

<p>BOARD OF ASSESSMENT APPEALS, STATE OF COLORADO 1313 Sherman Street, Room 315 Denver, Colorado 80203</p> <hr/> <p>Petitioner:</p> <p>KURTIS S. & NATALIE D. RHODEN,</p> <p>v.</p> <p>Respondent:</p> <p>EAGLE COUNTY BOARD OF COMMISSIONERS.</p>	<p>Docket No.: 68922</p>
<p>ORDER</p>	

THIS MATTER was heard by the Board of Assessment Appeals on February 15, 2017, Debra A. Baumbach and Louesa Maricle presiding. Petitioners were represented by F. Brittin Clayton III, Esq. Respondent was represented by Christina Hooper, Esq. Petitioners are protesting the 2015 classification of the subject property.

The parties agreed to the admission of Petitioners' Exhibits 1 through 7 and Respondent's Exhibits A through 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. 68968 Kurtis & Natalie Rhoden v. Eagle County Board of Equalization; Docket No. 68922, Kurtis & Natalie D. Rhoden v. Eagle County Board of Commissioners; Docket No. 68967 William J. Spicer Et al. v. Eagle County Board of Equalization; and Docket No. 68923 William J. Spicer and Glen Lyon Development v. Eagle County Board of Commissioners.

Subject property is described as follows:

**872 Webb Peak, Cordillera, CO
Eagle County Account No. R049822**

This appeal involves the relationship between two legal and platted residential lots located in the Cordillera Subdivision, Filing 35, in Eagle County, Colorado. The subject is a vacant buildable residential lot classified as a *vacant PUD lot* by Eagle County, hereinafter identified as Subject Lot. This lot contains 5.63 acres, has a generally rectangular shape, sloping topography and some trees.

Access to the parcel is via the Webb Peak road. County records indicate the Subject Lot was purchased by Kurtis S. and Natalie D. Rhoden on August 19, 2013. There were no residential or recreational improvements on the lot as of the assessment date.

Kurtis and Natalie Rhoden own an additional residential lot, which is not a subject of this appeal, at 928 Webb Peak, hereafter identified as Residential Lot. It shares a common border with the Subject Lot. Unlike the Subject Lot, this lot is improved with a single story residence consisting of 3,395.2 square feet of living area above grade with a 3,356.4 square foot walk out basement and is classified as *single family residential* by Eagle County. The improved parcel is 9.997 acres in size and access to the Residential Lot is also via the Web Peak road. County records indicate the Residential Lot was purchased by the owners on May 23, 2014.

Respondent placed vacant land classification on the Subject Lot for tax year 2015. Petitioners dispute the classification, arguing the Subject Lot should be re-classified as residential land for that tax year.

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]arcel(s) 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 stipulated the appeal pertains only to land classification; the Subject Lot is contiguous to the improved residential lot. The valuation of the Subject Lot is not disputed.

Petitioners' first witness, property owner Mr. Kurtis Rhoden, testified the Subject Lot was purchased in August 2013 with the intent to build a residence on it. Subsequently, Petitioners determined the Subject Lot was not conducive to the residence design planned, so they purchased the adjacent lot (the Residential Lot) in May 2014 and the residence was constructed on it instead. The Residential Lot was purchased in the name of Rhoden Properties, LLC, a company wholly owned and managed by Mr. Rhoden. Taking title under the company name was on the advice of his attorney as an added protection during construction of the residence. After construction was completed, title was transferred to Mr. and Mrs. Rhoden as individuals in September 2015.

Mr. Rhoden testified his family uses the residence as a vacation home multiple times during each year. Mr. Rhoden stated the family uses the Subject Lot to walk the dog; an escarpment type elevation on the lot gives an enjoyable view of the valley below; it provides access to an off-site subdivision trail; it has an aspen grove the family enjoys viewing; and the family uses it for snow shoeing, sledding, and to observe wildlife. Mr. Rhoden uses the Subject Lot as a setting off point for bow hunting trips because it provides a view out over the Bureau of Land Management land where he goes hunting. The lot provides protection of the views of the Gore Range mountains to the north, northeast, and east, and is a buffer from neighbors and noise. Mr. Rhoden testified that no part of the Subject Lot is used for commercial purposes or agricultural purposes, which are limited in this Cordillera subdivision.

Under cross examination, Mr. Rhoden testified the Subject Lot was listed for sale when construction of the residence on the Residential Lot began; and it has since been continuously marketed for sale. When asked if he had considered vacating the common lot line to combine the lots, he stated he had not checked into that process because it might be too permanent. Mr. Rhoden

stated the Residential Lot also provides access to the BLM land and to the subdivision trail. The Residential Lot can also be used for snow shoeing and sledding, but his children prefer the Subject Lot for those activities.

Petitioners' witness, Mr. Curt Settle, Deputy Director of the Colorado Division of Property Taxation, provided testimony regarding Assessor's Reference Library (ARL) policies, practices, and procedures. He did not provide testimony specific to the subject property. Mr. Settle stated that Assessors must follow the ARL, but it is not law. He cited court rulings regarding the use of the ARL and that departures can be made from it if the ARL is contrary to law. Mr. Settle was asked to discuss the meaning of some specific language in the ARL and/or Colorado statute, including, but not limited to "purpose", "integral", "use", "enjoyment" and "contiguity". Mr. Settle stated the broad range of variables that apply when determining classification of contiguous parcels are factors to be considered, but do not on their own meet the overall test for qualification. For example, "enjoyment" of a property does not on its own meet the overall test for classification. The witness also discussed the process and levels of review necessary to make changes to the ARL. In response to questions from the Board, Mr. Settle stated he is not aware of any active review of that portion of the ARL which addresses residential lot classification, as being inconsistent with the statute for the applicable tax year assessment period.

