

<p><b>BOARD OF ASSESSMENT APPEALS, STATE OF COLORADO</b> 1313 Sherman Street, Room 315 Denver, Colorado 80203</p> <hr/> <p>Petitioner:</p> <p><b>CLUB DEAL 127 MERK GRAND JUNCTION,</b></p> <p>v.</p> <p>Respondent:</p> <p><b>MESA COUNTY BOARD OF COMMISSIONERS.</b></p>	<p><b>Docket No.: 55569</b></p>
<p><b>ORDER</b></p>	

**THIS MATTER** was heard by the Board of Assessment Appeals on May 3, 2011, James R. Meurer and Gregg Near presiding. Petitioner was represented by Dan E. Wilson, Esq. Respondent was represented by David Frankel, Esq. Petitioner is requesting an abatement/refund of taxes on the subject property for tax year 2008-2009.

Both parties agreed the hearing will not consider the valuation of the property. The parties agreed that classification was the sole issue at hearing. Petitioner is seeking a residential classification for the property.

Subject property is described as follows:

**2372 G Road, Grand Junction, Colorado  
Mesa County Schedule No. 2701-324-00-097**

The property consists of 40 acres with several outbuildings. Five buildings were built between 1975 and 1978. The buildings are classified as commercial warehouse, containing a total of 7,017 square feet. The property is also improved with 1,300 linear feet of fence and six gates. Petitioner contends one of the buildings, containing 1,200 square feet, is being used as a residence.

Petitioner's witness, Mr. David Murillo, testified he lived on the subject property in a portion of the property known as the "incubator building," as its former use was an incubator for the previous owner's operation, an ostrich farm. Mr. Murillo testified the building did not have sanitary facilities, and he would use a local gas station or community recreation building to shower. The

building has connection to public water and electrical utilities. The water system drains to a septic system of unknown condition.

Petitioner presented a Residence Lease dated March 2, 2010, which was back-dated to March 18, 2008 with the lease term starting on March 1, 2008. The lease was back-dated to memorialize the situation prior to the formal lease. Mr. Murillo stated the agreement allowed him to reside on the property with his animals and store his vehicles on the site. He also used one of the buildings to store personal items. In return, he was to watch over the property and pick up trash. Mr. Murillo stated he was on the property every day between 2008 and 2009.

Petitioner presented bills under Mr. Murillo's name for intermittent rental of portable toilets and trash service as well as intermittent payments to the local water district. Mr. Murillo indicated the inconsistent payments were due to his inability to pay consistently.

Petitioner's witness, Mr. Douglas H. Gilliland, a member of the investment group that purchased the property in 2007, testified he purchased for its future value. He indicated that the investment group had paid some water and electrical bills for Mr. Murillo. Mr. Gilliland also indicated he was told there was an agricultural exception on the property due to the previous owner's ostrich farm.

Petitioner cited several court cases as being relevant to its position. In one decision, the taxpayer successfully obtained residential classification for a rustic property, which contained a cabin that was periodically occupied by the taxpayers and some of their friends and family during family outings. *Farny v. Dolores Cty. Bd. of Equal.*, 985 P.2d 106 (Colo. App. 1999). The cabin had no electricity or plumbing but had separate eating and sleeping areas and was heated by a wood stove. *Id.*

In another case where residential classification was in question, the court concluded that actual use on the relevant assessment date is a factor to be considered in determining proper classification. *Mission Viejo v. Douglas Cty. Bd. of Equal.*, 881 P.2d 462 (Colo. App. 1994).

Respondent indicated the subject property is a prime commercial property, has been made available for sale as a commercial property, and does not qualify for agricultural use. Respondent's witness, Mr. Reed Orr, a Certified General Appraiser, presented a classification report for consideration. Mr. Orr indicated the improvements on the property were developed by Occidental Oil Shale Company. The City of Grand Junction zoned the property as Mixed Use (MU), and the current use is non-conforming under that classification. The City's comprehensive plan shows this location's future use to be commercial-industrial.

Mr. Orr testified a field inspection was undertaken on this property in November 2009, and he became first aware of a caretaker on the property at that point. The property has been classified as commercial for the preceding 30 years. Mr. Orr did not visit the property during the valuation period.

Respondent also called Ms. Janell Hutton, with the Mesa County Assessor's Office and with considerable agricultural experience, as a witness. Ms. Hutton indicated the property has been

classified as commercial from 1996 to 2011. Ostrich farming is not considered an agricultural use; there has been no agricultural exception granted on this property.

