.L. c. 61A, § 9 references the appeal process of G.L. c. 61A, § 19 in the event of a disallowance, G.L. c. 61A, § 19 does not include language limiting its appeal process to G.L. c. 61A, § 9 disallowances. The language in G.L. c. 61A, § 19 is "any determination," not a determination made under G.L. c. 61A, § 9.

the assessors for modification or abatement thereof." G.L. c. 61A, § 19. Upon refusal of the assessors "to modify such a determination or make such an abatement or by their failure to act upon such an application," the taxpayer "may appeal to the appellate tax board within thirty days after the date of notice of their decision or within three months of the date of the application, whichever date is later." G.L. c. 61A, § 19. The appellant received notice on April 28, 2020, of the assessors' determination. The record contains no evidence that the appellant filed a timely application for modification of this determination within thirty days.

The Board has construed G.L. c. 61A, § 19 to provide "two distinct appeals" - "the c. 61A classification appeal, which impacts the taxpayer's general property tax liability, and the appeal from a conveyance or roll-back tax which is a separate assessment over and above the general property tax assessment." ***Sliski v. Assessors of Wayland and Lincoln***, Mass. ATB Findings of Fact and Reports 1995-29, 39. While the Board found that "the use of the word 'such' in conjunction with the phrase 'appeal with respect to the annual general property tax' suggests that a taxpayer who appeals his classification denial under § 19 has effectively appealed his general property tax assessment," ***id.*** at 1995-40, the same cannot be said of the reverse – that filing for an abatement of the general property tax assessment permits circumvention of the time periods in G.L. c. 61A, § 19 by

challenging those assessments on the basis of overvaluation because 61A classification was denied. Consequently, the appellant, having failed to file a timely application for modification, was jurisdictionally precluded from challenging denial of 61A classification by alleging - indirectly through the abatement applications - that the assessors overvalued the parcels at issue by not valuing them for horticultural use.[9]

III. Failure to meet the five-acre requisite

In order for land to be treated "for general property tax purposes" at a value that such land has for horticultural purposes, a taxpayer bears the burden of proving that the land comprises an area of "not less than five acres" that is "actively devoted to" horticultural use during the tax year in issue and at least the two immediately preceding tax years. G.L. c. 61A, § 4.[10] The statute does not state that only a portion of the five acres can be "actively devoted" to horticultural use to classify the entirety

[9] The Board notes, however, that while the appellant was jurisdictionally precluded from challenging 61A classification for fiscal year 2021 because of the failure to follow the procedures of G.L. c. 61A, § 19, a requirement for 61A classification pursuant to G.L. c. 61A, § 4 is that the land be actively devoted to horticultural use during the tax year at issue and for at least the two immediately preceding tax years. Thus these matters present the unusual scenario where the appellant was procedurally barred from seeking any relief for fiscal year 2021, but permitted to rely factually upon the activities taking place on the parcels at issue during fiscal year 2021 for purposes of whether the parcels at issue were entitled to 61A classification for fiscal year 2022. The Board observed no factual distinctions that would have – in the absence of jurisdictional flaws – entitled the appellant to 61A classification for fiscal year 2021 for the parcels at issue.

[10] In the "Statement of Facts" section of their Memorandum of Law, the assessors concede that "the parcels had been used for haying for the two years prior and beyond and had been given 61A classification."

of the land. *See, e.g.,* ***Brayton Point Energy, LLC v. Assessors of Somerset***, Mass. ATB Findings of Fact and Reports 2021-180, 186 ("The appellant suggests that it was subject to the corporate excise tax 'through its sole member' Dynegy Resource. But Clause Sixteenth(2) makes no such allowance and the Board cannot read this language into the statute.") (citations omitted), *aff'd*, 101 Mass. App. Ct. 466 (2022).

A close reading of G.L. c. 61A, § 4 confirms the intent of the unambiguous statutory language. A minimum of five acres must be actively devoted to horticultural use for classification to be granted. Section 4 further provides that "[f]or the said tax purposes land so devoted shall be deemed to include such contiguous land under the same ownership as is not committed to residential, industrial or commercial use and which is covered by application submitted pursuant to section six" and that "[a]ll such land which is *contiguous or is deemed contiguous for purposes of this chapter shall not exceed in acreage one hundred per cent of the acreage which is actively devoted* to agricultural, horticultural or agricultural and horticultural uses." G.L. c. 61A, § 4 (emphasis added).

