2016 IL App (2d) 151257-U
Nos. 2-15-1257 & 2-16-0005, Cons.
Order filed December 21, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

KEVIN DAHL, Petitioner, v. ILLINOIS PROPERTY TAX APPEAL BOARD, DeKALB COUNTY BOARD OF REVIEW, and SYCAMORE COMMUNITY SCHOOL DISTRICT NO. 427, Respondents.	)	On Petition for Review from the Illinois Property Tax Appeal Board. Nos. 08-03145.001-C-3 through 08-03145.005-C-3 and 09-03144.001-C-3 through 09-03144.005-C-3

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Hudson and Justice Hutchinson concurred in the judgment.

RULE 23 ORDER

¶ 1 *Held*: The Illinois Property Tax Appeal Board properly denied as untimely the taxpayer's 2008 open-space claim. However, we remand the taxpayer's 2009 open-space claim for further consideration on the merits. Affirmed in part, vacated in part, and remanded.

¶ 2 For the tax years 2008 and 2009, the De Kalb County assessor classified the 26-acre property at issue as vacant nonfarmland and assessed the property for tax purposes at its "next highest and best use," which was determined to be the market value for commercial land. The property was being marketed as commercial land and had a list price near $6 million. The assessed value was near $1.5 million, and the taxes derived from the assessed value were near $120,000 per year. Appellant-taxpayer, Kevin Dahl, separately appealed the 2008 and 2009 classifications and assessments to co-appellee, the De Kalb County Board of Review (Board). The Board affirmed the classification but slightly adjusted the assessed value (from $1,580,197 to $1,521,468), providing no significant relief. Dahl *then* separately appealed the 2008 and 2009 classifications and assessments to co-appellee, the Illinois Property Tax Appeal Board (PTAB). The Sycamore Community School District No. 427 (School District) intervened on the side of the Board.

¶ 3 In 2012, the PTAB heard the case. Dahl raised two arguments in favor of lower taxes: (1) pursuant to the developer's relief provision of the Illinois Property Tax Code (Code) (35 ILCS 200/10-30 (West 2008)), the assessed value should be based on use as farmland (which would result in comparatively nominal taxes under $1,000); or (2) alternatively, pursuant to the open-space provisions of the Code (35 ILCS 200/10-155) (West 2008)), the assessed value should be based on use as open space (which would result in taxes of an unspecified amount higher than the farmland rate, but still much less than the appealed-from amount). The PTAB accepted Dahl's developer's relief argument, and it granted him the preferential farmland tax rate. The PTAB did not consider Dahl's open-space argument.

¶ 4 In 2014, this court reversed the PTAB's decision and determined that the developer's relief provision did not apply. *Sycamore Community Unit School District No. 427 v. Illinois*

Property Tax Appeal Board, 2014 IL App (2d) 130055, ¶ 41.[1] The developer's relief provision was enacted to protect real estate developers from rising assessments that result from the initial platting and dividing of *farmland*. *Id*. ¶ 29. In order to be classified as farmland, a taxpayer must have farmed the property for the preceding two years. *Id*. ¶ 5. In this case, when Dahl platted the property for development, the property had not been farmed consistently in years and had already been classified as *nonfarmland*. *Id*. ¶ 41. Dahl did not timely plat the property. *Id*. ¶ 37. " 'Developers who plat and subdivide land beyond the year in which it [was] reassessed risk losing the benefit afforded by the [developer's relief provision]. *** [W]hile timely developers are protected, assessors are not indefinitely or unfairly prevented from reclassifying property and collecting increased taxes.' " *Id*. (quoting *Mill Creek Development, Inc. v. Property Tax Appeal Board*, 345 Ill. App. 3d 790, 796 (2003)). Thus, Dahl could not obtain the preferential farmland rate pursuant to the developer's relief provision. *Id*. We remanded for the PTAB to consider whether Dahl could obtain a lower tax rate pursuant to the open-space provisions. *Id*. ¶ 45.

¶ 5 In 2015, on remand, the PTAB issued two separate rulings for the 2008 and 2009 tax years. As to the 2008 tax year, the PTAB rejected Dahl's open-space claim as untimely. 35

[1] The parties state that the instant appeal is the parties' third. However, as to the 2008 and 2009 tax years, it is the second. An earlier appeal, *American National Bank Trust No. 2456 v. Whitwell*, Nos. 2-07-0889 & 2-07-0908 Cons. (2008) (unpublished under Supreme Court Rule 23), concerned the 2006 tax year. The first appeal concerning the 2008 and 2009 tax years, *Sycamore*, 2014 IL App (2d) 130055, addressed the developer's relief provision of the Code. The instant appeal concerns the 2008 and 2009 tax years and addresses the open-space provisions of the Code.

ILCS 200/10-160 (West 2008). Section 10-160 of the Code requires taxpayers to apply for open-space status by January 31 of the year in which they seek to receive the open-space rate, *id.*, but Dahl did not apply until September 2008. The PTAB did not address whether, had the application been timely, the property would have qualified for open-space status.

