In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-19-00294-CV

HOOD COUNTY APPRAISAL DISTRICT, Appellant

V.

MANDY ANN MANAGEMENT LTD., Appellee

On Appeal from the 355th District Court
Hood County, Texas
Trial Court No. C2017185

Before Sudderth, C.J.; Gabriel and Bassel, JJ.
Memorandum Opinion by Chief Justice Sudderth

MEMORANDUM OPINION

I. Introduction

Texas taxed farm and ranch land based on its market value until 1966, when voters began approving constitutional amendments to promote the preservation of agricultural and other open-space land by allowing it to be taxed on the basis of its productive capacity. *See Tarrant Appraisal Dist. v. Moore*, 845 S.W.2d 820, 821 (Tex. 1993); *Parker Cty. Appraisal Dist. v. Francis*, 436 S.W.3d 845, 848–49 (Tex. App.—Fort Worth 2014, no pet.). The productivity appraisal method dramatically lowers property value for taxation purposes.[1]

"Qualified open-space land" is land (1) that is currently devoted principally to agricultural use to the degree of intensity generally accepted in the area and (2) that has been devoted principally to agricultural use for five of the preceding seven years. Tex. Tax Code Ann. § 23.51(1); *Gifford-Hill & Co. v. Wise Cty. Appraisal Dist.*, 827 S.W.2d 811, 813 n.1 (Tex. 1991) (referencing Article 8, section 1-d-1 of the Texas Constitution). "Agricultural use" includes raising or keeping livestock and leaving land idle in conjunction with normal livestock rotation procedure. Tex. Tax Code Ann. § 23.51(2). And "principal" use is "the *more important* use in comparison with other uses." *Moore*, 845 S.W.2d at 823. A land use change that ends any agricultural use will trigger a rollback tax to cover the difference between the taxes imposed on

[1]For example, in 2016, under the productivity method, a tract of land in this case was valued as worth $2,774, but its market value was $77,661.

the land for each of the preceding five years under the productivity valuation and the tax that would have been imposed based on market value during those years. *See Francis*, 436 S.W.3d at 849 (citing Tex. Tax Code Ann. § 23.55(a)).[2]

Appellee Mandy Ann Management, Ltd. (Mandy) applied for a qualified open-space designation after receiving Appellant Hood County Appraisal District's notices of change of use determination in which the District classified the northern 239.51 acres of Mandy's 679.152 acres as commercial.[3] The District denied Mandy's application, imposed more than $50,000 in rollback taxes for tax years 2012–2016, and prevailed when Mandy protested to the Appraisal Review Board. *See* Tex. Tax Code Ann. §§ 42.01(a)(1)(A), 42.23(a).

After a trial de novo, a jury unanimously found in Mandy's favor regarding whether the 239.51 acres should be appraised as qualified open-space land for the 2017 and 2018 tax years, which also served to eliminate the rollback taxes. The trial court entered judgment in accordance with the jury's verdict. The District complains

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[2]As of September 1, 2019, the rollback was changed from five years to three years. *Compare* Act of May 27, 1997, 1997 Tex. Sess. Law. Serv. Ch. 345, sec. 5, *with* Act of May 19, 2019, 2019 Tex. Sess. Law. Serv. Ch. 1361, sec. 1(a), codified at Tex. Tax Code Ann. § 23.55.

[3]The notices pertained to 32.640 acres of R98943; 70.052 acres of R99662; 102.150 acres of R98940; and 34.670 acres of R47349. The reason stated in the notices is "**PRIMARY USE IS COMMERCIAL QUARRY**." No one claims in this appeal that there has been any mining activity on the southern 439.642 acres of Mandy's property.

on appeal that the evidence is not legally and factually sufficient to support the judgment.[4] We disagree, conclude that it is, and affirm the trial court's judgment.

II. Evidence

All of Mandy's property is located at 5310 Coleman Ranch Road in Hood County. The property focused on by the District is composed of four adjoining parcels totaling 239.51 acres. These parcels, in turn, are the northern portion of the total 679.152 acres owned by Mandy. The entire property is shaped like an upside-down "L."

Rancher Jim Coleman, a member of the District's Agricultural Advisory Board, has lived in Hood County since 1948, and his cows have roamed freely for decades on Mandy's 679.152 acres. Jim, Michael Arnold (Mandy's owner), and S.M. Morrison, a neighboring landowner, testified during Mandy's case, while David Eatherly, the District's senior appraiser, testified for the District. The comptroller's January 2017

[4]We may sustain a legal sufficiency challenge only when (1) the record bears no evidence of a vital fact, (2) the rules of law or of evidence bar the court from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a mere scintilla, or (4) the evidence establishes conclusively the opposite of a vital fact. *Shields v. Ltd. P'ship v. Bradberry*, 526 S.W.3d 471, 480 (Tex. 2017); *see also Ford Motor Co. v. Castillo*, 444 S.W.3d 616, 620 (Tex. 2014) (op. on reh'g); *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 334 (Tex. 1998) (op. on reh'g). When reviewing an assertion that the evidence is factually insufficient to support a finding, we set aside the finding only if, after considering and weighing all the pertinent record evidence, we determine that the credible evidence supporting the finding is so weak, or so contrary to the overwhelming weight of all the evidence, that the finding should be set aside and a new trial ordered. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986) (op. on reh'g); *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965).

