| BOARD OF ASSESSMENT APPEALS,<br>STATE OF COLORADO<br>1313 Sherman Street, Room 315<br>Denver, Colorado 80203 | Docket No.: 68921 |
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| Petitioner:<br><br>**JOHN A. AND BARBARA P. MAYER,**<br><br>v.<br><br>Respondent:<br><br>**EAGLE COUNTY BOARD OF COUNTY COMMISSIONERS** | |

## ORDER

**THIS MATTER** was heard by the Board of Assessment Appeals on February 14, 2017, Sondra Mercier and MaryKay Kelley presiding. Petitioners were represented by F. Brittin Clayton III, Esq. Respondent was represented by Christina Hooper, Esq. Petitioners are protesting the classification for tax years 2014 and 2015.

To avoid duplicative testimony, the Board agreed to consolidate four dockets pertaining to two different properties for the hearing purposes 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. 68969, John A. and Barbara P. Mayer v. Eagle County Board of Equalization; Docket No. 68921, John A. and Barbara P. Mayer v. Eagle County Board of Commissioners; Docket No. 68966, Joe B. Neuhoff Family Partnership, Ltd. v. Eagle County Board of Equalization; and Docket No. 68920, Joe B. Neuhoff Family Partnership, Ltd. v. Eagle County Board of Commissioners.

Description of the Subject Property

105 Juniper Lane, Edwards, Colorado
Schedule No. R042479

This appeal involves the relationship between two legal and platted lots located in Cordillera Valley Club. The subject is a vacant buildable residential 1.650-acre lot classified as *vacant land* by Eagle County. The second parcel (not a subject of this appeal) is located at 73 Juniper Lane. Unlike

the subject, this 1.360-acre parcel is improved with a residence and is classified as *residential* property.

The subject lot is owned by John A. and Barbara P. Mayer. The improved residential lot at 73 Juniper Lane is owned by the John A. Mayer 2007 Irrevocable Trust (50%) and the Barbara P. Mayer 2007 Irrevocable Trust (50%).

Petitioners argue that the subject lot should be re-classified as residential land. The value of the subject is not in dispute. Respondent has placed vacant land classification on the subject for tax years 2014 and 2015.

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.

The parties have stipulated to the contiguous nature of the subject lot with the improved residential lot. The dispute is twofold; whether the subject lot shares common ownership with the improved residential lot, and whether the subject lot is used in conjunction with the adjoining residential lot. Valuation of the subject lot is not disputed.

Evidence Presented Before the Board

The parties dispute classification of the subject lot. They disagree as to common ownership and the subject parcel's use in conjunction with the residence on the residential lot.

Petitioners' witness, Curtis Settle, Deputy Director, Division of Property Taxation for the State of Colorado, discussed both the statutory definition of residential real property and the ARL's interpretation of the statute. He testified that the assessor's judgment is crucial in determining if a vacant parcel adjacent to a residential parcel can be classified as residential property. Suggested judgment criteria include, but are not limited to the four criteria outlined in the ARL. Mr. Settle also opined that physical inspection and owner's own perception of the subject are important. There are numerous factors that the assessor may consider in determining appropriate classification for a property; one factor alone is not determinative.

Petitioners' witness, Travis Stuard, Property Tax Consultant, Duff & Phelps, testified that his company identified sixty taxpayers in Eagle County owning both a residentially-improved parcel with residential classification and a nearby vacant lot classified as vacant land. Letters were mailed to these taxpayers offering assistance in appealing the vacant land classification. Of those responding, approximately twelve appeals have been filed with the BAA following denial at the county level of appeal. Per the witness, Duff & Phelps is being retained on a contingency fee basis.

Petitioners' witness, Taylor Dix, Partner, Lewis Bess Williams & Weese, P.C. (trust and estate planning), described a trust as an entity that holds legal title to a property for the benefit of someone else. Mr. Dix offered testimony regarding the nature of the trusts involved in this appeal.

Residential Parcel Trusts (The John A. Mayer Irrevocable Trust (50%) and the Barbara P. Mayer (50% Irrevocable Trust)). Two Qualified Personal Residence Trusts (QPRT), created by federal tax code for tax planning purposes, were established for the residential parcel; a QPRT requires the existence of a residence. Mr. Dix testified that a QPRT enables the settlor of the trust to

keep possession of the property (i.e. the personal residence) during the predefined duration of time. The John A. Mayer Irrevocable Trust and the Barbara P. Mayer Irrevocable Trust were formed on August 15, 2007; termination dates are the earlier of a ten-year period or their dates of death. Each is identified as Grantor and the Beneficiary of his/her individual trust. The trusts are irrevocable but can be amended per tax code regulations. As Trustee, each is free to administer his or her 50% of the property or even sell his or her 50%.

Mr. Dix also explained why a QPRT for the vacant site was not advised. Exhibit 6 references Treasury Regulation 25.2702-5(c)(2)(ii), "A personal residence may include ... adjacent land not in excess of that which is reasonably appropriate for residential purposes (taking into account the residence's size and location)." According to Mr. Dix, the subject lot, although adjacent to the parcel upon which a personal residence is located, may not satisfy the requirement of "not [being] in excess of that which is reasonably appropriate for residential purposes." According to Mr. Dix, tax practitioners recommend placing only a personal residence into a QPRT; the addition of a vacant parcel could, on review, be challenged and subsequently compromise tax benefits.