¶ 6 For the 2009 tax year, the PTAB rejected Dahl's open-space claim on the merits. It found that Dahl had not used the property as open space for three prior years, as required by the Code. 35 ILCS 200/10-155 (West 2008). Specifically, it found that the one-time planting of winter wheat in 2006 resulted in soil disruption and precluded a finding that the land had been used for the promotion of soil conservation for three prior years. 35 ILCS 200/10-155(c) (West 2008). In evidence and in argument, the parties also implicated subsections 10-155(a) (concerning exclusivity) and 10-155(e) (concerning public benefit) of the Code, but the PTAB did not expressly address those subsections.

¶ 7 Dahl appeals the PTAB's 2015 open-space rulings as to the 2008 and 2009 tax years. Because the appealed-from decisions involve an assessed valuation of greater than $300,000, from which the taxes were calculated, we bypass the circuit court and hear the appeal directly. 35 ILCS 200/16-195 (West 2014). Dahl argues that the PTAB should have excused his late application in 2008 and that, on the merits, it erred when it determined that Dahl had not used the property for open space by meeting the criteria to qualify for open-space status under any one of the open-space subsections at issue: subsections 10-155(a), (c), and (e) of the Code. 35 ILCS 200/10-155(a), (c), and (e) (West 2008).

¶ 8 We hold that the PTAB did not err in refusing to excuse Dahl's untimely application for open-space status in 2008, where the deadline was mandatory and not amenable to substantial, as opposed to strict, compliance, and where enforcing the deadline was not unfair and did not result

in a denial of due process**.** However, as to the 2009 open-space claim, we determine that the PTAB did not adequately address subsection 10-155(a). Therefore, we vacate the PTAB's ruling on the 2009 open-space claim, and remand for further consideration in accordance with this order. We affirm in part, vacate in part, and remand for further consideration.

¶ 9 I. BACKGROUND

¶ 10 The instant case turns on the application of the open-space provisions of the Code, which provide:

> "In all counties, in addition to valuation as otherwise permitted by law, land which is used for open space purposes and has been so *used for the 3 years immediately preceding* the year in which the assessment is made, upon application under Section 10-160, shall be valued on the basis of its fair cash value, estimated at the price it would bring at a fair, voluntary sale for use by the buyer for open space purposes.
>
> Land is considered used for open space purposes if it is more than 10 acres in area and:
>
> (a) is actually and *exclusively* used for maintaining or enhancing natural or scenic resources,
>
> (b) protects air or streams or water supplies,
>
> (c) promotes *conservation* of soil, wetlands, beaches, or marshes, including ground cover or planted perennial grasses, trees and shrubs and other natural perennial growth, and including any body of water, whether man-made or natural,
>
> (d) conserves landscaped areas, such as public or private golf courses,

(e) enhances the value *to the public* of abutting or neighboring parks, forests, wildlife preserves, nature reservations, sanctuaries, or other open spaces, *or*

(f) preserves historic sites.

Land is not considered used for open space purposes if it is used primarily for residential purposes.

If the land is improved with a water-retention dam that is operated primarily for commercial purposes, the water-retention dam is not considered to be used for open space purposes despite the fact that any resulting man-made lake may be considered to be used for open space purposes under this Section." (Emphasis added.) 35 ILCS 200/10-155 (West 2008).

Subsections (a), (c), and (e) are at issue here.

¶ 11 On remand, in determining whether the open-space provisions applied, the PTAB reviewed the evidence and transcripts from the 2012 hearing. It did not hear new evidence.

¶ 12 A. Dahl's Testimony

¶ 13 Dahl testified that he has been in the real estate business for 30 years. He bought the property in 2001, with the intent to develop it:

"Q. The reason you stopped farming in 2005 was because it was your intention to develop the property; isn't that true?

A. Yes.

Q. You did start to develop the property by putting in sewer lines and the water lines; isn't that true?

A. Sure. I reassociated—got the FEMA involved and got some of the land out of the floodplain. Yeah, we worked on this thing pretty hard, pretty long.

Q. So you began the development process, but you didn't finish it; isn't that true?

A. That's correct. Still not done."

¶ 14 Dahl believed the plat was recorded in 2005, but it was not recorded. Over the course of the litigation in the case involving the 2006 tax year, discussed below, he realized the plat had not been recorded. Thus, in 2007, he caused the plat to be recorded.

¶ 15 Dahl testified regarding his application for open-space status. Initially, Dahl did not realize that pursuing open-space status was an option. Instead, when, in 2006, his taxes went up because he had not farmed the property in over one year, he sought lower taxes under the developer's relief provision. He resumed limited planting on the property, planting one crop of winter wheat in the fall of 2006. He litigated the developer's relief claim for the 2006 tax year until September 2008. In 2006, the Board ruled that the property did not qualify for the farmland rate under the developer's relief provision. Dahl (improperly) filed two simultaneous appeals, one to the PTAB and one to the trial court. In 2007, the PTAB dismissed the appeal for the 2006 tax year. Also in 2007, the trial court granted relief for the 2006 tax year. The Board appealed that ruling to this court. In September 2008, this court reversed on procedural grounds, and did not reach the merits of the developer's relief claim for the 2006 tax year.[2] Given this court's September 2008 ruling, Dahl hired new counsel. Dahl and his new attorney became concerned

[2] *Whitwell*, Nos. 2-07-0889 & 2-07-0908 Cons. (2008) (unpublished under Supreme Court Rule 23).

that their developer's relief claim as to the 2008 and, later, the 2009 tax years might not prevail. Therefore, Dahl's attorney suggested applying for open-space status as a backup.