Manual for the Appraisal of Agricultural Land was admitted into evidence, as were portions of the applicable tax laws, photographs of the land, and information about some of the land's other uses besides running cattle. From all of this evidence, the jury had to determine whether, during the 2017 and 2018 tax years, Mandy's 239.51 northern acres (1) had been devoted principally to agricultural use to the area's required level of intensity and (2) had been devoted principally to agricultural use for five of the preceding seven years, from 2010 onward.

A. The Comptroller's Manual

The comptroller develops and distributes appraisal manuals setting forth the method of appraising qualified open-space land, and appraisal offices "shall use the appraisal manuals in appraising qualified open-space land." Tex. Tax Code Ann. § 23.52(d); *see also* 34 Tex. Admin. Code § 9.4001 (Comptroller of Pub. Accounts, Valuation of Open-Space & Agric. Lands) (adopting Comptroller's "Manual for the Appraisal of Agricultural Land").[5] The parties read portions of the Manual into the record, and it was admitted in its entirety as Plaintiff's Exhibit 38 and Plaintiff's Exhibit 39.

[5]"We treat the Comptroller's Manual and an appraisal district's standards as agency rules, which carry a presumption of validity, and defer to such rules as long as they are reasonable and do not contradict the plain meaning of a statute." *Almeter v. Bastrop Cent. Appraisal Dist.*, No. 03-17-00092-CV, 2017 WL 4478217, at *6 (Tex. App.—Austin Oct. 5, 2017, pet. denied) (mem. op.).

We have summarized as follows the eligibility requirements set out by the Manual to qualify as open-space land devoted to farm or ranch purposes:

- the standard is applied to land and all appurtenances, such as roads, stock tanks, and fences, but not to improvements like barns or to minerals connected with the land;

- the land must be devoted currently and principally to agriculture—i.e., raising or keeping cattle and leaving land idle in conjunction with normal livestock rotation procedure—and if the land is used for more than one purpose, the agricultural use must be the most important or primary use, although it need not be the primary occupation and source of income of the landowner or make a profit;[6]

- the land must be "currently devoted" to agricultural use as of January 1 of the tax year, but if agricultural use is not evident on January 1, "the chief appraiser should grant productivity valuation if the owner can show evidence of the intent to put the land into agricultural use and that agriculture will be the primary use for the bulk of the calendar year covered by the application";

- the land must be used agriculturally to the degree of intensity generally accepted in the area, i.e., "the extent typical for agricultural operations," considering what the owner puts into the agricultural enterprise in time, labor, equipment, management, and capital, although an operation will not be disqualified simply because it differs from the typical operation;[7] and

[6]The Manual states that, per *Moore*, 845 S.W.2d at 821, in reviewing each application, the chief appraiser is to consider all of the facts surrounding the property owner's use of the land—the totality of the circumstances—to determine whether, in the exercise of his or her professional judgment, the appraisal should be granted.

[7]The Manual states that raising beef cattle requires fences, proper management of land for long-term forage, enough animal units to match the land's carrying capacity, and a herd management procedure to get the animals to market.

- the land must be used for the requisite time period—here, 5 out of 7 years—although the degree-of-intensity test does not apply to the preceding years but rather to the tax year of application and every year thereafter.

The Manual also states that if the property owner is ranching several tracts as a unit, the chief appraiser "is to consider the *entire* agricultural operation as a unit, not separately, with respect to the activities on each individual parcel."[8] [Emphasis added.]

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[8]The Manual's Appendix contains the following pertinent questions and answers that the jury may have found helpful in its determination:

> **A property owner acquired four contiguous tracts over the years. The tracts are not divided by fences; in fact, they are used together as a single ranch operation. How should the property owner file the application(s) for special appraisal as 1-d-1 [open space] land?**
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> The property owner should file one application covering all four tracts. Even if the tracts appear as individual accounts in the appraisal records and on the appraisal roll, the property owner's use of the tracts together, in a single agricultural operation, means only a single application needs to be filed. Property owners should [also] file a single application if the parcels making up a single agricultural operation are not contiguous.
>
> Both property owners and appraisal districts need to be alert to the possibility that a particular parcel may be used as part of a larger operation. Appraisal districts should inform potential applicants and applicants should point out larger uses to the appraisal district.
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> . . . .
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> **A rancher grazes cattle over a large tract and devotes the majority of time and resources to raising cattle and growing feed for them. During part of the year, the property is leased for hunting wild game and game birds. Although the rancher principally devotes the land to cattle ranching, the income from the hunting leases is substantially greater than the income from cattle ranching. Does the tract qualify for agricultural appraisal?**

B. Agricultural Usage

The neighbors to the north and west of Mandy's property use their land for ranching. Unlike the neighboring properties, however, Mandy's land is also home to a quarry owned by Arnold Stone, Inc., Arnold's building stone and mining company. In 2016, Arnold Stone transferred the property to Mandy, also owned by Arnold.[9] The 75-acre quarry has been taxed as commercial property since 2006, and the remaining 604.152 acres have been appraised as qualified open-space land since before Jim and his brother Don sold the land to Arnold Stone.

