BOARD OF ASSESSMENT APPEALS, STATE OF COLORADO 1313 Sherman Street, Room 315 Denver, Colorado 80203	Docket No.: 68918
Petitioner: **COLORADO LA PALOMA INC,** v. Respondent: **EAGLE COUNTY BOARD OF COMMISSIONERS.**	

ORDER

THIS MATTER was heard by the Board of Assessment Appeals on February 16, 2017, Diane M. DeVries and Gregg Near presiding. Petitioner was represented by F. Brittin Clayton III, Esq. Respondent was represented by Christina Hooper, Esq. Petitioner is protesting the 2013, 2014 and 2015 classification of the subject property.

The parties agreed to the admission of Petitioner's Exhibits 1-7 and Respondent's Exhibits A-K. To avoid duplicative testimony, the Board agreed to consolidate four dockets pertaining to two different properties for purposes of the hearing only. The Board will decide each case solely on its own merits without regard to discussion pertaining to the second property, with separate decisions issued for each. The dockets addressed in the hearing include: Docket No. 68919, James P. and Debra L. Donahugh v. Eagle County Board of Commissioners; Docket No. 68964, James P. and Debra L. Donahugh v. Eagle County Board of Equalization; Docket No. 68918, Colorado La Paloma, Inc. v. Eagle County Board of Commissioners; and Docket No. 68963, Colorado La Paloma, Inc. v. Eagle County Board of Equalization.

Subject property is described as follows:

110 W Hillside Drive
Basalt, Colorado
Eagle County Schedule Number 2467-074-63-4

This appeal involves the relationship between three legal and platted residential lots located in the Hillside Grove subdivision in the Basalt Gulch area. The subject is one of three contiguous lots.

The three lots are described as follows:

Lot B, Hillside Grove Subdivision (improved residential lot), 0.313 acres (128 W. Hillside Drive);

Lot C, Hillside Grove Subdivision (residential lot), 0.286 acres, (120 W. Hillside Drive);

Lot D, Hillside Grove Subdivision (vacant lot), 0.260 acres, (110 W. Hillside Drive).

Respondent assigned *vacant land* classification for Lot D, the subject parcel, hereinafter identified as the Subject Lot. Petitioner is requesting residential classification. The value of the Subject Lot is not in dispute.

Applicable Law

Section 39-1-102(14.4), C.R.S. defines "residential land" as:

> "...a parcel or **contiguous** parcels of land under **common ownership** upon which residential improvements are located and that is **used as a unit** in conjunction with the residential improvements located thereon ..." (Emphasis added).

The Property Tax Administrator (PTA) interprets Section 39-1-102(14.4), C.R.S. to mean that "[p]arcels of land, under common ownership, that are contiguous and used as an integral part of a residence, are classified as residential property." *See* Assessors Reference Library (the ARL), Volume 2, Section 6.10. Citing *Sullivan v. Denver County Board of Equalization*, 971 P.2d 675 (Colo.App.1998) and *Fifield v. Pitkin County Board of Commissioners*, 292 P.3d 1207 (Colo.App.2012) the PTA adds that the primary residential parcel must conform to the definition of residential real property as defined in Section 39-1-102(14.5), C.R.S.

Further, the Property Tax Administrator, *see* ARL, Vol. 2, Section 6.10-6.11 titled "Special Classification Topics; Contiguous Parcels of Land with Residential Use," emphasizes that the assessor's judgment is crucial in determining if contiguous parcels can be defined as residential property and that a physical inspection provides information critical to the determination whether a contiguous lot can be classified as residential. Moreover, the PTA suggests several judgment criteria to be considered when making such a determination:

- Are the contiguous parcels under common ownership?
- Are the parcels considered an integral part of the residence and actually used as a common unit with the residence?
- Would the parcel(s) in question likely be conveyed with the residence as a unit?
- Is the primary purpose of the parcel and associated structures to be for the support, enjoyment, or other non-commercial activity of the occupant of the residence?

The Property Tax Administrator's interpretation of statutes pertaining to property taxation is entitled to judicial deference as the issue comes within the administrative agency's expertise.