¶ 16 Dahl testified to the public's use of the property, or lack thereof. In 2007, Dahl sold a parcel of land that abutted the subject property to the park district. (The park district later used the land for a soccer field.) Prior to 2007, no park district property abutted Dahl's property. However, the School District had long owned property across the street.

¶ 17 Dahl posted "no-trespassing" signs on the property "a couple of times." He did this because people dumped garbage on the property, such as a couch and a fan. Dahl paid his tenant, who lived nearby, to "check the area" and remove the garbage. When specifically asked whether members of the public ever accessed the property, Dahl answered: "Yeah, sometimes people would walk across it. Other times we had some kids riding bikes out there. I think my tenant told me that he'd run off a couple of kids with motorized, like, dirt bikes out there. It was a recreational area."

¶ 18 In 2007 and 2008, Dahl left the property vacant. Dahl resumed farming the property in 2009. He hoped to reduce taxes, presumably by beginning a two-year farming history to receive a lower rate under the developer's relief provision. He also wanted to relieve himself of the burden of cutting down weeds, which was "fairly expensive."

¶ 19 B. McArdle's Testimony

¶ 20 Dahl called Thomas McArdle, a forest ecologist, to testify. McArdle had previously testified in three open-space cases, including another case for Dahl's law firm, *U.S. Steel Group v. Cook County Board of Review*, PTAB Docket No. 00-24208.001-C-3 (December 19, 2005). McArdle had been to the property once, in 2012. In forming his opinion that the property was open space in that it was used to conserve soil (subsection 10-155(c)), McArdle reviewed 11

aerial photographs of the property, taken between 1999 and 2012. The photographs showed that, *in 2005*, the entire property was scraped and graded; storm water management ponds also appeared. (Dahl prepared the property for development that year, laying sewage and piping.) In 2006, Dahl planted winter wheat. From 2007 to 2009, "successional" patterns of vegetation began to develop.

¶ 21 McArdle explained that there are three types of successional patterns: (1) degraded, where vegetative growth has minor, sporadic disturbances; (2) cultivated, where the vegetative growth itself might be considered a type of disturbance; and (3) ruderal, where the vegetative growth takes over an area that was at one time significantly disturbed but the disturbances have ceased. McArdle testified to the ecological benefits of successional patterns:

> "[When] a site that has been *** partially developed and left abandoned in which vegetation moves into the area that has exposed soil, you get early successional pioneer plants that come in the area, establish, grow, then they die, provide detritus or material in which additional seeds and plants can move in, and you generally have a building up of the soil, deepening soil conditions in which more plants move into an area. And then eventually the herbaceous material turns into woody shrubs and tree saplings, until you get larger trees.
>
> * * *
>
> In the earliest stages of secondary succession when the plants first move into an area that has exposed ground, you'll have the plants establish root. It will hold the soil in place, prevent erosion. It will also provide some limited wildlife habitat benefits for more common wildlife species, raccoons, possums, that type of stuff. You'll also have water quality benefits. As the rain falls on the newly established vegetation, the roots

> will uptake water and slow the movement of water off the site, thus reducing erosion, reducing sedimentation of adjacent streams or wetlands. You'll also have nutrient uptake pollutant trapping benefits as the water is trapped."

According to McArdle, this ruderal successive ecological development takes many years. The process can begin "when disturbances ceas[e]."

¶ 22 In 2005, two storm water management ponds, or water retention areas, appeared. The ponds hold water before water is able to move downstream. This increases water quality to downstream areas. The ponds also provide limited wildlife habitat. The ponds help to conserve soil "if they're left and allowed to vegetate."

¶ 23 McArdle opined that the 2006 planting of winter wheat promoted soil conservation: "[I]t holds the soil in place, reduces erosion, reduces downstream sedimentation. That's a typical practice that's used by farmers and by land developers who are leaving exposed ground idle as a means to cover the ground and to provide those types of benefits, to hold the soil in place."

¶ 24 During cross-examination, McArdle again acknowledged that he had visited the property only once, in 2012. He did not visit the property during the relevant years of 2005 to 2009. He never conducted a soil test. When he earlier stated that, in 2005, the entire property was scraped and graded, he meant that the topsoil was removed.

