BOARD OF ASSESSMENT APPEALS, STATE OF COLORADO 1313 Sherman Street, Room 315 Denver, Colorado 80203	Docket No.: 61965
Petitioner: **COLORADO MCDONALD ENTERPRISES, LLLP** v. Respondent: **ARAPAHOE COUNTY BOARD OF COMMISSIONERS.**	

ORDER

THIS MATTER was heard by the Board of Assessment Appeals on October 11, 2013, James R. Meurer and Gregg Near presiding. Petitioner was represented by Richard G. Olona, Esq. Respondent was represented by George Rosenberg, Esq. Petitioner is requesting an abatement/refund of taxes on the subject property for tax year 2011.

The subject property is described as follows:

6500 S. Broadway, Littleton, CO
Arapahoe County Schedule No: 2077-22-4-22-001

The subject property consists of land and commercial improvements.

I. Background

The Arapahoe County Assessor (the "Assessor") issued a notice of valuation setting the actual value of the subject property for the 2011 tax year at $2,875,000. Petitioner protested the 2011 valuation to the Assessor. The Assessor issued a notice of determination denying the protest and keeping the actual value of the subject property at $2,875,000. Petitioner appealed to the Arapahoe County Board of Equalization (the "CBOE"). On August 5, 2011, the CBOE sent Petitioner a letter stating:

> APPEAL DENIED. THIS IS AN ADMINISTRATIVE DENIAL. DUE TO BUDGETARY CONSTRAINTS ARAPAHOE COUNTY IS DENYING ALL VACANT LAND AND COMMERCIAL PROPERTIES BROUGHT TO THE COUNTY BOARD OF EQUALIZATION BY A TAX AGENT/ATTORNEY.

The CBOE's August 5, 2011 letter also stated:

> If you desire to appeal the Board's decision, you have three (3) options: (1) Arapahoe County District Court, (2) State Board of Assessment Appeals, or (3) Arbitration. All require written filing within thirty (30) days of the date of this letter. This letter is sent to the owner and to the agent, if any.

Petitioner did not file an appeal for tax year 2011 in Arapahoe County District Court or with the State Board of Assessment Appeals after receiving the CBOE's August 5, 2011 letter. Petitioner also did not seek arbitration in response to the CBOE's August 5, 2011 letter.

In 2012, the Assessor issued a notice of valuation setting the actual value of the subject property for the 2012 tax year at $2,875,000 (the same value as the 2011 tax year). Petitioner protested the 2012 valuation to the Assessor. The Assessor issued a notice of determination denying the protest and keeping the valuation at $2,875,000. Petitioner appealed to the CBOE. On August 3, 2012, the CBOE issued a decision on the 2012 appeal reducing the actual value of the subject property for the 2012 tax year to $2,700,000. The CBOE's 2012 decision stated the following:

> REFEREES HAVE REVIEWED THE DATA SUBMITTED WITH YOUR APPEAL, RECOMMENDED ADJUSTMENT TO CBOE AND THE VALUE WAS ADJUSTED.
>
> For even numbered years your value will be the same as the prior year except for an unusual condition as set forth in C.R.S. 39-1-104(11)(b)(1).

On December 14, 2012, Petitioner filed a Petition for Abatement or Refund of Taxes for the 2011 tax year with Respondent. Petitioner provided the following reason for seeking the abatement in the petition:

> The 2011 valuation should be changed to equal the 2012 adjusted value. See copy of the decision by the Board of Equalization dated August 3, 2012, attached.
>
> Petitioner's estimate of value: $ 2,700,000 (2011)
> Value Year

On March 14, 2013, Respondent denied Petitioner's abatement petition, stating that Respondent did not have jurisdiction because "a protest was filed for the year in which this petition asks for consideration based on 'overvaluation'."

On April 12, 2013, Petitioner filed this appeal with the Board. On the Petition to State Board of Assessment Appeals, Petitioner estimated the value of the property for the 2011 tax year at $2,700,000 and provided the following explanation for disagreeing with the value assigned to the subject property: "The current 2011 valuation is illegal".

On August 30, 2013, Respondent filed a motion to dismiss with the Board stating that the BAA is without jurisdiction and must dismiss the petition as a matter of law, citing Section 39-10-114(1)(a)(I)(D), C.R.S. as follows: "No abatement or refund of taxes shall be made based upon the ground of overvaluation of property if an objection or protest to such valuation has been made and a

notice of determination has been mailed to the taxpayer pursuant to section 39-5-122...". The motion to dismiss also states that the 2011 valuation was protested to the Arapahoe County Assessor (and "was reduced by the Assessor") and that a notice of determination was mailed to the taxpayer.