Jim testified that prior to the sale to Arnold Stone, he had used the entire 679.152-acre property to raise and keep cattle, "[n]ot continuously[,] but some every year," and he said that although he had authorized someone to mine on the land prior to the sale, this had not affected the property's open-space designation. He and Don sold the 679.152 acres to Arnold Stone on the condition that they could continue to graze their cattle on it. Jim's adjacent property, which had an improved pasture on it, was to the north of the 239.51 acres.

> Yes, the land qualifies. For 1-d-1 [open space], determining the primary use of land usually does not have much to do with measuring or comparing income derived from each use. The property owner's intent and commitment of energy and resources over a period of time are more accurate indicators of the primary use of the land.

[9]Arnold said that the property was transferred to Mandy to avoid complicating the 2018 sale of most of Arnold Stone's assets. At the time of the trial, Arnold remained Arnold Stone's minority owner.

Arnold said that since the sale in 2006, Jim had continued to keep approximately 40[10] cows on the 679.152 acres on a rotation schedule between Jim's property and Arnold Stone's (now Mandy's) property, principally from late summer through the fall. The cows roamed the entire 679.152 acres because the only fence on the property was the one surrounding the perimeter. Arnold stated that when Jim opened the gate, the cows "just kind of go wherever they want. Beyond that, it's fully fenced in,[11] so once [Jim] moves them out of his pasture, they can pretty well roam wherever they want on that 679.152." Arnold said that while he had not observed all 40 cows on a daily basis, sometimes the cattle would cross into the commercial quarry area and would have to be shooed away.[12]

Jim said that the cows spent eight months of the year on his property before he moved them to Arnold Stone's property "from the last of July through frost." He dated the average frost as "November the 23rd" but he acknowledged that "in the cattle business, you don't always get to do what you want to do" and that the cows "could stay a little while after" November 23. He said that he tried to keep the cows

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[10]Jim said that he ran 30 to 40 cows on the property.

[11]Eatherly said that under the Tax Code and comptroller's guidelines, for property to be appraised as qualified open-space land for cattle grazing, "you'd have to have fences."

[12]Eatherly said that even if five or six cows wandered into the 239.51-acre area for three or four months of the year, that property did not meet the intensity requirement and its principal use was as a rock and caliche quarry.

on Mandy's 679.152 acres from August to December. Coleman said that in 2017, his wife had been ill from April until August, so he was unable to place cattle on Mandy's land until September. And he said that "there may have been a dry year back there when I didn't [run cattle], but I think I've been in there every year."

Arnold recounted that during his tenure on the property, improvements that he had made for purposes of raising and keeping cattle included maintaining fences with Jim's help, maintaining cattle guards on the oil-and-gas road that bisected the property on the south side, placing a stock tank in the middle of one of the parcels at issue (R98940), placing four stock ponds on the 239.51 acres at issue,[13] and "smooth[ing]" some of the native pasture in the 239.51 acres that had been torn up by his predecessors' mining prior to 2006. Jim agreed that his cows sometimes grazed on the 239.51 acres and used the stock ponds located thereon. When the cows were on Jim's adjacent property, Jim fed them approximately 150 bales of hay to supplement their grazing.

Like Jim, Morrison owned adjacent land on Coleman Ranch Road. He had 52 cows on his property at the time of the trial but said that he preferred to run around 40, and he used 520 acres of native grass and then rotated his cows to an improved

[13]Eatherly stated that the water near the caliche pit was not fresh water and contained "pollutants from the caliche, from calcium carbonate and also diesel from the trucks and oil and various things" and opined that there was no nutritional value to cattle on the quarry itself because there was nothing there for them to eat. Eatherly stated that in his opinion, rock quarrying was inconsistent with grazing and that he could not think of any agricultural use consistent with quarrying.

pasture that he supplemented with hay, like Jim did.[14] Morrison did not know if his property was appraised as open space but said that he received an agriculture exemption.

Eatherly, who had a bachelor's degree in history and no degrees in animal science, agriculture, or mining, testified that cattle are rotated to make sure that they do not overgraze the land and that the frequency of rotation in the area was "[g]enerally[] every few months." He disputed that the rotation schedule described by Jim and Arnold—eight months on improved pasture and four months on native grass—was normal, and he generally disagreed with Arnold's characterization of the land's usage.

C. Level of Intensity

Eatherly described Section 23.51's intensity requirement as "land that looks like the other land around it, . . . is worked in a similar way[,] . . . and is used the same way." He said that his job was to provide oversight of agricultural property and determine whether it qualified as open-space and that it included "driv[ing] the roads and look[ing] at people's properties." Eatherly stated that "one 1,000-pound animal unit per 15 acres is the intensity level" set by the District's Agricultural Advisory Board. The "2017 Agricultural Advisory Board Guidelines and Standards," which

[14]Unlike Jim, however, Morrison harvested the hay that he used from one of his other properties. Neither Jim nor Arnold harvested hay on Mandy's property.

were updated in April 2017, were admitted into evidence and confirmed the 1-cow-to-15-acres degree of intensity for native pasture.

