BOARD OF ASSESSMENT APPEALS, STATE OF COLORADO 1313 Sherman Street, Room 315 Denver, Colorado 80203	Docket No.: 68964
Petitioner: **JAMES P. & DEBRA L. DONAHUGH,** v. Respondent: **EAGLE COUNTY BOARD OF EQUALIZATION.**	

ORDER

THIS MATTER was heard by the Board of Assessment Appeals on February 16, 2017, Diane M. DeVries and Gregg Near presiding. Petitioners were represented by F. Brittin Clayton III, Esq. Respondent was represented by Christina Hooper, Esq. Petitioners are protesting the 2016 classification of the subject property.

The parties agreed to the admission of Petitioners' Exhibits 1-6 and Respondent's Exhibits A-I. 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:

147 Blue Flax
Avon, Colorado
Eagle County Schedule Number 1943-364-09-011

This appeal involves the relationship between two legal and platted residential lots located in the Mountain Star Subdivision in the Beaver Creek/Bachelor Gulch area. The subject is one of two contiguous lots owned by Petitioners.

The two lots are described as follows:

Lot 13, Amended Final Plat Mountain Star (improved residential lot), 2.05 acres;

Lot 12, Amended Final Plat Mountain Star (vacant subject lot), 3.97 acres.

Respondent assigned *vacant land* classification for Lot 12, the subject parcel, hereinafter identified as the Subject Lot. Petitioners are 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 stipulated the appeal pertains only to the classification of the Subject Lot; the Subject Lot is contiguous to the improved residential lot ("Residential Lot"); and the two lots were under a common ownership during the 2016 tax year. The valuation of the Subject Lot is not disputed.

Petitioners 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.

Petitioners presented Mr. James P. Donahugh as a witness. Mr. Donahugh testified to purchasing Lot 13 in 1998 and building a home there in 2003. In 2003, an adjacent vacant lot (Lot 12) became available for purchase. The Subject Lot has allowed the family to access hiking trails in the national forest and to snow shoe and sled in the winter. Mr. Donahugh noted the terrain in the area has a pretty substantial slope downward to the south at an approximate 10% grade. The lower end of both Lot 12 and Lot 13 connect to a cul-de-sac bulb on Blue Flax, providing access. The witness noted this access area is heavily treed with aspen and the grove is largely confined to the building envelope on the Subject Lot.

Petitioners next presented Mr. Travis Stuard, Senior Associate. Duff & Phelps, the author of Petitioners' Exhibits 1-6. Exhibits 1 and 2 provided photos of the Subject Lot and portions of the improved Residential Lot. Exhibits 3 through 6 consisted of additional background information. Mr. Stuard testified to visiting the Subject Lot with a colleague and discussed the features illustrated in

the photos. The witness also stated this is a gated community and he did not have full access to the property(s).

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

Petitioners 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, a buffer; to prevent adjacent development; to preserve a view, etc. According to Petitioners, passive practices represent adequate use of the Subject Lot for purposes of Section 39-1-102(14.4), C.R.S. Petitioners also disputed Respondent's contention there was no active use pointing to the owner's testimony regarding hiking on the property to reach trails in the national forest and in the winter for family activities such as sledding. Petitioners further argued that the aspen grove on the Subject Lot would likely be removed when a home is constructed there. Petitioners claimed such construction would disrupt the view from the Residential Lot and lessen privacy.

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-I and stated he has inspected the Residential Lot and the Subject Lot many times. Mr. Cassidy discussed the physical features of the Subject Lot noting the parcel slopes steeply down to the south and east with primary views to the south and east. The witness referred to Exhibit A illustrating the general location of the Subject Lot and the Residential Lot. Petitioners' Exhibit 2, page 5, was also referenced relative to view and existing vegetation. According to Mr. Cassidy, development of the Subject Lot is limited to the area of the building envelope and also limited by drainage to the southeast.

Respondent contended there were no improvements on the Subject Lot and there was no evidence of the uses described by the owner. After Petitioners' request for reclassification, the Assessor sent a questionnaire asking if the owner wished to remove the lot line between Petitioners' two lots.

After inspection of the property and based on previous visits, Respondent disputed the significance of the adverse influence from potential development on the Subject Lot upon the view from Petitioners' home noting the orientation of the residential improvement is to the south and toward a very good view. In contrast to Petitioners' assertions that potential development of the Subject Lot would likely disturb the aspen grove on the Subject Lot, existing conifer trees that were planted by Petitioners on the Residential Lot already serve as a significant view barrier.

Respondent agreed with Petitioners' estimate of a 10% downward grade to the Subject Lot but considered that degree of slope combined with a southeastern drainage in the building envelope prevented construction of an improvement that could significantly impact the existing view from the Residential Lot. Respondent described the subject neighborhood as 80% built out and asserted the likelihood the Subject Lot would likely be sold as a separate parcel.

The Board's Findings

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 that Petitioners used the Subject Lot as claimed. Instead, the Board was persuaded by Respondent's witness, Kevin Cassidy, who conducted multiple site visits to the Subject Lot and did not observe any evidence of use of the Subject Lot.

Mr. Cassidy's testimony concerning the views from the residence was also convincing. Mr. Cassidy testified that the primary view from the residential improvement is to the south toward the ski areas and high mountain peaks and not in the direction of the Subject Lot. Mr. Donahugh's testimony that the Subject Lot has a wonderful view to the south supports Mr. Cassidy's testimony. Mr. Cassidy's testimony concerning the orientation of the residential improvements on the Residential Lot and the topography and drainage for the Subject Lot was also convincing. The Board believes that the views from the residential improvements located on the Residential Lot would not be impacted by development of a home on the Subject Lot. Based on the evidence, the Board does not believe that the Subject Lot was used as a unit in conjunction with the residential improvements located on the Residential Lot for the enjoyment or preservation of views.

The Board also believed Mr. Cassidy's testimony that the Subject Lot would not likely be conveyed as a unit with the Residential Lot. Mr. Cassidy's testimony also diminished the credibility of Petitioners' claimed use of the Subject Lot for buffer purposes by noting that the claimed buffer use was never raised to the assessor's office before Mr. Donahugh's testimony at the BAA hearing. Moreover, the Board found persuasive Mr. Cassidy's testimony that trees planted on the Residential Lot actually create a barrier between the Subject Lot and the Residential Lot further supporting the position that the two lots are not used as a unit. The Board also believes that the trees which were planted by Petitioners on the Residential Lot, lessen the credibility of Petitioners' claimed use of the Subject Lot for privacy.

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. Accordingly, the Board does not believe that any portion of the Subject Lot is entitled to residential classification for tax year 2016. 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 2016.

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 of the respondent county, 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).

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 within thirty days of such decision 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 of the respondent county, Respondent may petition the Court of Appeals for judicial review of such questions within thirty days of such decision.

Section 39-8-108(2), C.R.S.

DATED and MAILED this 20th day of April, 2017.

BOARD OF ASSESSMENT APPEALS

Diane M. DeVries

Gregg Near

SEAL

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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