On September 5, 2013, Petitioner filed a response to Respondent's Motion to Dismiss, citing *Boulder Country Club v. Boulder County Bd. of Comm'rs*, 97 P.3d 119 (Colo. App. 2003) for the proposition that an abatement petition (which asserts, as a matter of law, that the assessments for each of the two years in the re-assessment cycle must be the same absent unusual conditions) is based on "erroneous valuation for assessment" (a legal issue) rather than "overvaluation". Because the abatement petition was not based on overvaluation, Petitioner responded that Section 39-10-114(1)(a)(I)(D), C.R.S. does not preclude the abatement petition. Citing *Cherry Hills Country Club v. Bd. of County Comm'rs*, 832 P.2d 1105, 1109 (Colo. App. 1992), Petitioner also responded that the 2011 valuation must be the same as the 2012 CBOE valuation as a matter of law. Petitioner's response also included a request for reasonable costs and attorneys fees incurred in responding to the Motion to Dismiss.

On October 11, 2013, the Board heard arguments from the parties. During oral arguments, Respondent asserted that the appeal is based on overvaluation. Respondent argued that the appeal must be dismissed under Section 39-10-114 (1)(a)(I)(D), C.R.S. Respondent also argued that the Board's analysis in Docket 56263 *William J. Fresch, Custodian v. Douglas County Bd. of Comm'rs* should govern the Board's decision in this appeal. Petitioner argued that Respondent's Motion to Dismiss should be denied based on the *Boulder Country Club* decision. Petitioner also argued that the Board should find as a matter of law that the 2011 valuation must be the same as the 2012 CBOE valuation. Both parties agreed that the Board should rule based on the law and that no factual findings on valuation were necessary.

Following the hearing, both parties confirmed to the Board that no "unusual conditions" under Section 39-1-104(11)(b), C.R.S. were applicable in this appeal.

II. Motion to Dismiss

The Board finds that Petitioner's abatement petition is based on erroneous valuation for assessment and not on overvaluation.

The language used by Petitioner in both the December 14, 2012 Petition for Abatement or Refund of Taxes filed by Petitioner with Respondent and the April 12, 2013 Petition to State Board of Assessment Appeals was helpful to the Board in making this finding. In those documents, Petitioner asserted that the abatement petition should be granted because "the 2011 valuation should be changed to equal the 2012 adjusted value" and "the current 2011 valuation is illegal". Petitioner did not assert that the subject property was overvalued for 2011.

The Board also considered the substance of Petitioner's argument and concluded that Petitioner properly characterized its abatement petition based on an erroneous valuation for assessment. Whether Petitioner is entitled to an abatement does not involve a factual determination. Petitioner asserts that, as a matter of law, the assessments for 2011 and 2012 must be the same. This requires a legal, rather than a factual, determination. Consistent with the analysis used by the

Colorado Court of Appeals in the *Boulder Country Club* case, the Board concludes that Petitioner's abatement petition is based upon erroneous valuation for assessment – a legal issue – rather than overvaluation – a factual issue.

Respondent's motion to dismiss is based on Section 39-10-114(1)(a)(I)(D), C.R.S. which states that, "No abatement or refund of taxes shall be made *upon the ground of overvaluation* of property if an objection or protest to such valuation has been made and a notice of determination has been mailed to the taxpayer pursuant to section 39-5-122...". Because the Board finds that Petitioner's abatement petition is based on erroneous valuation for assessment and not on overvaluation, Section 39-10-114(1)(a)(I)(D), C.R.S. does not bar the abatement petition, and Respondent's motion to dismiss is denied.

III. 2011 Valuation of the Subject Property

Having denied Respondent's motion to dismiss, the Board must now decide if the subject property must be valued the same for both the 2011 and 2012 tax years, and if so, whether the 2011 Assessor's valuation of $2,875,000 should be reduced to the 2012 CBOE valuation of $2,700,000 as asserted by Petitioner.

In deciding whether the valuation for the two years must be the same, the Board first looks to Colorado statutes. Section 39-1-104(10.2), C.R.S. requires a reassessment cycle consisting of two full calendar years. The first year of a reassessment cycle is generally referred to as the base year, and is an odd-numbered year. The second year is generally referred to as the intervening year and is an even numbered year. In this appeal, the 2011 tax year was the base year, and the 2012 tax year was the intervening year.

Section 39-1-104(11)(b)(I), C.R.S. makes it clear that in some instances, the valuation of a property need not be the same in both the base year and the intervening year. Under this section, assessors may take into account certain "unusual conditions" listed in the statute when valuing property for an intervening year. However, assessors may not revalue property in the intervening year except as necessary to reflect the increase or decrease in actual value attributable to such unusual conditions. In this instance, the parties agree that none of the statutory unusual conditions apply to this appeal.