Petitioner, John Mayer, testified that he and his wife purchased the residential lot in 2000 and completed residential construction in 2007. They bought the subject lot in 2011 for the following reasons: to protect the view corridor to Arrowhead and Beaver Creek Ski Areas; and to ensure privacy and protect against development. They enjoy the two parcels equally and consider them to be a single unit.

Mr. Mayer testified that a house built in the subject lot's designated building envelope would block Petitioners' view of Arrowhead Ski Area and the more distant Beaver Creek Ski Area. Petitioners provided photographs showing Arrowhead ski runs and Beaver Creek that lies two to three miles distant from the subject.

Mr. Mayer built a water feature that flows from the spring on the northern border of the residential parcel southward between two sections of the residence. To address runoff from heavy rains, he also planted trees and dug drainage ditches to a stream on the subject's eastern border.

According to Mr. Mayer's testimony, the family walks the level portion of the subject parcel up until the point where it drops steeply toward its eastern border. Neighbors also walk the parcels to access BLM land to the north.

According to Mr. Mayer, should he and his wife sell the improved parcel, they would sell the vacant parcel along with it; he assumes a buyer would want to purchase both parcels. He has not legally consolidated the two parcels by vacating lot lines.

Respondent's witness, Kevin Cassidy, Certified Residential Appraiser for the Eagle County Assessor's office, denied residential classification for the subject lot. In his opinion, ownership of the subject parcel and the residential parcel does not meet Assessor Reference Library guidelines, and he is not convinced the two are "commonly owned" as required by statute.

Further, Mr. Cassidy testified that he saw no significant evidence that the subject lot was used in conjunction with the residential improvements on the residential lot He did not consider walking on the subject lot to meet the statutory relationship between the two parcels. He also disagreed that construction of a house on the subject's designated building envelope would obstruct the view of Arrowhead Ski Area to the southeast (or Beaver Creek further east). Further, he noted that the front of the house was oriented in a southerly direction to take advantage of panoramic views of the Sawatch Range.

## 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).

### Common Ownership

Petitioners argue 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, Petitioners cite 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, Petitioners cite statutory and case law from several other jurisdictions that interpret "common ownership" in a broad and functional manner.

Petitioners also argue 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 Petitioners, 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, Petitioners contend that "common ownership" exists whenever there is a common thread of ownership or control between the two record owners. Petitioners allege 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 Petitioners 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 Petitioners' 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 vacant parcel and the adjacent improved parcel on the assessment date was in different names, *e.g.* joint tenancy dated 2011 and the two irrevocable trusts dated 2007 (the John A. Mayer Irrevocable Trust and the Barbara P. Mayer Irrevocable Trust) for the residential parcel, respectively.

Beyond the distinction of the title ownership, the Board finds that the ownership of the two parcels is separate in substance. The evidence presented before the Board was undisputed that the subject parcel and the adjoining residential parcel are owned by two separate and distinct entities. Therefore, the Board is persuaded that the ownership of the subject parcel is separate and distinct from the ownership of the adjacent residential lot, and that common ownership does not exist.

Use

The Board is not persuaded that Petitioners used the subject "as a unit in conjunction" with the residential improvements on the adjacent residential lot.

In making this finding, the Board is not convinced by Petitioners' claimed uses of the subject lot. Instead, the Board is persuaded by Respondent's witness, Kevin Cassidy, who conducted multiple site visits to the subject and did not observe any evidence of use of the subject lot.

Mr. Cassidy's testimony concerning the views from the residence is also convincing. The Board finds persuasive Mr. Cassidy's testimony that the home's southerly views of the Sawatch Range carry both marketability and value and would not be negatively affected in the event the subject parcel is improved with a residence. Mr. Cassidy's testimony concerning the orientation and location of the residential improvements, the elevations and topography of the residential improvements and the subject lot, the location and views of the Arrowhead and Beaver Creek Ski Areas from the residential property. and the building envelope for the subject property is also credible. Based on the evidence, the Board does not believe that the subject lot is used as a unit in conjunction with the residential improvements for the enjoyment or preservation of views.

The Board also believes Mr. Cassidy's testimony that the subject parcel would not likely be conveyed as a unit with the residential lot. In addition, the Board is persuaded by Mr. Cassidy's testimony that development of the subject parcel would not have a negative effect on privacy of the improved residential parcel.

Petitioners did not convince the Board that use of the subject parcel included the treehouse (platform) located therein. According to testimony, this platform was not built by Petitioners. It was built by the previous owner of the subject property for use by her children. Based on the evidence, the platform did not appear to have been used recently, and it looked like it was in disrepair.

Petitioners did not convince the Board that the subject property was used for drainage purposes. Based on the evidence presented, the Board is unable to determine the size or exact location of the improved drainage ditch or the extent that the improved drainage ditch, if any, is located on the subject property. The Board finds Mr. Cassidy's testimony with respect to the drainage ditch credible.

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 Petitioners as a unit in conjunction with the residential improvements located on the residential lot for tax years 2014 and 2015. Accordingly, the Board does not believe that any portion of the subject lot is entitled to residential classification for tax years 2014 and 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).

The Board finds that Petitioners failed to meet their burden of proof regarding reclassification of the subject parcel for tax years 2014 and 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**

Sondra Mercier

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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