

<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>JAMES E. AND MARY ELLEN O'NEIL SHAY PATRICK AND SHAUN MICHAEL O'NEIL</b></p> <p>v.</p> <p>Respondent:</p> <p><b>CONEJOS COUNTY BOARD OF COMMISSIONERS.</b></p>	<p><b>Docket No.: 65665</b></p>
<p><b>ORDER</b></p>	

**THIS MATTER** was heard by the Board of Assessment Appeals on October 26, 2015, Diane M. DeVries and MaryKay Kelley presiding. Petitioners were represented by Benjamin F. Gibbons, Esq. Respondent was represented by Stephane W. Atencio, Esq. Petitioners are requesting an abatement/refund of taxes on the subject property for tax year 2012.

Subject property is described as follows:

**165 Tall Pines Trail, Antonito, Colorado  
Conejos County Schedule No. 598122300100**

1. Respondent's Motion to Dismiss

On or about August 12, 2015, the Board received Respondent's Motion to Dismiss. Respondent argues that the Board of Assessment Appeals lacks jurisdiction to grant relief to Petitioners, James and Mary Ellen O'Neil, *et al.*, because they are not the owners of the subject property. According to Respondent, the subject property is owned by Shay Patrick O'Neil and Shaun Michael O'Neil. Respondent contends that Shay Patrick O'Neil and Shaun Michael O'Neil did not seek an abatement or refund by filing a petition with the County and thus did not exhaust their administrative remedies. Therefore, Respondent argues, the Board lacks jurisdiction to adjudicate Petitioners' appeal.

In support of its argument, Respondent presented a copy of a Quit Claim Deed pertaining to the subject property, which was executed on November 1, 2010 between James Edward O'Neil and

Mary Ellen O’Neil as Grantors and their two sons, Shay Patrick O’Neil and Shaun Michael O’Neil as Grantees. Pursuant to the terms of the Deed, Grantors and Grantees agreed to jointly and/or separately retain the use, occupation and benefit of the subject property. Moreover, the Grantors, James Edward O’Neil and Mary Ellen O’Neil, expressly retained full responsibility for any and all debts attached to the use, occupation and benefit of the subject property.

Petitioners filed a Response to Respondent’s Motion to Dismiss on October 19, 2015. Petitioners argue that they have legal authorization to request the abatement and to bring the appeal as reflected by the terms of the Quit Claim Deed whereby Petitioners retained the right to use the property as well as the financial responsibility associated with the property. Petitioners also allege that they paid property taxes for which they now seek abatement. Finally, Petitioners contend that Respondent is estopped from claiming that Petitioners are not the proper parties to bring the appeal, because Petitioners have in the past applied for Special Use Permits to rent the subject and the County never questioned Petitioners’ authority to receive such permits.

Based on the information and evidence presented, the Board finds that Petitioners James and Mary Ellen O’Neil are the proper parties to prosecute their 2012 & 2013 abatement petitions before the Board of Assessment Appeals. Pursuant to the express terms of the Quit Claim Deed, which was executed between Petitioners and their two sons, Petitioners retained the right to enjoy the property and also assumed the financial responsibilities associated with the property. By the terms of the Quit Claim Deed, Petitioners were authorized and indeed required to be responsible for any “debt” associated with use of the property. The Board finds that the interpretation of such broad language includes taxes that are required to be paid on the subject property. Petitioners had, in fact, paid the 2012 and 2013 property taxes on the subject property for which they are now seeking abatement. *See Hughey v. Jefferson Cty. Bd. of Comm’rs.*, 921 P.2d 76 (Colo. App. 1996) (“Generally, the one who bears the financial burden of a tax is a party aggrieved and thus has standing to challenge an assessment.”) Therefore, the Board denies Respondent’s Motion to Dismiss.

## 2. Merits of the Appeal

On April 3, 2014, Petitioners filed a Petition for Abatement with the Board of County Commissioners for tax years 2012 and 2013. The County Assessor, Naomi Martinez-Keyes, testified that the BOCC denied the petition but failed to notify Petitioners of the denial. The parties are in agreement that the Board of Assessment Appeals has jurisdiction to adjudicate Petitioners’ appeal pursuant to Section 39-2-125(1)(e), C.R.S. (Board is required to “[h]ear appeals from determinations by county assessors when a county board of equalization or an assessor has failed to respond within the time provided by statute to an appeal properly filed by a taxpayer.”)

The subject property is a 2,770 square foot log house with a three-car garage. It is located on 2.7 acres with Conejos River frontage near the town of Antonito.

Respondent assigned commercial classification (residential lodging) for the subject property for tax year 2012. Petitioners are requesting residential classification.

James and Mary Ellen O'Neil, with a primary residence in Albuquerque, purchased a vacant lot in the Sheep Creek Subdivision approximately twelve years ago and built a log home there in 2010. Mr. O'Neil described its wooded acreage, river frontage, and outdoor activities, among them hunting and fishing. Mr. and Mrs. O'Neil purchased it as a family retreat and an inheritance for their sons.

In order to preserve the subject property for their sons, Mr. and Mrs. O'Neil conveyed a Quit Claim Deed to them in November of 2010. They retained financial responsibility for the subject, maintaining the property and paying taxes, which were reported on Mr. and Mrs. O'Neil's income tax filings. Mr. O'Neil estimated 30-40 days of use by the family in 2012 that included year-round visits and week-long stays.