Respondent presented sufficient probative evidence and testimony to show that the tax year 2008-2009 valuation of the subject property was correct.

Colorado statute defines residential improvements as “a building, or that portion of a building, designed for use predominantly as a place of residency by a person, a family, or families. The term includes buildings, structures, fixtures, fences, amenities, and water rights that are an integral part of the residential use.” Section 39-1-102(14.3), C.R.S.

The Board finds that the incubator building does not satisfy the definition of a building predominantly designed as a place of residency. The Board did not find the *Farny* decision to be analogous to Petitioner’s situation because, while both situations involved episodic use, in *Farny*, the cabin was designed and intended for residential use. By contrast, the subject property was never intended to be used as a residence, which is contrary to statutory definition for residential improvements.

The Board is not convinced that *Mission Viejo* applies to this situation either. As explained in the *Mission Viejo* decision, the relevant factors established for classifying property are: 1) the actual use of a structure; 2) the zoning and any other applicable use restrictions; and 3) the probable use. *Mission Viejo*, 881 P.2d at 465. The court found further that a structure must be “designed for use predominantly as a . . . residence,” rather than simply “actually used” as a residence, in order to meet the statutory definition of a “residential improvement.” Respondent illustrated that, as of January 1, 2008 and as of January 1, 2009, there was insufficient evidence to support the Petitioner’s stated actual use of the property.

Respondent presented sufficient evidence to question the occupancy of the structure on January 1 of the assessment periods. Respondent presented testimony indicating water and power were provided to the property under commercial accounts. Bills for curb service pick up for trash and for portable toilets were presented, but they did not support actual occupancy of the structure as of January 1 of each year.

Respondent testified the septic system on the property was installed for commercial use for a laboratory. Respondent also presented a notice of Federal Tax Lien signed on February 11, 2009 indicating Mr. Murillo’s residence to be 786 26 1/2 Road, Grand Junction, CO 81506-8350, thus calling into question the actual occupancy of the “incubator building” during the time frame considered.

The Board is not persuaded that Mr. Morillo’s temporary occupancy of the commercial structure represents actual use. The MU zoning in place, while allowing residential mixed use, is clearly represented by structures designed for warehouse and office occupancy. The Board did not believe that the residential lease, referenced earlier, encompassed the January 1, 2008 period, despite Petitioner’s argument that it memorialized the situation by being back-dated. The Board further finds the “incubator building” cannot be considered as a structure designed predominantly for use as a residence. The building was built and designed for commercial and not residential purposes.

**ORDER:**

The petition is denied.

**APPEAL:**

If the decision of the Board is against Petitioner, Petitioner may petition the Court of Appeals for judicial review according to the Colorado appellate rules and the provisions of Section 24-4-106(11), C.R.S. (commenced by the filing of a notice of appeal with the Court of Appeals within forty-five days after the date of the service of the final order entered).

If the decision of the Board is against Respondent, Respondent, upon the recommendation of the Board that it either is a matter of statewide concern or has resulted in a significant decrease in the total valuation for assessment of the county wherein the property is located, may petition the Court of Appeals for judicial review according to the Colorado appellate rules and the provision of Section 24-4-106(11), C.R.S. (commenced by the filing of a notice of appeal with the Court of Appeals within forty-five days after the date of the service of the final order entered).

In addition, if the decision of the Board is against Respondent, Respondent may petition the Court of Appeals for judicial review of alleged procedural errors or errors of law when Respondent alleges procedural errors or errors of law by the Board.

If the Board does not recommend its decision to be a matter of statewide concern or to have resulted in a significant decrease in the total valuation for assessment of the county in which the property is located, Respondent may petition the Court of Appeals for judicial review of such questions.

Section 39-10-114.5(2), C.R.S.

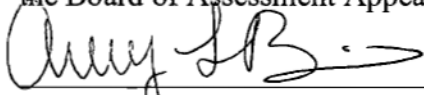
DATED and MAILED this 27 day of May 2011.

**BOARD OF ASSESSMENT APPEALS**

  
\_\_\_\_\_  
James R. Meurer

  
\_\_\_\_\_  
Gregg Near

I hereby certify that this is a true  
and correct copy of the decision of  
the Board of Assessment Appeals.

  
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Amy Bruins