Huddleston v. Grand Cty. Bd. of Equalization, 913 P.2d 15, 16-22 (Colo. 1996) ("Judicial deference is appropriate when the statute before the court is subject to different reasonable interpretations and the issue comes within the administrative agency's special expertise.")

The Colorado Court of Appeals has cited favorably the PTA's interpretation of the statutory definition of "residential land" per Section 39-1-102 (14.4), C.R.S. as well as the PTA's proposed "judgment criteria" that assessors must consider when determining whether contiguous parcels are residential land. *Fifield*, 292 P.3d 1207.

Moreover, the procedures contained in the ARL promulgated by the Property Tax Administrator pursuant to Section 39-2-109(1)(e), C.R.S. are binding upon county assessors. *Huddleston*, 913 P.2d 15, 16-22.

Evidence Presented Before the Board

The parties dispute classification of the Subject Lot. The contiguity of the Subject Lot and the adjacent unimproved residential Lot C is not disputed. The parties disagree as to the common ownership of the Subject Lot and Petitioner's Lots B and C, and the Subject Lot's use in conjunction with the residential improvements on Lots B and C.

Petitioner called Mr. Curt Settle as a witness. Mr. Settle testified to his position as a designated representative of the Property Tax Division in regard to the interpretation of the Assessor's Reference Library ("ARL"). Mr. Clayton requested Mr Settle to answer numerous questions regarding the judgement criteria to be considered in classification (Ex. C, page ECG-0009, excerpt from ARL, Vol. 2, page 6.11). Respondent objected on the basis of Mr. Clayton's leading the witness by providing series of hypothetical situations involving the criteria. The Board asked Mr. Clayton to avoid hypotheticals that are not relevant to the subject appeals being heard by the Board, and Mr. Clayton agreed to follow this direction.

Mr. Settle also testified regarding recent changes to the ARL with respect to classification. In 2016, redundant language was removed from the ARL, Volume 3. In 2015, language from the *Fifield* decision, which modified the 1998 *Sullivan* decision, was also added. The witness noted *Fifield* eliminated the requirement under *Sullivan* that a residential structure must be present for a property to receive residential classification. Mr. Settle stated he had not seen the data relating to the specifics of the subject property.

Petitioner presented Mr. Juaquin Blaya as a witness. Mr. Blaya testified to acquiring a large lot in 1999 and constructing a house there in 2009. Subsequently, the large parcel was subdivided into four building lots (Lots A, B, C & D), one of which, Lot B, was retained as the home site. Lot A, (134 W. Hillside Drive) was sold to a third party. Mr. Blaya retained the ownership of the remaining three lots B, C & D. Mr. Blaya testified Lot C (120 W. Hillside Drive) has landscaping that the witness described as "integrated" with the home; this lot was previously reclassified from vacant to residential land.

According to Mr. Blaya, the Subject Lot has been retained for open space, view protection and as a play area for neighborhood children. The family uses Subject Lot in the winter for skiing and the children sled there. The Subject Lot has a low brick wall along the frontage, a feature common to all the lots within the subdivision. There is a parking area in the southwest corner of the Subject Lot and a partial wrought iron fence separates a portion of the Subject Lot from the adjacent Lot C, 120 W. Hillside Drive. The witness testified the parking area at the southwest corner of the Subject Lot is used by his neighbor with permission. Mr. Blaya stated he does not use the parking area and he cannot directly access the Subject Lot from the improved residential Lot B.

Mr. Blaya pointed to the photo within Petitioner's Exhibit 2, page 10 as illustrative of the improvements supporting the residential land classification for Lot C. The photo depicts cohesive nature of the landscaping, flower gardens, benches, patio and fire pit that illustrates use of the lot by the property owners. On the background of the photograph the partial wrought iron fence separating the Subject Lot from Lot C can be observed as well as a distinct change in vegetation between the two lots.

Petitioner contended there were several factors supporting reclassification for the Subject Lot. According to Petitioner, use of a vacant parcel in conjunction with the improved parcel can be either "active" or "passive."