Mr. O'Neil testified that in 2011 the family decided to offer the home as a vacation rental so that others could enjoy the ambience and outdoor activities and so as to offset the expenses of a second home. They advertised with Vacation Rentals by Owner (VRBO) and consulted an attorney to ensure the legality of screening applicants and negotiating fees. They offered 310 days of availability in 2012 and estimated 70-75 actual rental days, most of which occurred in June, July and August. Per tax returns, 2012 rental income produced by the subject was \$17,000.

On learning that rental properties required a permit, Petitioners requested a Special Use Permit (SUP) on June 18, 2012 for overnight lodging from the County's Land Use Office. The request was granted on August 15, 2012.

Petitioners are requesting residential classification for tax year 2012. They argue that the improvement was built as a second home and that predominant use had been personal. Overnight lodging was always considered secondary.

Respondent's witness, Naomi Martinez-Keyes, Conejos County Assessor, was informed by the Land Use Administration that a Special Use Permit for overnight lodging had been requested by Petitioners. She then located the subject property on the VRBO web site and obtained "testimonials" from lodgers.

The witness then discussed the sections of the Assessor's Reference Library (ARL) and Colorado statutory law that were referenced in the County's reclassification of the property.

In re-reclassifying the subject from residential to commercial property, Respondent referred to the ARL's definition of "commercial property": "Commercial property includes all lands, improvements, and personal property used as a commercial enterprise. Commercial improved property may have one or more uses." ARL, Vol. 2, at page 6.27. The witness then referred the Board to the definition of "commercial enterprise" from Vocabulary.com: "the activity of providing goods and services involving financial and commercial and industrial aspects."

Ms. Keyes then referred to Volume 3 of the ARL, page 7.33, that defines "Mixed Use Property" as a "property that has an improvement that is used as a residential dwelling unit and is also used for any other purpose". It also defines "Short Term Stay" as "a hotel or motel room that is

used for overnight accommodations and that is leased or rented for less than 30 consecutive days by the same person or business entity.”

Ms. Keyes testified that the Conejos County Land Use Code, Section 2.100 defines “overnight lodging” as “[a] facility or structure offering lodging accommodations on a daily basis to the general public. This definition includes such uses as hotel or motel, resort lodge, conference center, guest ranch, bed and breakfast or a commercial boarding house. The overnight lodging facility may also include incidental business uses commonly associated with the main lodging use.”

Ms. Keyes identified the definition of “lodging” in the Assessor’s Reference Library, Volume 2, page 6.30: “The land, structures, and improvements which typically provide temporary overnight lodging or sleeping facilities are assigned to this subclass. It includes, but is not limited to, the following types of businesses: bed and breakfast, cabins, hotels, inns, motels, overnight campgrounds, and YMCA/YWCA.” Ms. Keyes argued that the subject property met this definition.

Ms. Keyes determined that the subject property met the definition of “public establishment” per Section 12-44-101(3), C.R.S.: “any establishment leasing or renting overnight sleeping accommodations to the public generally, including, ... boarding houses, hotels, motor hotels, motels, and rooming houses, unless the rental thereof is on a month-to-month basis or a longer period of time.”

Based on her research and conviction that the subject’s primary use was lodging, Ms. Keyes changed the subject’s classification from residential to residential lodging (commercial) and sent a Special Notice of Valuation (SNOV) on September 4, 2012.

Petitioners presented sufficient probative evidence and testimony to prove that the tax year 2012 classification of the subject property was incorrect.

As defined by the General Assembly, “residential real property” is “residential land and residential improvements.” Section 39-1-102 (14.5), C.R.S. “Residential improvements” are “a building, or that portion of a building, designated for use predominantly as a place of residency by a person, a family, or families.” Section 39-1-102 (14.3), C.R.S. The phrase “‘designated for use’ in this context contemplates that a structure is ‘devoted to or ‘intended’ for a particular use at the time its status is under review.” *Mission Viejo Co. v. Douglas Cnty. Bd. of Equalization*, 881 P.2d 462, 464 (Colo. App. 1994).

Based on the definition of the “residential improvement,” predominant and actual use of the property is the focal point when determining appropriate classification. The Board finds that the subject has been designated for use predominantly as a place of residency. The subject site was purchased and the home was built for personal use. The intent of James and Mary Ellen O’Neil was use as a second home and as an inheritance for their sons. The short-term rental decision was made so that visitors could enjoy the outdoor experience and to offset expenses. Even though the property was available for rental much of the year, most rental activity occurred in summer months. Petitioners used the property when possible (30-40 days during 2012). Therefore, the subject’s predominant and actual use was as a second home.

Owners' physical presence at the property is not necessary for residential classification. The *Assessors' Reference Library* does not equate current use with physical presence. "[H]omes which stand empty for a period of time would not lose their residential classification simply because they were not 'actually' being used as a residence." *Mission Viejo*, 881 P2d at 465. The property was used as a short-term rental for 70-75 days in 2012. This means that the property was a residence for approximately 290-295 days whether or not it was occupied during this time. Hence, the property's predominant use was residential.

Petitioners' payment of sales and lodging taxes and their application for a Special Use Permit does not affect classification.

The Board concludes that the subject's predominant and actual use in 2012 was as a second home.

Pursuant to Section 39-10-114.5(2), C.R.S., it is the recommendation of the Board that the Board's decision is a matter of statewide concern. Therefore, Respondent 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.

### **ORDER:**

Respondent is ordered to change classification to residential and to cause an abatement/refund to Petitioner.

The Conejos County Assessor is directed to change his/her records accordingly.

### **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-nine 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-nine 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 November, 2015.



**BOARD OF ASSESSMENT APPEALS**

*Diane M. DeVries*

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Diane M. DeVries

*MaryKay Kelley*

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MaryKay Kelley

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

*Milla Lishchuk*  
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Milla Lishchuk