But in a July 2017 email between Eatherly and Marty Vahlencamp, the Texas A&M University Hood County agricultural extension agent who helped create the Manual, Vahlencamp opined that the appropriate standard of intensity in Hood County for native pasture was 1 cow to 17–25 acres, which would have required a herd of 9 to 14 cows for a 239.51-acre parcel, 24 to 35 cows for a 605-acre parcel, and 27 to 40 cows for a 679.152-acre parcel.

At the 1-cow-to-15-acres ratio, 16 cows would be required for a 239.51-acre parcel,[15] 40 cows would be required for a 605-acre parcel, and 45 cows would be required for a 679.152-acre parcel. Jim said that on average, "probably most" of his cows each weighed 1,000 pounds.

The two viewpoints on the proper cow-to-acre ratio can be summarized as follows:

[15]Eatherly informed the jury that they should divide Mandy's 239.51 acres by 15 to get the number of animal units (16) that would be required to meet open-space requirements, that Mandy's property did not meet the intensity requirement even if five or six cows wandered into the 239.51 acres for three or four months of the year, and that the 239.51 acres' principal use was as a rock and caliche quarry.

Acreage	Eatherly's 1:15 ratio	Vahlencamp's 1:17–25 ratio
239.51 parcel	16 cows	9–14 cows
605 parcel	40 cows	24–35 cows
679.152 parcel	45 cows	27–40 cows

Eatherly said that some of Arnold's property immediately south of the 239.51 acres was still qualified open-space land but said that he had been going on the property since 2010 and that although he had seen "a lot of quarrying of rocks," he had "not once ever seen a cow." Eatherly testified, "I want to see cows. When I see cows, it makes my job easier."

Arnold said that he had seen cattle grazing on the property "a dozen or more" times but that he did not pay attention because they were not his cows. Morrison said that he had seen cows on Mandy's land "in passing down the road" but that he had never counted them. He stated, "I would guess I've seen maybe as many as 20 at a time, sometimes, and I don't know how many is grazing there and how many is out of sight." He described the terrain as hilly, said he could not see across Mandy's entire property,[16] and said, as to the number of cows and where they chose to graze, "They got free choice, so . . . they're not always right up by the road."

[16]Eatherly said that from Coleman Ranch Road, he could see about two-thirds of the Mandy's property. Eatherly opined that there would not be cattle on the

Like Arnold, Morrison said that he never kept a record of cow-sightings because he had no interest in doing so—they were not his cows. But he also observed that it was more common to see a truck than a cow on Mandy's property, stating, "Well, some days there's one truck right after another. You may see a hundred trucks. I've never seen a hundred cows I don't think. I think I can count them better than that." As to Jim's rotation schedule, Morrison said that he could not recall how many times a year he had seen cows on Mandy's property, stating, "sometimes they're in there and sometimes they're not."

Jim said that he used Mandy's land for three or four months of the year and acknowledged that the 239.51 acres alone could not support many cows year-round because it was "pretty poor," but he noted that it could support at least four to six cows, although it is unclear from his testimony whether he meant year-round. During cross-examination, Coleman gave the following testimony:

> Q. And I believe it was your testimony from counsel that you said this north part sustains maybe five or six cows at best? Is that your testimony?
>
> A. Well, I don't understand. If y'all are talking about for a year, yeah, that's what it would do. But that's not the way I'm using it.
>
> Q. How are you using it?
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> A. I'm using it about three or four months a year and run them in there, so you can figure it thataway.

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portion he could not see because that third of the property was caliche, with nothing on it for the cattle to forage.

. . . .

> Q. And I believe, just to reiterate, it's your testimony that you could maybe run five or six cows three or four months out of the year on the top 239.51 acres?
>
> A. Well, maybe -- yeah. Four to five, yeah.

D. Land Usage and Appraisal, 2006–2010

Arnold said that when he closed on the property in 2006, he identified for the District the 75 acres that he planned to use for commercial purposes—rock mining in the northwestern part of the property and scales and management facilities in the southeastern corner—and paid five years' worth of rollback taxes (2002–2006) on that property. *See* Tex. Tax Code Ann. § 23.55. From 2007 to 2010, the District treated 75 acres of the property as commercial and the remainder as open-space land. Arnold testified that in 2010, after Eatherly began working for the District, all of that changed.

E. Land Usage and Appraisal, 2010–2013

According to Arnold, the catalyst for the change was an escalation in hostility between his company and the District following a telephone conversation between his accounts payable clerk and a District employee in 2010 about the mis-delivery of a tax statement and ensuing $230 penalty. Arnold recounted that his clerk was "very upset" following her conversation with the District employee and requested that "she not have any more communication with [him] as a result of their phone conversation."