Petitioner asserted that "used as a unit" does not require the property owner to "actively" use the property, such as, for example, building fences, cutting trees or recreating. The adjoining property may also be used "passively" such as, for example, as a buffer, to prevent adjacent development, to preserve a view, etc. According to Petitioner, passive practices represent adequate use of the Subject Lot for purposes of Section 39-1-102(14.4), C.R.S. Petitioner also disputed Respondent's contention there is no active use arguing that the neighborhood children play on the Subject Lot.

Further, Petitioner argued that the term "common ownership" does not means "identical ownership." Petitioner contended that "common ownership" exists wherever there is a common thread of ownership or control between the record owners. Petitioner pointed out that Mr. Blaya is the sole owner of Colorado La Paloma Inc. that owns the Subject Lot; Lots B and C are owned jointly by Joaquin and Isabel Blaya. Accordingly, because there is a common thread of ownership that exists through Mr. Blaya, there is a commonality of ownership between the three parcels.

Respondent presented Mr. Bruce Cartwright's testimony in regard to the photos in Petitioner's Exhibit 2. Mr. Cartwright inspected the Subject Lot in February 2016 and found that the Subject Lot, as well as Lots B and C, were for sale. According to Mr. Cartwright, maintenance of the Subject Lot as shown by pages 12 and 13 of Petitioner's Exhibit 2 was limited to the area around the address monument.

Respondent presented the testimony of Mr. Kevin Cassidy, a Certified Residential Appraiser with the Eagle County Assessor's Office. Mr. Cassidy testified to the contents of Respondent's Exhibits A-K and stated he visited Petitioner's property multiple times. The witness pointed to Exhibit A, page 1, and indicated there was heavy foliage to the rear of the Subject Lot. Lot C was previously granted residential classification as it met all of the statutory requirements for residential

classification.

Mr. Cassidy introduced photos of the Subject Lot in Exhibit F that depict additional views of the address monument on the corner of the Subject Lot and portions of the wall that is common within the subdivision. Additional photos, pages 25 and 26, show the terrain and vegetation at the rear of the Subject Lot as well as the wrought iron fencing along the boundary between the Subject Lot and Lot C. According to Mr. Cassidy, no evidence was noted of anyone playing on the Subject Lot.

Respondent contended there were no improvements on the Subject Lot and there was no evidence of the uses described by Mr. Blaya. After a request for reclassification, the Assessor mailed a questionnaire asking if the owner wished to remove the lot line. Respondent noted the questionnaire sent by the Assessor was not returned. After inspection of the property and based on previous visits, Respondent disputed Petitioner's contention that the Subject Lot was being used for purposes described by Petitioner.

Further, Respondent dismissed Petitioner's argument that the term "common ownership" in Section 39-1-102(14.4), C.R.S. is a flexible and functional term that encompasses overlapping ownership and substantial commonality of ownership. According to Respondent, the legislature intended the word "ownership" to mean record-ownership – as ascertained from the records of the county clerk and recorder.

The Board's Findings

The burden of proof in BAA proceedings is on the taxpayer to establish the basis for any reclassification claims concerning the subject property. *Home Depot USA, Inc. v. Pueblo Cty. Bd. of Comm'rs*, 50 P.3d 916, 920 (Colo. App. 2002). The Board finds that Petitioner failed to meet its burden of proving that the subject meets the definition of "residential land" which is defined in Section 39-1-102(14.4), C.R.S. as "a parcel or **contiguous parcels** of land under **common ownership** upon which residential improvements are located and that is **used as a unit** in conjunction with the residential improvements located thereon." (Emphasis added).

Use

The Board is not persuaded that the Subject Lot was used as a unit in conjunction with the residential improvements on Lot B or Lot C.

In making this finding, the Board was not convinced that the Subject Lot was used as claimed by Petitioner. The Board was not convinced that the Subject Lot was used in conjunction with the residential improvements for buffer, open space, parking or the other uses claimed by Petitioner. Instead, the Board was persuaded by the evidence presented by Respondent, including the testimony of Respondent's witness, Kevin Cassidy, who inspected the Subject Lot multiple times. Mr. Cassidy did not observe any evidence of Petitioner's claimed uses of the Subject Lot. The Board also believed Mr. Cassidy's testimony that the subject parcel looked like a separate unit and would not likely be conveyed as a unit with the residential Lots B or C. Moreover, the Board found persuasive Mr. Cassidy's testimony that a wrought iron fence that separates the Subject Lot from Lot C actually

creates a barrier between the Subject Lot and Lots C and B further supporting Mr. Cassidy's observations that the Subject Lot is not used as a unit in conjunction with the residential improvements on Lots B or C.