The contiguous land treatment for "the said tax purposes" emphasizes that this contiguous land is not the land that must meet the requisites for G.L. c. 61A classification. None of the land can receive the tax benefit if the primary land does not meet

the "actively devoted to" horticultural use requisites on its own, including the five-acre requisite. With respect to the parallel provisions of Chapter 61A dealing with agricultural land, the Supreme Judicial Court has agreed with the Board's interpretation that the statutory structure of G.L. c. 61A, § 4 "suggests that land actively devoted to agriculture should be limited to land primarily and directly used in agriculture." ***Nashawena Trust v. Assessors of Gosnold***, 398 Mass. 821, 827 (1986) (affirming Mass. ATB Findings of Fact and Reports 1985-158).

Land meeting the five-acre requisite is deemed to be "actively devoted to" a horticultural use when the gross sales of horticultural products resulting from the horticultural use are at least $500 annually.[11] *See* G.L. c. 61A, § 3. The gross sales standard "was intended to establish a threshold of intensity of" the use. *See* ***Nashawena Trust***, Mass. ATB Findings of Fact and Reports at 1985-190. This gross sales figure increases by $5 per acre for land exceeding five acres. *See* G.L. c. 61A, § 3. This exponential increase further supports that use of a specific acreage is a key component, not a loose approximation.

Critically, underlying whether land can even be considered actively devoted to horticultural use is the determination of what

[11] In the "Statement of Facts" section of their Memorandum of Law, the assessors conceded this point: "The reported income from haying was over $500."

constitutes horticultural use and whether five acres are being put to this use. General Laws c. 61A, § 2 provides that

> [l]and shall be considered to be in horticultural use when primarily and directly used in raising fruits, vegetables, berries, nuts and other foods for human consumption, feed for animals, tobacco, flower, sod, trees, nursery or greenhouse products, and ornamental plants and shrubs for the purpose of selling these products in the regular course of business; . . . or when primarily and directly used in a related manner which is incidental to those uses and represents a customary and necessary use in raising these products and preparing them for market.

G.L. c. 61A, § 2. Construing "primarily and directly" to permit classification so long as most of the land is put to horticultural use is not supported by the statutory language. The "or" phrasing of the statute - that land is used primarily and directly in cultivation "or" primarily and directly in a related manner - suggests that the land must either be the productive land or land supporting the cultivation. See ***Henry v. Board of Appeals***, 418 Mass. 841, 843-47 (1994) (The Court stated that "[b]ecause the proposed excavation of 300,000 to 400,000 cubic yards of gravel is not primarily agricultural or horticultural, the issue is whether the proposed excavation is incidental to the creation of a 'cut your own' Christmas tree farm."). There can be no portions of land with a claim of horticultural use but whose existence has no attributable relation to horticulture.

General Laws c. 61A, § 2A is also instructive, the pertinent provisions stating that "land used primarily and directly for . .

. horticultural use pursuant to section 2 may, in addition to being used primarily and directly for . . . horticulture, be used to site a renewable energy generating source." Relevant here is the phrase "in addition to being used," which signifies that the land must, first and foremost, be put to a horticultural use.

Thus, unless a taxpayer can establish that five or more acres of land are primarily and directly used for a horticultural purpose or primarily and directly used in a related manner as set out in G.L. c. 61A, § 2, the land cannot be "actively devoted to" the horticultural use for purposes of 61A classification. ***Nashawena Trust***, Mass. ATB Findings of Fact and Reports at 1985-175, provides that "[t]o be classified as agricultural land, it is not sufficient that land be 'primarily and directly' used for agricultural purposes; it must also be 'actively devoted' to agricultural uses during the tax year and at least the two immediately preceding tax years." However, the land cannot reach the intensity threshold of $500 required to meet the "actively devoted" requirement if the acreage criteria for horticultural use is not met first. The minimum acreage is not merely a co-requisite with the $500, but rather a foundational requisite. As stated by the Board in ***Nashawena Trust***:

> The issue before the Board is whether the appellee properly disallowed agricultural classification for Nashawena Island for tax years 1984 and 1985. Its resolution depends on how many acres were primarily and directly used for raising sheep, and how many of those

> acres were actively devoted to the raising of sheep. The resolution of the latter question depends, in turn, on the amount of gross sales derived from the sale of animals and animal products and on the number of acres of which to base the amount of gross sales required.

Mass. ATB Findings of Fact and Reports at 1985-163.