¶ 25 C. VanKampen's Testimony

¶ 26 Dahl also called Shawn R. VanKampen, who prepared the plat. VanKampen began preparing the plat in 2004. The only unusual circumstance in preparing the plat involved the removal of flood plains. By 2005, the owner, mortgagee, the planning commission, and the City of Sycamore approved the plat. However, the county clerk did not "approve" the plat until 2007,

when VanKampen filed and recorded the plat. VanKampen stated that, according to the Plat Act, the person who prepared the plat must cause the plat to be recorded.

¶ 27 D. Schnetzler's Testimony

¶ 28 The Board called Kevin Schnetzler, the Sycamore County assessor. Schnetzler had been the assessor for 19 years, and one of his job responsibilities was to value properties for tax purposes. In 2006, when he noticed Dahl had stopped farming the property, Schnetzler called the contract farmers, who confirmed that they had not farmed the property since 2004. Schnetzler then reclassified the property as vacant commercial land. Schnetzler thought this classification was appropriate, because he "assumed" the land was zoned for commercial ("I know the infrastructure was there"), curbs and fire hydrants had been installed, and the property was listed for sale and marketed as commercial property. The Board asked Schnetzler whether the property was *used* as commercial property. Schnetzler answered: "Yeah, or *valued* as commercial property." (Emphasis added.) The hearing officer later followed up:

"Q. Sir, you testified earlier *** with regard to the *use* of the subject property for 2007, and you said it was *valued* as commercial property. Was it *used* as commercial property?

A. As far as improvements?

Q. These are your terms. You valued it as commercial property.

A. Right.

Q. How was it used?

A. Well, it was basically vacant commercial land.

Q. It's vacant commercial land because—I mean I understand the vacant part of the definition. Why is it commercial land?

A. Because it went to—basically—okay. Because he stopped farming it, it goes to, you know, the next highest and best use. And the commercial—the property was being listed on the open market as being sold as commercial property."

¶ 29 E. Argument and Ruling

¶ 30 In closing, as to the 2008 tax year, Dahl asked the PTAB to overlook the 2008 deadline. He stated that "he had no reason to know that there was going to be a problem with his 2008 assessment," and that is why he missed the deadline by nine months. As to the 2009 tax year, Dahl refered the PTAB to the cases cited in his brief, particularly *U.S. Steel*, PTAB Docket No. 00-24208.001-C-3. In Dahl's view, these cases show that land does not have to be "nicely landscaped" to qualify for open-space status.

¶ 31 The Board argued, as to the 2008 tax year, that the application was untimely. Therefore, per the express language of section 10-160, Dahl forfeited the open-space claim. As to the 2009 tax year, the Board argued that Dahl had not met the criteria to qualify for open-space status under any one of the subsections at issue: subsections 10-155(a), (c), and (e).[3] As to subsection 10-155(a), the Board urged that Dahl did not *exclusively* use the property for maintaining a scenic or natural resource, because he also planted winter wheat and engaged in commercial development. As to subsection 10-155(c), the Board argued that McArdle's testimony concerning soil conservation was not reliable, because McArdle did not even visit the property until 2012. Additionally, the Board noted that Dahl planted winter wheat and began commercial development (activities that, presumably, disrupt the soil). Finally, as to subsection 10-155(e), the Board contended that Dahl could not claim that he enhanced the value *to the public* of an

[3] The Board argued some of these points in opening, rather than in closing. For convenience, we set forth the Board's arguments in a single paragraph.

abutting park for the previous three years, because it was not until 2007 that the park district purchased the land that was to become the abutting soccer field.

¶ 32 The PTAB denied Dahl's 2008 open-space claim, because Dahl missed the application deadline. The PTAB did not consider the merits of the 2008 open-space claim.

¶ 33 The PTAB denied Dahl's 2009 open-space claim on the merits. It explained:

> "While the PTAB recognizes that [the open space provisions are] open to broad interpretation, the PTAB finds that [Dahl] clearly engaged in farming activities on the subject property in November 2006 when [he] hired [a farmer] to plant winter wheat on the property. *** Dahl specifically planted wheat to obtain a farmland assessment; he testified that he planted it 'to address the farming deal of it.' [Dahl] did not testify to any clear desire to plant 'ground cover,' 'perennial grasses,' or other plants set forth in Section 10-155 to either obtain or maintain an open space assessment. To the contrary, the PTAB finds that tilling the soil, seeding and planting winter wheat with the intention of harvesting a crop (even though the crop failed to be harvested due to an early cold period), disturbs the soil ***. *** The expert [McArdle] was clear that the successional pattern (growth of new plant material on bare ground) is a process of many, many, many years in the absence of disturbance which then results in a 'climax community.'
>
> *** [I]n light of [McArdle's] clear opinion that this successional pattern takes numerous years of the soil or ground being undisturbed, the PTAB finds McArdle's testimony that planting winter wheat 'serves or promotes conservation' by holding the soil in place was not credible and runs counter to the remainder of his testimony.

> Therefore, *** [t]he PTAB finds that due to the 2006 farming activity of planting winter wheat, the subject property fails to meet the qualifications for an open space assessment."

This appeal followed.