Arnold responded that he would "handle it," and he "picked up the phone and called" the District employee. According to Arnold, he

> explained [to the District employee] that [Arnold] had two situations: One, the professionalism in which [the District employee] conducted himself was totally inappropriate. At that point in time, [the District employee] notified [Arnold] that it was not [Arnold's] place to challenge his authority, that [Arnold] . . . would not challenge his authority, that basically [Arnold Stone was] to pay the penalty and that was it. . . . [The district employee] said[, "T]the penalty will be paid or I will foreclose your property on the -- and sell it off on the courthouse steps.["]

Following that conversation, Arnold paid the penalty and assumed "that would be the end of the conversation." Arnold then described how, after that encounter, the relationship between Arnold Stone and the district "deteriorated very quickly,"[17] stating,

> [W]e subsequently nearly every year have had issues with the [D]istrict now trying to either rollback portions or all of the property. One year that they were trying to double - - double the valuation on the property, and each year as I went and presented to the [Appraisal Review Board] panel, I could tell that that was an increasing frustration because even in one situation Mr. Eatherly at the conclusion of the panel slammed down books and stormed out of the room. And I have been in a number of [Appraisal Review Board] panels both as a witness, you know, observing someone else and putting on evidence of a valuation. It's never a contentious situation. And it's always been a very contentious situation since that time.

Specifically, according to Arnold, in 2011 and 2013, the District claimed that a change of use had occurred and that almost all of the property should be appraised as

[17]Eatherly admitted that he visited Arnold Stone's property on numerous occasions in 2010.

commercial property, but he appealed those decisions to the Appraisal Review Board and prevailed. The trial court admitted into evidence the October 2013 notices that the District sent to Arnold Stone to inform it of a change to market-value taxation beginning with the 2014 tax year and the possibility of Arnold Stone's having to pay rollback taxes based on the District's determination that "the use of all or part of the agricultural property . . . has changed [to commercial operation] and is no longer used for agricultural purposes."[18]

But the 2013 notices may have been triggered by some of the other activities on the property during that time when, in addition to the quarry, Arnold Stone had also opened the property for off-road vehicle use during weekend events run by Rock Trails of Tolar.[19] Arnold said that Rock Trails operated "maybe two days" per month for around a year and a half and that he charged enough to pay the employee who was there to open the gate,[20] but Eatherly, who characterized Rock Trails as "an off-road amusement park," said that according to Rock Trails's Facebook page, it had started in 2009 and did not cease operations until 2016. As of June 15, 2013, Rock Trails had

[18]In that instance, the District sent notices pertaining to 554 acres: 70.052 acres of R99662, 214.640 acres of R99655, 98 acres of R40349, 34.670 acres of R47349, 102.150 acres of R98940, and 34.640 acres of R98943.

[19]Arnold stated that Rock Trails of Tolar was operated by Arnold Stone.

[20]Defendant's Exhibit 37, a Rock Trails membership application, was admitted into evidence, showing pricing levels from $50 for a passenger to $350 for a family membership. Arnold said that Arnold Stone "ultimately didn't make anything off of [Rock Trails]."

1,321 "followers" on Facebook, and 38 people had "liked" its post that day about seven new event parks and the announcement that Rock Trails was open "every Saturday and Sunday from 8 a.m. to 5 p.m."[21]

Rock Trails hosted a Treadnecks event—ROCtober Fest—from October 3 to October 6, 2013, to raise money for first responders after Granbury was hit by a tornado. Defendant's Exhibits 20 and 22, fliers for the 2013 event, were admitted into evidence. Exhibit 22 lists the activities available that weekend: "car crush, blind man's bluff, helicopter rides, bikini contest, offroad contests, kid's inflatables, food vendors, rock-crawling and off-road trails, mud pits, and live music." Arnold said that

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[21]Defendant's Exhibit 26, a screenshot of Rock Trails's Facebook page, was admitted into evidence and shown to the jury. It contained a post from June 15, 2013 that announced that Rock Trails

> is kicking it in high gear. Just beginning construction on 7 new event parks here at the Trails
>
> (1) Mud pit – Fast Track (side by side raceway)
> (2) Hill and Hole Mud Track/Mud Bog
> (3) 3 acre Rock Garden!!!
> (4) Rock Climbers Obstacle Course
> (5) Tuff Truck Challenge Course
> (6) Off-Road Uphill Raceway
> (7) Frame Twister Course
>
> Come check out the progress. Open every Saturday and Sunday from 8:00 a.m. to 5 p.m. PROUD TO BE A TREADNECK!

the main stage, food court, general store, and other items were between the scale house and the office on the 239.51 acres.[22]

In addition, from May 16 to May 18, 2014, Rock Trails hosted "Mud Fest 2014," another Treadnecks-sponsored event. Other defense exhibits provided additional context for the Rock Trails events. Defendant's Exhibit 14, an undated flyer, showed the layout for parking, spectator areas, "roadways" through the property, and standard and VIP camping. Defendant's Exhibit 15, a photograph dated June 5, 2014, showed a sign that said "Welcome Treadnecks!!" at the entrance to 5310 Coleman Ranch Road. Defendant's Exhibits 17, 18, and 19, all undated photos, show off-road vehicles on giant rocks.