After carefully weighing all of the evidence and considering the credibility of the witnesses, the Board is convinced that no portion of the Subject Lot was used by Petitioner as a unit in conjunction with the residential improvements located on Lots B or C for tax year 2013-2015. Accordingly, the Board does not believe that any portion of the Subject Lot is entitled to residential classification for tax years 2013-2015. See *Farny v. Bd. of Equalization*, 985 P.2d 106, 110 (Colo. App. 1999) and *Fifield*, 292 P.3d at 1210 (determination of acreage entitled to residential classification is question of fact for BAA).

Ownership

Petitioner argues that the term "common ownership" as used in Section 39-1-102(14.4), C.R.S., is a flexible and functional term that encompasses overlapping ownership and substantial commonality of ownership. In support of this contention, Petitioner cites various sections of Colorado statutes that reference "common ownership" in the context of hotel and restaurant licensure, income and cigarette taxation and disabilities law. In addition, Petitioner cites statutory and case law from several other jurisdictions that interpret "common ownership" in a broad and functional manner.

Petitioner also argues that "common ownership" does not mean "identical ownership" and that when the Colorado General Assembly means "identical ownership" it uses the term "identical ownership." According to Petitioner, because the General Assembly has used the different terms for "common ownership" and "identical ownership" in different settings. it must be presumed that the two terms have different meaning.

In sum, Petitioner contends that "common ownership" exists whenever there is a common thread of ownership or control between the two record owners. Petitioner alleges that when legal title to two parcels is vested in two separate trusts that have one or more beneficiaries in common, there is a common thread of equitable title that exists through the common beneficiaries, and therefore there is "common ownership" between the two parcels.

In response, Respondent argues that the Assessor has always interpreted "common ownership" to mean ownership in the same name. Respondent cites *Sullivan v. Denver County Board of Equalization*, 971 P.2d 675 (Colo. App. 1998) in support of its argument that ownership in different names on the assessment date disqualifies a property from residential classification based upon its use in conjunction with a residence on a separate property:

> We first reject taxpayer's contention that the subject parcel qualified for residential classification based on his use of it in conjunction with his residence on the adjacent parcel. As to this issue, notwithstanding taxpayer's actual use of the subject parcel for residential purposes, it is undisputed that the ownership of this vacant parcel and the adjacent improved parcel was in

different names on the 1996 assessment date.

Sullivan, 971 P.2d at 676.

The Board did not find persuasive the legal authorities cited by Petitioner as none were on-point and many were outside of this jurisdiction. The Board found that the *Sullivan* case that dealt specifically with Section 39-1-102(14.4), C.R.S. is the most applicable and provides guidance for the Board's decision in denying Petitioner's appeal. In *Sullivan*, the Colorado Court of Appeals denied residential classification based, in part, on a finding that "the ownership of [this] vacant parcel and the adjacent improved parcel was in different names on the [1996] assessment date." Similar to the facts in *Sullivan*, the ownership of the Subject Lot and the adjacent Lots B and C on the assessment date was in different names, *e.g.* Colorado La Paloma Inc. and Joaquin and Isabel Blaya, respectively. Beyond the distinction of the title ownership, the Board finds that the ownership of the two parcels is separate in substance. Therefore, the Board is persuaded that the ownership of the Subject Lot is separate and distinct from the ownership of Lots B and C.

Petitioner presented insufficient probative evidence and testimony to prove that the subject property was incorrectly classified for tax years 2013-2015.

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-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 20th day of April, 2017.

BOARD OF ASSESSMENT APPEALS

Diane M. DeVries

Gregg Near

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

Milla Lishchuk

STATE OF COLORADO SEAL BOARD OF ASSESSMENT APPEALS

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