¶ 34 II. ANALYSIS

¶ 35 Dahl challenges the PTAB's decision to deny open-space status for the 2008 and 2009 tax years. The Administrative Review Law provides that judicial review of an administrative agency's decision extends to all questions of law and fact presented by the entire record before the court. 735 ILCS 5/3-110 (West 2008). The standard of review given to an agency's decision turns on whether the issue presented is a question of law, a question of fact, or a mixed question of law and fact. *Sycamore,* 2014 IL App (2d) 130055, ¶ 27. An agency's interpretation of a statute is a question of law to be reviewed *de novo*, unless the statute is ambiguous. *Coalition to Request Equitable Allocation of Costs Together v. Common Wealth Edison Co*., 2015 IL App (2d) 140202, ¶ 44. If the statute is ambiguous, the court does not perform its own *de novo* interpretation of the statute. *Id*. Rather, the court merely asks whether the agency charged with the statute's administration came to a reasonable interpretation based on a permissible construction of the statute. *Church v. State of Illinois*, 164 Ill. 2d 153, 162 (1995). While the court is not bound by the agency's interpretation, the court is not justified in reversing the decision merely because it would have interpreted the statute differently. *Id*. The agency's interpretations, while not binding on the courts, are an informed source, helpful to ascertaining the legislative intent, because of the agency's expertise and experience in enforcing the statute. *Sycamore*, 2014 IL App (2d) 130055, ¶ 27. An agency's determination of fact, in contrast, is reviewed according to the manifest-weight-of-the-evidence standard. *Id*. When an agency's

decision involves mixed questions of law and fact, the clearly-erroneous standard applies. *Id*. A decision is deemed "clearly erroneous" only where the reviewing court, upon consideration of the entire record, is left with the definite and firm conviction that an error has been made. *Id*. While an agency need not make a finding on each evidentiary fact or claim, its findings must be specific enough to permit an intelligent review of its decision. *Violette v. Department of Healthcare and Family Services*, 388 Ill. App. 3d 1108, 1112 (2009). Where an agency has not made a sufficient finding on a claim, remand to the agency for further review, evaluation, and decision is appropriate. *Id*. at 1114.

¶ 36 A. The 2008 Tax Year: Untimely Application

¶ 37 Dahl concedes that the 2008 application was untimely. The Code provides that a taxpayer "must" apply for open-space status "by January 31 of each year for which the valuation is desired. If the application is not filed by January 31, the taxpayer waives the right to claim that additional valuation for that year." 35 ILCS 200/10-160 (West 2016). Dahl did not file his application for open-space status until September 2008.

¶ 38 Dahl does not directly challenge the plain language of the statute calling for a mandatory deadline. Dahl would be hard-pressed to do so, where the Code states both that a taxpayer "must" file his or her application before the deadline and sets forth the consequence of forfeiture if the deadline is not met. See, *e.g*., *Schultz v. Performance Lighting, Inc*., 2013 IL App (2d) 120405, ¶¶ 13-14 (where the legislature uses the word "shall" and sets forth a consequence for non-compliance, it intends a mandatory obligation).

¶ 39 Dahl argues, however, that "highly unusual circumstances" should have compelled the PTAB to excuse the otherwise mandatory deadline. Dahl argues that the common law allows administrative bodies and courts to excuse mandatory deadlines in order to: (1) satisfy the

purpose of the statute; (2)(a) avoid an unfair result; and (2)(b) avoid a denial of due process. Each these three sub-arguments essentially asserts that the PTAB overlooked established facts, such as the timing of this court's September 2008 ruling, when considering whether to excuse the late filing and, thus, calls for clear-error review.

¶ 40 1. Purpose

¶ 41 Dahl argues that the PTAB should have excused his late filing in order to satisfy the purpose of the open-space provisions. In Dahl's view, the PTAB should not have been concerned with the "technicality" of a deadline, where granting Dahl open-space status would have promoted the provisions' purpose of "protecting owners of these open[-]space properties from being consumed by real estate taxes and feeling forced to sell the land for a more profitable use." (Emphasis added.)

¶ 42 Dahl has forfeited this argument, because he did not cite any cases where courts have excused a statutory deadline in order to satisfy the larger purpose of the statute. See *Vancura v. Katris*, 238 Ill. 2d 352, 370 (2010). Dahl appears to be arguing that mandatory provisions may be satisfied with substantial, rather than strict, compliance if the *purpose* of the statute has been satisfied and the opposing party was not prejudiced. See *Fehrenbacher v. Mercer County*, 2012 IL App (3d) 110479, ¶ 15. Here, however, the provision at issue, a deadline, is not particularly amenable to substantial compliance. *Cf. Samuelson v. Cook County Officers Electoral Board*, 2012 IL App (1st) 120581, ¶ 37 (the candidate substantially complied where 426 out of 427 signature pages met the requirements). Dahl's argument concerning the larger purpose of the statute is forfeited and, in any event, lacks merit.