Arnold identified Defendant's Exhibit 9, a photo dated February 4, 2013, and Defendant's Exhibit 12, an undated photo, as what the District had used to support its claim that the property was not being used for agricultural purposes. Defendant's Exhibit 9 shows a sign pointing towards parking, camping, vehicle staging, and a park entrance; it also shows a port-a-potty between two trees.[23] It also shows dry, scrubby

[22]Arnold said that he had not worried that traffic would disturb the land because Coleman drove across it every day, although he acknowledged that Coleman did not go four-wheeling on the property.

[23]Defendant's Exhibit 8 is a closer photo of the same signage in Defendant's Exhibit 9. Defendant's Exhibit 10 contains another photo of signage pointing towards parking and vehicle staging in front of a large tree and a field of native grass. A bright patch of caliche is in the foreground, while trees fill the background. Defendant's Exhibit 11 is a photo of signage pointing towards "office" and "store" on a dirt road bordered by scrubby grass.

grass, hilly terrain, and trees in the background. Defendant's Exhibit 12 shows three jeeps parked in front of a lean-to and three light poles; in the foreground is a blinding patch of blue-white, while the background shows hilly terrain, native grass, and trees.

F. 2014 Appraisal Review Board Hearing

At the July 2014 hearing on Arnold Stone's protest of the 2013 notice, the Appraisal Review Board determined that, notwithstanding the October 2013 and May 2014 events, as in prior years, all but the 75 acres should be appraised as open-space land.[24] Arnold said that the District had "made a huge issue" of the off-roading events but that the Appraisal Review Board had "said no, an incidental use is an incidental use."

Arnold said that he was surprised when the District did not appeal the Appraisal Review Board's order because when Arnold Stone prevailed, Eatherly "slammed down books and stormed out of the room." Arnold said, "Mr. Eatherly was quite upset when this ruling was -- was given. I thought surely that the district was going to come after me, that it was like, okay, I can't -- I can't get away from these guys. They just keep petitioning for the same thing every year. But they never appealed any of the decisions from the ARB panel."

[24]The typed notation in the order states, "**GRANT AG ON ALL PROPER[T]Y EX[C]EPT FOR 75 ACRES**."

G. Land Usage, 2017–2018

In 2016, Arnold Stone's transfer of the property to Mandy triggered the District's notices of change of use determination for the 239.51 acres, for which the District stated that "the use of all or part of the agricultural property described [herein] has changed and is no longer used for agricultural purposes." *See* Tex. Tax Code Ann. § 23.54(e) (stating that once appraisal under Subchapter D of Chapter 23 is allowed, "the land is eligible for appraisal under this subchapter in subsequent years without a new application unless the ownership of the land changes or [the land's] eligibility under this subchapter changes").

Eatherly opined that the 239.51 acres underwent a change of use "when the new owner took over" and from "the fact that it's a rock quarry and had a secondary entertainment business, that's a change of use." He read to the jury a portion of the Manual defining "change of use" as a physical change in which the landowner stops using the land for agricultural purposes.[25] Eatherly stated that the District denied Mandy's 2017 open-space application for the 239.51 acres because "[t]he fencing is down along the street, which cannot contain animals, and it was down for over 400 yards. Also, it did not meet the intensity requirements."

[25]The Manual cautions, "Chief appraisers must exercise great care in determining when a change of use triggers a rollback," because a rollback "is a serious economic penalty." It warns that "[a]ppraisers must keep in mind that change-of-use issues are often unclear and require a delicate balance between fair application of the law and good decisions based on the facts of each situation."

Eatherly recited the guideline that if the land did not qualify on January 1, then the owner had to "show evidence of the intent to put the land into agricultural use and that agriculture will be the primary use for the bulk of the calendar year covered by the application." However, Eatherly also agreed that other determinations would include the stocking rates and the property's historical use over five of the preceding seven years.

Arnold said that in 2017 and 2018, the property was still being used to the same degree of intensity as before, stating, "we've never used the property any differently than we've always had it since the time I bought it" and that Jim was still running the same number of cattle. He stated that the property "has always been used exactly the same way that we declared it, 75 acres commercial, 605 Mr. Coleman uses to run cattle on."

On cross-examination, Arnold acknowledged that the quarry was usually open five days a week, with a daily average of 8 to 12 trucks entering the property to be loaded with product from the mining area on the west side of the property and then weighed before exiting the property on the same side as the property's entrance. And Arnold acknowledged that he lived on the other side of the DFW Metroplex but said that he visited the property more than once a week, on average.[26]

[26]Arnold testified that he visited the property 75 days out of 365 days in a year.

H. Photographic Evidence

The jury saw photographs of the 239.51 acres as well as maps and aerial photographs of the entire area. Many of the photos showed dirt, rocky hills, trees, and native grass, and Arnold said that Plaintiff's Exhibits 41 and 44 accurately depicted what was typical of the northern 239.51 acres and that cattle had grazed in that area every year since 2006, stating, "You see them up there quite a bit."