Additional case law is also instructive, indicating that while all the land does not need to be productive, the entirety must have an evident concomitant purpose. In ***Sliski v. Assessors of Lincoln and Wayland***, Mass. ATB Findings of Fact and Reports 1995-29, 30, the taxpayers applied for 61A classification of two parcels of land, respectively 4.67 acres and 0.8424 acres. Most of the 4.67-acre parcel and the entire 0.8424-acre parcel were certified by the Department of Environmental Management as being managed under a planned program to improve the quantity and quality of a continuous forest crop, which tracked the definition of land in horticultural use under G.L. c. 61A, § 2. ***Id.*** at 1995-31. The Board "reject[ed] the assessors' argument that the areas under stone, wood, and dirt piles, and other 'nonproductive' land between trees where no vegetation is growing, cannot be considered to be in horticultural use." ***Id.*** at 1995-33. The Board found that "[n]ot every square inch of land has to have a tree growing on it or an animal grazing on it in order to qualify for classification under c. 61A" and that "[t]he Forest Management Plan itself recognizes that thinning of trees is necessary in order to achieve optimum

output of forest products" and "that ancillary uses such as storage are necessary to further the qualifying use of the property." ***Id.***

In ***Nashawena Trust***, the Supreme Judicial Court noted that the Board "found 'sufficient basis in the evidence presented for distinguishing land whose principal use was as a source of forage for sheep from land which was unsuitable or only marginally suitable for that purpose, and which may contribute more to recreational and general conservation uses.'" 398 Mass. 821, 824-26 (1986). The court found that "[c]onsiderable testimony was introduced in the hearings before the board that the land included in the applications was the land on the island 'primarily and directly used' by the farming operations of the trust for agricultural purposes." ***Id.*** at 825. The court specifically referenced detailed testimony by the farm manager, which was "further substantiated by a report prepared by the county agent for the Soil Conservation Service of the United States Department of Agriculture, which included a 'land use inventory.' This inventory listed a total of 635 acres of 'pasture,' 'planned pasture,' and 'native pasture' on the island. This figure, plus the addition of ten acres for farmstead and farm ponds, resulted in the figures used on the 1985 application." ***Id.***

Though the case concerned the Zoning Act under G.L. c. 40A, the Court in ***Henry v. Board of Appeals***, 418 Mass. 841, 843-44 (1994) – holding that the activities did not qualify as incidental

use and did not "bear a reasonable relationship to agricultural use" - looked to G.L. c. 61A, § 2 for a definition of "horticultural use" and looked to cases contemplating "incidental" activities in zoning law. The Court considered the question of whether the excavation and removal of gravel from a hilly five-acre portion of the plaintiff's thirty-nine-acre plot was incidental to an agricultural or horticultural use of the land. ***Id***. at 841-42. The plaintiff used a portion of the property to cultivate trees to restore a forest and begin a "cut your own" Christmas tree farm, which necessitated the removal of 300,000 to 400,000 cubic yards of gravel. ***Id***. at 842-43. The Court found that the gravel removal was "not primarily agricultural or horticultural" and that the issue was whether the gravel removal was "incidental to the creation of a 'cut your own' Christmas tree farm." ***Id***. at 844. The Court determined that "incidental," when used to define an accessory use, must incorporate a reasonable relationship with the primary use and that it is insufficient for the use to be "subordinate; it must also be attendant or concomitant. To ignore this latter aspect of 'incidental' would be to permit any use which is not primary, no matter how unrelated it is to the primary use." ***Id***. at 845 (citations omitted).

Central to the above cases was extensive and detailed evidence, which the appellant's case critically lacked. While the appellant did not have to establish that every square inch of five

acres were primarily and directly cultivating hay to meet the requisite of G.L. c. 61A, § 4, he had the burden of proving that portions not dedicated to haying had some reasonable relationship to the primary use, some customary and necessary use in raising such products and preparing them for market. The appellant failed to meet this burden. Moreover, the Board found credible the testimony and documentary evidence - in particular aerial maps and the personal observations of Assessor Tonelli - offered by the assessors showing that substantial portions of the parcels at issue did not support the appellant's haying operation. Instead, they were under the shade of trees or on banks where no growing or harvesting of hay, or any related activity, could be performed.

Based upon the above and the entirety of the record, the Board found and ruled that it lacked jurisdiction over fiscal year 2021 and that the appellant failed to establish that the parcels at issue were entitled to 61A classification for fiscal year 2022. Accordingly, the Board issued decisions for the appellee.

THE APPELLATE TAX BOARD

By: /S/ *Mark J. DeFrancisco*
Mark J. DeFrancisco, Chairman

A true copy,
Attest: /S/ *William J. Doherty*
Clerk of the Board