¶ 43 2. Fairness and Due Process

¶ 44 Dahl asserts that, until September 2008, he had no reason to believe that the property's preferential farm rate was in jeopardy. Thus, in Dahl's view, the PTAB acted unfairly and violated his right to due process when it declined to excuse his untimely application. Dahl cites *Weber v. White Eagle Golf Club*, 241 Ill. App. 3d 557 (1993) (fairness),[4] and *City National Bank & Trust v. Property Tax Appeal Board*, 97 Ill. 2d 378 (1982) (due process).

¶ 45 This case is factually distinguishable from *Weber*. In *Weber*, the taxpayer *timely* applied for open-space status under Permanent Real Estate Index Number (PIN) 004. *Weber*, 241 Ill. App. 3d at 559. The property, a golf course, had been receiving open-space status for years. *Id*. However, after the deadline passed, the *assessor* assigned a new PIN to the property, now PIN 010. *Id*. at 560. The court held that, under the circumstances, the taxpayer complied with the law to the greatest extent possible to obtain its open-space valuation, and the taxpayer would not be penalized for failing to apply for open-space status under the newly issued PIN. *Id*. Thus, unlike the instant case, *Weber* did not involve a question of timeliness so much as it involved a question of whether the taxpayer should be allowed to refile, or correct, the initial, timely filed application to include the correct PIN.

¶ 46 This case is also factually distinguishable from *City National*, where the plaintiff *timely* filed his complaint for administrative review on the day of the deadline. *City National*, 97 Ill. 2d at 379. The plaintiff's attorney advised the clerk that the summonses had to be issued that day,

[4] Dahl also cites *Hoyne Savings & Loan Association v. Hare*, 60 Ill. 2d 84 (1974), in support of his fairness argument. However, *Hoyne* is inapposite. *Weber* cited *Hoyne* in a portion of its analysis did not pertain to the timeliness of an open-space application. *Weber*, 241 Ill. App. 3d at 560. Rather, that portion of the analysis acknowledged some flexibility in the general rule that an appellant must first exhaust administrative remedies. *Id*.

but the clerk waited three days. *Id*. at 379-80. The court declined to find the complaint untimely, noting that "when a party has done all that he can to meet the statutory requirements, but there is a failure to comply with the statute because of the action or inaction of a third person outside of his control, to deny him the right to pursue his administrative remedy would constitute a deprivation of due process." *Id*. at 380. Unlike in *City National*, a third party did not prevent Dahl from timely filing his application.

¶ 47 We disagree that Dahl had no reason, prior to the January 2008 application deadline, to believe that the property's preferential farm rate was in jeopardy. In 2006, the Board ruled that the property did *not* qualify for the farmland rate under the developer's relief provision. Dahl appealed, but, in 2007, the PTAB dismissed the appeal. Also, Dahl knew that the circuit court's 2007 decision in favor of the developer's relief provision was under review. When Dahl finally applied for open-space status, he did so as an alternative to farm status under the developer's relief provision for the 2008 tax year. There is no reason he could not have *timely* applied for open-space status as an alternative to farm status under the developer's relief provision, just as he did in 2009. Unlike *Weber* and *City National*, this is not a case where Dahl did "all that he [could]" to meet the Code's deadline. An errant strategy does not excuse the failure to meet a mandatory deadline. The PTAB did not clearly err in refusing to excuse Dahl's untimely 2008 application.

¶ 48 In any event, the 2008 claim is without merit. The 2008 claim's three-year look-back period includes the blatant disqualifying events of 2005. In 2005, Dahl engaged in significant development: scraping and grading the property, removing topsoil, laying piping, installing curbs and hydrants, removing flood plains, and platting the property (but not recording the plat). Thus, it is difficult to see how Dahl could prove that he exclusively used the property for open space in

2005 (subsection 10-155(a)) or that he used the property to promote the conservation of soil in 2005 (subsection 10-155(c)). We affirm the PTAB's decision for the 2008 tax year.

¶ 49 B. The 2009 Tax Year: The Merits of the Open-Space Claim

¶ 50 Dahl argues that the PTAB should have granted open-space status based on subsections 10-155(a), 10-155(c), and 10-155(e) of the Code. Qualification under any one subsection is sufficient to gain open-space status. 35 ILCS 200/10-155 (West 2008). At the same time, an applicant must meet all of the criteria in any one subsection. Therefore, general arguments that a property need not be landscaped to qualify as open space are unavailing; landscaping might be relevant to subsection 10-155(d)'s landscape clause, but landscaping might not be relevant to subsection 10-155(c)'s conservation clause. Likewise, conclusory arguments that "any property that is 10 acres and is open" qualifies as open space are unavailing. The correct approach is to begin with the language of the relevant subsection and determine whether, given the evidence, the property qualifies as open space under that subsection. See, *e.g.*, *U.S. Steel*, PTAB Docket No. 00-24208.001-C-3; *Kane County Fair Ass'n*, PTAB Docket No. 97-1443-C-3 (Dec. 4, 1998).

