

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

TX 2009-000660

06/28/2011

HONORABLE DEAN M. FINK

CLERK OF THE COURT  
S. Brown  
Deputy

HUGH H STEWART, et al.

CHARLES HULTSTRAND

v.

PINAL COUNTY, et al.

RICHARD V HUSK

MINUTE ENTRY

The Court took this matter under advisement following oral argument on June 27, 2011. The Court has considered Defendant's Motion for Summary Judgment and Plaintiff's Motion to Strike Affidavit of Paul L. Larkin, County Assessor and finds as follows.

Plaintiffs' response, at 4:18-20, states, "It has not contested that the property has not been utilized for agricultural or grazing purposes, at least to the knowledge of the Plaintiffs, for seven out of the last ten years." This eliminates any fact issue.

Plaintiffs base their argument on the failure of the assessor to give them the benefit of discretion, asserting that, as of the effective date of July 1, 2009, he made a decision to deny all waivers for properties not strictly meeting the statutory requirements. The statute expressly makes waiver subject to the discretion of the assessor. "Something is discretionary because it is based on an assessment of conflicting procedural, equitable or factual considerations which vary from case to case." *State v. Chapple*, 135 Ariz. 281, 297 n.18 (1993). The statute recognizes that such considerations may exist and empowers the assessor to make the final decision. That the final decision of the Pinal County assessor has for the past two years been consistently to deny waiver does not demonstrate that he is improperly failing to weigh those considerations and thereby abusing his discretion. (An official may also abuse his discretion by failing to recognize the scope of discretion available to him. In that event, the proper course is to remand for further consideration. *State v. Garza*, 192 Ariz. 171, 175-76 ¶ 16-17 (1998). But Plaintiffs do not appear to argue that the assessor is unaware of the existence of his discretion, and this would be inconsistent with their argument that he had granted waivers in the past.)

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Plaintiffs state that a “decision based upon a calendar date to no longer exercise discretion to approve agricultural classifications for [non-complying] property ... is clearly an arbitrary and capricious exercise and abuse of [the assessor’s] discretion.” But they provide no evidence either that he made a decision or that he based it upon a calendar date. All that they show is that no waiver was granted after July 1, 2009. (This is based solely on the County’s failure to respond to Request for Admissions numbers 1 and 2; because the County did not respond, they are by rule deemed admitted. However, the requests asked only if the assessor had granted any waivers since July 1, 2009, not if he had a policy in place for all waivers to be denied. Mr. Liberatore’s statement is pure speculation: even if his experience base is sufficiently large to make a judgment – and he does not state how many such cases he has handled in Pinal County before and after that date, or if there were any at all – he testifies to no first-hand knowledge of why the assessor acted as he did.) This proves nothing. No matter how frequently or infrequently waivers are granted, there must be a latest one; that an application was denied subsequent to that latest one is no evidence of a change of policy in the interim so as to make the denial an abuse of discretion.

As for the uniformity clause, to find a violation the Court must define the appropriate class of property for evaluating the claim of discriminatory treatment. *Aileen H. Char Life Interest v. Maricopa County*, 208 Ariz. 286, 291 ¶ 10 (2004). Here, Plaintiffs concede that their land is appropriately classified as non-agricultural according to the statutory definition. For the Court to nonetheless decide that the land should be classified as agricultural would arrogate to itself the discretion the legislature has reserved to the assessor. As Plaintiffs have shown no abuse of the assessor’s discretion, this argument fails.

Plaintiffs’ motion to strike Mr. Larkin’s affidavit is fruitless. Even if it were stricken, Plaintiffs have not proven the contrary, that there was a deliberate policy based on an arbitrary date. A record without evidence must be resolved in favor of the party not bearing the burden of proof.

For the foregoing reasons,

IT IS ORDERED granting Pinal County’s Motion for Summary Judgment.

IT IS FURTHER ORDERED denying Plaintiff’s Motion to Strike Affidavit of Paul L. Larkin, County Assessor.

Defendant’s counsel is instructed to file a Statement of Taxable Costs, any Application and Affidavit for Attorney’s Fees and lodge a form of judgment consistent with the Court’s ruling within thirty (30) days.