Plaintiff's Exhibit 41 showed hilly terrain and a rough dirt-and-rock road along which grass, shrubs, and cacti grew, with a thicket of trees on the left. Plaintiff's Exhibit 44 showed three black cows grazing on native grass near a large rock, surrounded by trees and scrub brush characteristic of the Texas Hill Country. Arnold said that in addition to seeing the cattle graze there, he had seen them bed down under the trees and congregate near the ponds during the heat of summer in July, August, and September. Arnold said that he knew Jim's cows used the northern 239.51 acres even when trucks came and went from the mine because that was normally where he saw them. Arnold identified cows in Plaintiff's Exhibits 42 and 43 as some of the cows on the property but said that Jim's cows "all pretty well look the same."[27]

[27]Plaintiff's Exhibit 42 showed a large black cow standing in the dirt road pictured in Plaintiff's Exhibit 41. Plaintiff's Exhibit 43 showed two black cows climbing rocks that were heavily interspersed with native plants. There were trees in the background.

Arnold said that Plaintiff's Exhibits 71 and 72—aerial photos shot in 2019—accurately depicted the property as it existed in 2017 and 2018.[28] Plaintiff's Exhibit 71 labels the tracts at issue and shows green groundcover and trees interspersed with bright, interconnected white patches. Plaintiff's Exhibit 72 is a close-up of the northern 239.51 acres: R99662, a 70-acre parallelogram-shaped tract bordered by Nix Road on one side and Coleman Ranch Road on the other and containing two white swirls; R47349, a 34.67-acre triangular tract containing a white swirl; R98940, a 102.150-acre tract of which one-third contains a white-and-blue mass; and R98943, a 32.64-acre tract containing the other half of the white-and-blue mass and an additional white swirl.

Arnold said that Defendant's Exhibit 1, a close-up aerial photograph like the one in Plaintiff's Exhibit 72, is what the District had relied upon to support its claim that the entire 239.51 acres was used for mining. Instead of the shades of green

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[28]The trial court initially sustained the District's objections to Plaintiff's Exhibits 71 and 72 on the basis of late designation but then reconsidered and overruled the objection when Mandy's counsel pointed out that the photographs were discovered on the District's website the weekend before trial and that, although Mandy had requested during discovery that the District produce all photographs of the subject property, the District had produced one from 2016 and had failed to supplement production with the more recent photos. Mandy's counsel explained, "[W]e had to independently discover that these photographs had been obtained by the [D]istrict."

Eatherly testified that the 2019 aerial photo would not be helpful in determining whether the property qualified on January 1, 2017, because it was taken "after the fact."

shown in Plaintiff's Exhibits 71 and 72, Defendant's Exhibit 1 has a sepia tone, with substantially larger white patches covering almost all of R98943, three-quarters of R98940, and large areas of the remaining tracts, depicting an arid, bleached-out wasteland. Arnold said that the District had shown Defendant's Exhibit 1 every year to the Appraisal Review Board, that the photograph looked like it had been taken during an intense drought, and that the property had not looked like that during Arnold Stone's or Mandy's ownership. Eatherly, on the other hand, testified that Defendant's Exhibit 1 was taken in January or February 2016,[29] identified the white material in the photo as caliche, and stated that the photograph was not taken during a drought.

III. Discussion

In its two issues, the District complains that the evidence is legally and factually insufficient to support the jury's verdict that the property was "currently devoted to principally agricultural use" and that the District presented uncontroverted testimony that the property could not support agricultural use "to the degree of intensity generally accepted in the area" as required by the Tax Code.

Mandy responds that the evidence is legally and factually sufficient to show that it used the property to the required degree of agricultural intensity and that it was "currently devoted principally" to agricultural use for tax years 2017 and 2018

[29]Eatherly said that the District hired a company every two years to take aerial photographs of the entire county.

because: (1) under the Manual, the agricultural activity on the subject property should not be considered in isolation, and the Tax Code provides that agricultural use includes leaving land idle for the rotation of livestock; (2) appraisers may consider agricultural land improvements to determine the degree of intensity; (3) the 1-cow-to-15-acres was just one suggested guideline for degree of intensity; and (4) even if agricultural use is not evident on January 1, the appraiser can still grant open-space valuation if the owner shows that agricultural activity will be the primary use for the bulk of the year.

In determining whether legally sufficient evidence supports the finding under review, we must consider evidence favorable to the finding if a reasonable factfinder could and must disregard contrary evidence unless a reasonable factfinder could not. *Cent. Ready Mix Concrete Co. v. Islas*, 228 S.W.3d 649, 651 (Tex. 2007); *City of Keller v. Wilson*, 168 S.W.3d 802, 807, 827 (Tex. 2005). We indulge "every reasonable inference deducible from the evidence" in support of the challenged finding. *Gunn v. McCoy*, 554 S.W.3d 645, 658 (Tex. 2018); *City of Keller*, 168 S.W.3d at 819 ("If the parties to an oral contract testify to conflicting terms, a reviewing court must presume the terms were those asserted by the winner.").