¶ 51 Here, however, the PTAB did not reference any specific subsection in rejecting the open-space claim. This makes the PTAB's decision more difficult to review. We infer from the PTAB's statements that the PTAB determined that the property did not qualify as open space under subsection 10-155(c). The PTAB referenced plants listed in subsection 10-155(c), and it addressed the use set forth in subsection 10-155(c) of promoting soil conservation when it stated that farming "disturbs the *soil* and defeats [the] claim for open space." (Emphasis added.)

¶ 52 1. Subsection 10-155(a)

¶ 53 The PTAB did not sufficiently address qualification under subsection 10-155(a). Subsection 10-155(a) states that land is considered used for open space purposes if it "is actually and *exclusively* used for maintaining or enhancing natural or scenic resources." (Emphasis added.) 35 ILCS 200/10-155(a) (West 2008). Here, the two uses with the potential to violate subsection 10-155(a)'s exclusive-use requirement are commercial use and farm use. The PTAB did not address whether commercial use violated subsection 10-155(a)'s exclusive-use requirement. Similarly, the PTAB did not address whether farm use violated subsection 10-155(a)'s exclusive-use requirement. It stated that farm use precluded open-space status *not* because it violated subsection 10-155(a)'s exclusive-use requirement, but because it was incompatible with subsection 10-155(c)'s soil conservation goals.

¶ 54 i. Commercial Use

¶ 55 The PTAB did not address whether commercial use violated the exclusive-use requirement. The evidence reflects a fair question of fact as to whether Dahl used the property for commercial purposes during the years in question. The PTAB never rendered a decision on the sub-issue, and it seemed to struggle with the sub-issue at hearing. The hearing officer questioned the assessor on this point:

> "Q. Sir, you testified earlier *** with regard to the *use* of the subject property for 2007, and you said it was *valued* as commercial property. Was it *used* as commercial property?
>
> A. As far as improvements?
>
> Q. These are your terms. You valued it as commercial property.
>
> A. Right.
>
> Q. How was it used?

A. Well, it was basically vacant commercial land.

Q. It's vacant commercial land because—I mean I understand the vacant part of the definition. Why is it [used as] commercial land?" (Emphasis added.)

¶ 56 There is no doubt that Dahl used the property for commercial development in 2005. However, 2005 is not at issue for the 2009 open-space claim. After 2005, it seems that the only commercial activity involved off-site work of a clerical nature, such as the recording of the already-created plat and the unsuccessful marketing of the property for sale.

¶ 57 Dahl argues that neither of these activities constitute commercial use *of the property*. In Dahl's view, the marketing of the property for sale reflects an intended use, not an actual use. Indeed, prior PTAB decisions have distinguished between actual and intended use. For example, in *U.S. Steel*, the PTAB considered whether the taxpayer's plans to develop the property "at some unknown future time" precluded an open-space categorization. *U.S. Steel*, PTAB Docket No. 00-24208.001-C-3 at 13. The PTAB determined that it did not, stating, "while there may be a plan for future development of [the] parcels[,] *no action [was] taken*" in furtherance of those plans *during the years in question*. (Emphasis added.) *Id*. at 11.

¶ 58 Determining the existence of commercial *use* in the context of the *open-space provisions* involves different factors than those considered by the assessor when deciding to *value* the property as commercial land based on factors relevant to the *developer's relief provision*. Whether off-site work of a clerical nature, such as recording a plat or marketing the property for sale, constitutes actual commercial use of the property during the years in question for the purposes of exclusive-use requirement in subsection 10-155(a) of the open-space provisions is a question for the PTAB.

¶ 59 ii. Farm Use

¶ 60 Similarly, the PTAB did not address whether farm use violated subsection 10-155(a)'s exclusive-use requirement. Although Dahl does not use the word "exclusive," he essentially argues that: (1) farming does not violate section 10-155(a)'s exclusivity requirement *because farmland is open space,* or at least it is open space under the facts of this case; and (2) even if farming violates section 10-155(a)'s exclusivity requirement, it would violate the spirit of the Code as a whole to read section 10-155(a)'s exclusivity requirement to preclude receipt of the open-space rate where the sole intermittent use, farming, has a *lower* tax rate than the tax rate applied to open-space use and where farm use is consistent with the open-space provisions' aim to stem unmitigated residential and commercial development. See 735 ILCS 200/10-115 *et seq*. (West 2008) (concerning the preferential rate given to farm land). Dahl suggests that it is unfair that, by alternating exclusively between two low-rate uses for three years, but engaging in neither use continuously for the requisite number of years, he did not receive the benefit of either low rate.[5]

¶ 61 In Dahl's view, in 2006, he took a scraped property and improved its aesthetics and soil quality by planting winter wheat. He did not harvest the wheat, but, in 2007 and 2008, he cut down weeds as they grew and paid a nearby tenant to pick up litter. Then, in 2009, in part to pursue the elusive farmland rate and in part because cutting down weeds was "fairly expensive," Dahl planted a crop. Dahl contends that the manner in which he used the property from 2006 to 2009 was consistent with subsection 10-155(a)'s goal of maintaining a scenic resource and with

[5] Dahl raised these arguments throughout his brief and at oral argument. At oral argument, he stated that this argument pertained to subsection 10-155(c). However, the argument best fits into subsection 10-155(a). Where the PTAB did not reference specific subsections in its ruling, we do not find controlling Dahl's lack of precision in this instance.

the open-space provisions' overall goal of stemming unmitigated residential and commercial development, at least for the requisite three-year period. This argument warrants further consideration by the PTAB.