The Board finds the Colorado Court of Appeals decision in *Cherry Hills Country Club v. Bd. of County Comm'rs*, 832 P.2d 1105 (Colo. App. 1992) compelling. In that case, the Court stated that pursuant to Section 39-1-104(10.2), C.R.S., the same level of value is applicable to both the base year and the intervening year and that the level of value is to be determined with reference to the same base period. The Court of Appeals ruled that absent statutory exceptions that were not applicable in the case, the valuations of the taxpayer's land for the base year and the intervening year had to be the same. Finally, the Court determined that the county board of equalization valuation for the intervening year (and not the county board of equalization valuation for the base year) was the correct value for both years.

Based on the analysis in the *Cherry Hills Country Club* case and the lack of statutory unusual conditions in this case, the Board finds that the valuation of the subject property must be the same for both the 2011 base year and the 2012 intervening year.

The Board also finds that the 2012 CBOE valuation is the correct valuation of the subject property for both the 2011 base year and the 2012 intervening year. The Board notes that the CBOE never actually heard Petitioner's appeal for the 2011 base year. Despite the statutory mandate set forth in Section 39-8-106(1), C.R.S. ("The county board of equalization shall receive and hear petitions from any person whose objections or protests have been refused or denied by the assessor..."), the CBOE issued "administrative denials" without hearings on any vacant land and commercial property appeals brought to the CBOE by a tax agent or attorney for 2011 base year. In the 2012 intervening year, after actually hearing Petitioner's appeal for 2012, the CBOE reduced the value of the subject property by $175,000. The Board is convinced that the CBOE's 2012 review provided a more thorough and thoughtful analysis of the property's valuation than the 2011 administrative denial that the CBOE issued, and the correct level of value for the two year reassessment cycle is the value reached by the CBOE in 2012.

The Board notes Respondent's argument concerning the Board's decision in Docket 56263 *William J. Fresch, Custodian v. Douglas County Bd. of Comm'rs*, where the Board found that the subject property in that case did not need to be valued the same for the two years in the assessment cycle under very unusual facts.

In the *Fresch* case, the county board of equalization heard the taxpayer's appeal for the base year. The taxpayer appealed the county board of equalization's decision to the district court. After filing the appeal in district court, the taxpayer took no action to prosecute the base year appeal, and the district court issued an order to show cause why the appeal should not be dismissed. Having not received a response to the order to show cause, the district court dismissed the appeal with prejudice. The taxpayer attempted to resurrect the district court appeal 18 months later, but the district court refused to re-open the appeal. In an attempt to circumvent the district court's dismissal, the taxpayer filed an abatement appeal with the Board for the same year that the district court had dismissed. The base year abatement appeal was based in part on a stipulation that the taxpayer reached with the county for the intervening year and a legal argument that the valuation had to be the same for both the base year and the intervening year. The Board declined to require the same valuation for the reassessment year and the intervening year under the very specific facts of the case.

The Board finds the *Fresch* case is clearly distinguishable from the present case. Unlike the *Fresch* case where a county board of equalization hearing was held, Petitioner in the present case was not afforded a CBOE hearing for the 2011 base year appeal. Also, unlike the *Fresch* case, Petitioner did not waste judicial resources by filing an appeal with the district court and failing to prosecute the appeal. Unlike the *Fresch* case, Petitioner's abatement appeal is not barred by the statute of limitations. Finally, unlike the *Fresch* case, Petitioner did not seek to circumvent a district court's decision by filing an abatement appeal with the Board. Because the *Fresch* case involved a very different situation, the Board declines to base its decision in the present case on the decision in the *Fresch* case.

The Board also notes that its decision in this appeal is consistent with several other Board decisions where the Board has followed the Court of Appeals rulings in the *Boulder Country Club* and the *Cherry Hills Country Club* cases.

IV. Petitioner's Request for Award of Attorneys' Fees and Costs

The Board has considered Petitioner's Request for Award of Attorneys' Fees and Costs. Whether or not to award costs to a successful appellant remains with the discretionary powers of the Board of Assessment Appeals. *Jefferson County Bd. of Equaliz. v. Gerganoff*, 241 P.3d 932 (Colo. 2010). However, the Board also recognizes that the general assembly changed Section 39-8-109, C.R.S. in 2010 to specifically state that the appellant and county shall each be responsible for their respective costs in a board of assessment appeals case.

Having reviewed the legal issues raised in Respondent's motion to dismiss and Petitioner's response, the Board finds that an award of attorney fees and costs is not appropriate in this case. Petitioner and Respondent shall each be responsible for their respective costs and attorneys' fees in this matter.

ORDER:

The petition is granted. Respondent is ordered to cause an abatement/refund to Petitioner based on a 2011 actual value for the subject property of $2,700,000.

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 24th day of October, 2013.

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

Milla Lishchuck