Petitioners' final witness, Mr. Travis Stuard, Senior Associate with Duff & Phelps, testified to the contents of Petitioner's Exhibits 1-7, which he prepared, and the orientation of photos of the Subject Lot and Residential Lot included in the exhibits. Under cross examination, he stated he had not considered the location of the building envelope for the Subject Lot when he inspected the property and the potential impact on view from the Residential Lot if a residence were to be built on the Subject Lot.

Respondent presented the testimony of Kevin Cassidy, 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 had inspected the Subject Lot and Residential Lot. Deed evidence was presented to show the Residential Lot was owned by Rhoden Properties, LLC as of January 1, 2015, and the witness concluded the two lots were not under common ownership for tax year 2015. Mr. Cassidy testified the most dramatic views from both lots are of the Sawatch Range mountains to the south. The northern and eastern views toward the Gore Range are not dramatic because that range is farther away. The southern views of the Sawatch Range are similar from both lots and those views from the Residential Lot would not be affected if a residence were to be built in the platted building envelope on the Subject Lot.

The witness testified the Subject Lot is an independent development lot and he provided evidence it was first listed in July 2014. He concluded it is not likely the Subject Lot and Residential Lot would be conveyed with the residence as a unit. Mr. Cassidy stated he did not see any of the uses reported by Petitioners occurring on the Subject Lot or evidence of those uses. Because it has continuously been marketed for sale since July 2014, the witness concluded the primary purpose of the parcel is not for the support, enjoyment, or other non-commercial activity of the occupant of the residence.

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 Petitioners failed to meet their 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 meanings.

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 "common ownership" must be determined from records of the Eagle County Clerk and Recorder. Thus, for the vacant unimproved property to qualify under the definition of Residential Land, the same individual or entity that owns the improved residential property must also be the record owner of the vacant unimproved property. 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 does not find persuasive the legal authorities cited by Petitioners as none was on-point and many were outside this jurisdiction. The Board finds that the *Sullivan* case, which 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 Residential Lot on the assessment date was in different names: Kurtis & Natalie Rhoden and Rhoden Properties, LLC, respectively.

Beyond the distinction of the title ownership, the Board finds the ownership of the two parcels is separate in substance. The evidence presented before the Board was undisputed that the Subject Lot was owned by the Rhodens as individuals on January 1, 2015, and the adjoining Residential Lot was owned by Rhoden Properties, LLC. The evidence was also undisputed that the taxpayers purchased the Residential Lot in the name of the Rhoden Properties, LLC as an added layer of legal protection during construction of the residence. The different ownerships are separate and distinct legal entities subject to different legal terms. Therefore, the Board is persuaded that the ownership of the Subject Lot is separate and distinct from the ownership of the adjacent Residential Lot.

Contiguity

The contiguity of the Subject Lot and the Residential Lot is not in dispute because they share a common boundary line.

Use

The Board was not persuaded that the Subject Lot was used as a unit in conjunction with the residential improvements located on the Residential Lot.

In making this finding, the Board was not convinced by Petitioners' claimed uses of the Subject Lot. Instead, the Board was persuaded by Respondent's witness, Kevin Cassidy, who inspected the Subject Lot and testified that he did not see any of the uses claimed by Petitioners occurring on the Subject Lot or evidence of those uses.

Mr. Cassidy's testimony concerning the views from the residence was also credible. Although Petitioners claim there would be some loss in northern and eastern views toward the Gore Range, the Board is convinced by the evidence the Residential Lot would still retain some, if more limited, view of Gore Range even if a residence is constructed on the Subject Lot. Moreover, the Board is persuaded by the evidence that the real and significant views from the improved Residential Lot are in the opposite direction toward the Sawatch Range to the south and not toward the more distant Gore Range. The Board believes that the views of the Gore Range from the Residential Lot

are inconsequential. Based on the evidence presented, the Board does not believe that the Subject Lot and the Residential Lot were used as a unit in conjunction with the residence for the enjoyment of views.

The Board also believed Mr. Cassidy's testimony concerning whether the Subject Lot would likely be conveyed as a unit with the residence. The Board believed Mr. Cassidy's testimony that the Subject Lot is not used as a buffer for the Residential Lot, considering that the Residential Lot is almost 10 acres in size. In addition, the Board found convincing Mr. Cassidy's testimony that Petitioners' listing of the Subject Lot for sale as of July of 2014, and continual marketing of the property since, further supports the position that the Subject Lot would not likely be conveyed as a unit with the residence located on the Residential Lot.

After carefully weighing all the evidence and considering the credibility of the witnesses, the Board is convinced that the portion of the Subject Lot used by Petitioners as a unit in conjunction with the residential improvements was, at most, de minimis. Accordingly, the Board does not believe any portion of the Subject Lot is entitled to residential classification for tax year 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).

Petitioners presented insufficient probative evidence and testimony to prove that the subject property was incorrectly classified for tax year 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

Debra A. Baumbach

Debra A. Baumbach

Louesa Maricle

Louesa Maricle

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

Milla Lishchuk

Milla Lishchuk