¶ 62 The appellees argue that, as a matter of law, farmland cannot be considered open space. They note that the Code should be interpreted to avoid surplusage. *Kerger v. Board of Trustees of Community College District No. 502*, 295 Ill. App. 3d 272, 277 (1997). They contend that allowing farmland to qualify as open space would lead to a surplusage in the Code, because the Code already sets forth a separate tax classification for farmland. 35 ILCS 200/10-110 (2008).

¶ 63 We reject the appellees' argument that, as a matter of law, farmland cannot be considered open space. Allowing farmland to qualify as open space does not lead to surplusage in the Code, because not all farmland qualifies for the farmland tax rate. To qualify for the farmland tax rate, the property must have been farmed for two consecutive years. *Sycamore*, 2014 IL App (2d) 130055, ¶ 5. Thus, where land alternates between farm use and land left fallow for non-farming purposes, classifying such land as open space would not necessarily result in a surplusage. The land could very well qualify for the open-space rate but not the farmland rate.

¶ 64 Even if a property qualifies for both the farmland and open-space tax rates, and, thus, results in some overlap or surplusage, Dahl raises a fair argument that the farmland should not be excluded from open-space status in every instance. The open-space provisions do not specifically exclude farmland, even though they do specifically exclude other types of property, such as residential property. Also, as noted by Dahl, it is reasonable to interpret Representative Deavers' statement that "farmland is already exempt under another bill, so [the open-space provisions] wouldn't apply" to mean that the legislator did not see the need to expressly list farmland in the open-space provisions, as a taxpayer would be unlikely to seek the open-space

rate for farmland. See 80 Ill. Gen. Assem., House Proceedings, March 16, 1977, at 47 (statements of Representative Deavers). After all, the open-space rate is *higher* than the farmland rate.

¶ 65 This case has a unique history. Had the surveyor recorded the plat in 2005 when the property was still classified as farmland, and had Dahl better monitored the surveyor to ensure the recording, Dahl would have received a lower tax rate under the developer's relief provision. *Sycamore*, 2014 IL App (2d) 130055, ¶ 41. Just as Dahl's failure to meet the requirements of the developer's relief provision cannot be excused, it cannot be used as a basis to reject, or give short-shrift to, his open-space claim. Dahl fully acknowledges that he intended to develop the property, and, as to the 2008 open-space claim, that intent resulted in a late filing and actual, disqualifying development. However, as to the 2009 open-space claim, where Dahl did not engage in obvious commercial development of the property during the years at issue, his open-space claim warrants further consideration.

¶ 66 We instruct the PTAB to consider Dahl's arguments concerning commercial use and farm use under subsection 10-155(a). This includes Dahl's argument that farming does not violate section 10-155(a)'s exclusivity requirement because farmland is open space, or at least it is under the facts of this case; and (2) even if farming violates section 10-155(a)'s exclusivity requirement, it would violate the spirit of the Code as a whole to read section 10-155(a)'s exclusivity requirement to preclude receipt of the open-space rate where the sole intermittent use, farming, has a *lower* tax rate than the tax rate applied to open-space use and where farm use is consistent with the open-space provisions' aim to stem unmitigated residential and commercial development.

¶ 67 As long as the case is remanded, we encourage the PTAB to reevaluate subsection 10-155(c), as well. While we infer that the PTAB evaluated subsection 10-155(c) based on its commentary on soil conservation, the PTAB did not specifically reference subsection 10-155(c) in its analysis. The PTAB equated the question of soil conservation with the issue of McArdle's credibility. However, an expert cannot testify to an ultimate conclusion, *i.e.*, soil conservation. Moreover, the questions of whether a plant holds previously scraped soil in place and whether ponds increase downstream water quality are not so much questions of credibility as they are widely accepted ecological principles. Whether these positive actions taken by Dahl and existing during the years in question rise to the level of soil conservation is for the PTAB to determine. (The PTAB did not specifically reference subsection 10-155(e), but the evidence that the public was not allowed to access the property and that the soccer field did not exist until 2007 makes this omission less troubling than the other omissions.)

¶ 68 III. CONCLUSION

¶ 69 In sum, Dahl's late filing defeats the 2008 open-space claim. As to the 2009 open-space claim, the PTAB did not sufficiently address qualification under subsection 10-155(a). This makes its decision difficult to review, and a remand is warranted. *Violette*, 388 Ill. App. 3d at 1112. We affirm the PTAB's ruling in part, we vacate the PTAB's ruling in part, and we remand to the PTAB for further consideration.

¶ 70 Affirmed in part, vacated in part, and remanded.