Anything more than a scintilla[30] of evidence is legally sufficient to support a finding. *Cont'l Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444, 450 (Tex.

[30]Scintilla means a spark or trace. *Scintilla*, Black's Law Dictionary (10th ed. 2014).

1996); *Leitch v. Hornsby*, 935 S.W.2d 114, 118 (Tex. 1996); *see also 4Front Engineered Sol., Inc. v. Rosales*, 505 S.W.3d 905, 909 (Tex. 2016) ("The evidence is legally sufficient if . . . there is more than a scintilla of evidence on which a reasonable juror could find the fact to be true."). More than a scintilla exists if the evidence rises to a level that would enable reasonable and fair-minded people to differ in their conclusions. *Rocor Int'l, Inc. v. Nat'l Union Fire Ins.*, 77 S.W.3d 253, 262 (Tex. 2002); *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997). On the other hand, when the evidence offered to prove a vital fact is so weak that it creates no more than a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003); *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983). The factfinder is the sole judge of the witnesses' credibility and the weight to be given to their testimony. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003).

During trial, Arnold presented a holistic view of his property, in that 604.152 acres of the 679.152 total acres had historically been and had continued to be open-space land for cattle-raising, while the remaining 75 acres were commercially used (and taxed) as a quarry. The District, in contrast, tried to focus the jury's attention exclusively on the 239.51 acres in the northwest quadrant where the quarry was located, despite the Manual's instructions to consider the "entire agricultural operation as a unit" if a property owner ranched several tracts as a unit. The jury saw maps and

photos of the land and the activities thereon, including evidence of all of the other uses. The jurors could have chosen to believe Arnold when he testified that the land had continued to be used as it always had been—before and after his purchase of it from Jim—and that the only change had been that he had transferred ownership of the property from one of his businesses to another.

Further, the Manual states that raising cattle requires fences, proper management of the land for long-term forage, enough animal units to match the land's carrying capacity, and a herd management procedure to transport the animals to market. While no one testified what proper management for long-term forage entailed and neither side took an actual census of the cows, there was sufficient evidence from which the jury could have drawn conclusions about fencing, forage, and number of cows.

With regard to fencing, both Jim and Arnold testified that the entire 679.152-acre property was fenced around the perimeter but not internally. Although Eatherly testified that the perimeter fence had fallen down in places, the District offered no photographic evidence to show that the fence had fallen down or that it had been inadequately maintained, and the jury was entitled to disbelieve the testimony.

With regard to forage, Vahlencamp stated in his June 16, 2017 email to Eatherly that "[a] general rule of thumb is a cow will need about 30 pounds of forage

per day."[31] The jury could have considered all of the photographic evidence of the 239.51 acres and the size of the cows and determined that the 239.51 acres could support 30 pounds of forage a day for at least 16 cows over the course of four months.

And with regard to carrying capacity and the number of cows supported by Mandy's land, Jim's testimony and Morrison's testimony supported that the entire 679.152-acre property could be and had been used to raise 40 cattle as part of a rotation, and Arnold said that he had shooed cows away from the quarry (which was taxed separately as commercial property) and saw them when he entered and exited the property. The aerial photographs and Rock Trails of Tolar map show that the entrance and exit to Mandy's property from Coleman Ranch Road are within the northern 239.51 acres.

Although the District argues in its reply brief that the jury charge defined the land at issue as the "approximately 240 acres of Plaintiff's real property" and thus required the jury to find that it met the intensity test of 1-cow-per-15 acres (i.e., 16 cows), Morrison said that he had seen up to 20 cows at a time when passing "down the road," and the property map illustrated that he would have driven past the 239.51 acres to reach his adjacent land, located south of the wide part of the upside-down "L."

[31]Vahlencamp noted that "[w]ithout being on the property[,] it [would be] difficult for [him] to estimate how much forage it has on it."

Although Jim's cows were not released onto the property on January 1, they were present in 2017 from September until November 23 at the earliest—or December at the latest—and the remainder of the time, the native pasture was left idle in conjunction with what Jim and Arnold described as normal livestock rotation. Jim's adjacent property was to the north of the 239.51 acres, meaning that the cattle would necessarily cross through and forage on the 239.51 acres on their way to the southern 439.642 acres.

The jury had the opportunity to assess the witnesses' credibility and evaluate the rest of the evidence and could have decided that the District had vindictively pursued stripping the open-space designation from Arnold ever since the dispute arose regarding the late penalty. The jury likewise could have chosen to discount Morrison's testimony—"You may see a hundred trucks"—as hyperbole and to disbelieve Eatherly's testimony that he wanted to see cows but had never seen any on the 239.51 acres. Accordingly, based on the record before us and the applicable standards of review, we conclude that the evidence is legally and factually sufficient to support the jury's verdict, and we overrule both of the District's issues.

IV. Conclusion

Having overruled both of the District's issues, we affirm the trial court's judgment.

/s/ Bonnie Sudderth
Bonnie Sudderth
Chief Justice

Delivered: November 12, 2020