BOARD OF ASSESSMENT APPEALS, STATE OF COLORADO 1313 Sherman Street, Room 315 Denver, Colorado 80203	Docket No.: 69065
Petitioner: **MICHAEL H. ERSKINE LIVING TRUST,** v. Respondent: **LA PLATA COUNTY BOARD OF EQUALIZATION.**	

ORDER

THIS MATTER was heard by the Board of Assessment Appeals on March 22, 2017, Diane M. DeVries and Louesa Maricle presiding. Petitioner was represented by Benjamin J. Leonard, Esq. Respondent was represented by Kathleen Lyon, Esq. Petitioner is protesting the 2016 classification of the subject properties.

To avoid duplicative testimony, the Board agreed to consolidate four dockets pertaining to three 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 other properties, with separate decisions issued for each case. The dockets addressed in the hearing include: Docket No. 69065 Michael H. Erskine Living Trust v. La Plata County Board of Equalization; Docket No. 69728 Michael H. Erskine Living Trust v. La Plata County Board of Commissioners; Docket No. 69059 The Martin Trust v. La Plata County Board of Equalization; and Docket No. 69724 The Martin Trust v. La Plata County Board of Commissioners.

The parties stipulated that the only disputed issue in this case is use of the subject properties. The parties agreed to the admission of Petitioner's Exhibits 1 through 5 and Respondent's Exhibits A through H.

Subject properties are described as follows:

Lot 2, River Ranch Development Phase II
La Plata County Account No. R422403 and
Lot 4, River Ranch Development Phase II
La Plata County Account No. R422405

This appeal involves the relationship between three legal and platted residential lots located in the gated River Ranch Development Phase II subdivision in La Plata County, Colorado. The subject lots are vacant buildable residential lots classified as *vacant residential* land by La Plata County, hereinafter identified as Subject Lots. Lot 2 contains 9.562 acres and Lot 4 contains 9.061 acres. Both lots share a common border, have irregular shapes, and generally level to gently sloping topography. Lot 2 has few trees; Lot 4 has some trees. Access to the parcels is from River Ranch Circle. There were no residential or recreational improvements on the lots as of the assessment date.

Petitioner owns an additional residential lot, which is not a subject of this appeal, at 7573 CR 501, hereafter identified as Residential Lot. It is separated from the two Subject Lots by the River Ranch Circle road. Unlike the Subject Lots, this lot is improved with a single story residence, built in 1957, and is classified as *residential* by La Plata County. The improved parcel is 6.974 acres in size and access to the Residential Lot is also via the River Ranch Circle road.

Petitioner claims the Subject Lots are integral to the residence and that the recreational uses on the lots and passive enjoyment could all meet the use in conjunction test for residential classification. Respondent disagrees, stating the uses claimed by Petitioner are not qualifying uses for residential classification under the Statute or the Assessor's Reference Library (ARL), which is binding on the Assessor. Respondent placed vacant land classification on the Subject Lots for tax year 2016. Petitioner disputes the classification, arguing the Subject Lots 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]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 land classification; the Subject Lots and improved Residential Lot are separated only by the River Ranch Circle road; and there was common ownership for tax year 2016. The valuation of the Subject Lots is not disputed.

Petitioner's witness, Mr. Curt Settle, Deputy Director of the Colorado Division of Property Taxation, provided testimony regarding the ARL policies, practices, and procedures. He did not provide testimony specific to the Subject Lots. 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. The witness cited the *Fifield* case, which made clear that residential structures are not required on the otherwise vacant parcels to qualify for residential classification. Mr. Settle was asked to discuss the meaning of some specific language in the ARL and/or Colorado Statue, 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 ARL does not address passive vs. active uses. The witness also discussed the process and levels of review necessary to make changes to the ARL.

Petitioner's second witness, Mr. Benjamin Erskine, son of Petitioner testified on behalf of his father. The witness testified the Subject Lots and Residential Lot are part of a larger property purchased by Petitioner in May 1997. The residence is used for summer vacations and was last used

by his parents in approximately July 2016. The witness testified Petitioner purchased the larger property to maintain a large space as a buffer. At the time of purchase, zoning allowed development of 15 to 20 residential lots on the larger property. Petitioner had the property platted to reduce the allowed density to four lots to avoid over-development of the area. The witness testified the fourth lot, south of the Residential Lot, was sold three or four years ago to a third party and was subsequently improved with a residence. Petitioner's family has historically used the Residential and Subject Lots to enjoy time outside; the children have ridden bikes on the Subject Lots, and Petitioner's wife has ridden a horse on the lots, and trained a friend's horse on the lots, although it was unpaid work and periodic. Over time, the family picked up rocks on the Subject and Residential Lots and placed them in piles on the properties. A Rain Bird retractable sprinkler has periodically been used on the Subject and Residential Lots. The witness testified there has been no commercial use of the lots. There is no visible demarcation between the two Subject Lots. He estimated 75% to 80% of the Subject Lots were used for the activities described, then amended his statement, testifying he could say all the lot areas were used and that they are necessary to the enjoyment of the Residential Lot.

Mr. Erskine testified the River Ranch Development has fencing along the south side of County Road 501, including the north boundaries of the Residential Lot and Subject Lot 2, and there is a locked gate at the east leg of River Ranch Circle, which separates the Subject and Residential Lots. The separately owned horse property to the east of the Subject Lots has a fence along the east boundary of the lots; there are no other fences on the lots. River Ranch Circle is a private road easement for the River Ranch Development. The Subject Lots have been listed for sale on and off over the years and for most of the last five years. Approximately three years ago, the Subject and Residential Lots were listed for sale together, but the Residential Lot is no longer listed. The Subject Lots continue to be marketed for sale. Mr. Erskine testified that platting the larger parcel into 4 lots provided Petitioner with future options for the land. The witness testified there is a utility box hub to serve all four of the platted lots, but utilities have not been extended into the two Subject Lots.

Respondent presented the testimony of Mr. Craig Larson, a Certified Residential Appraiser and the La Plata County Assessor. Mr. Larson testified to the contents of Respondent's Exhibits A-H and stated he had inspected the Subject Lots and Residential Lot. Mr. Larson testified he found no evidence of any activities on the Subject Lots. In his opinion, the uses described by Petitioner's witness, Mr. Erskine, are incidental, at best, and not qualifying uses for residential classification. The road separating the Subject and Residential Lots provides access to utilities, so the Subject Lots can be developed. The witness testified he found multiple listings of the Subject Lots in the last several years. In his opinion, the Subject Lots are not integral to the Residential Lot; the primary use is to sell the Subject Lots separately. In response to Petitioner's questions, the witness testified he had considered views from the residence as well as views relative to the building envelopes on the Subject Lots. The residential development on Lot 3, the fourth lot sold to a third party, obstructs views of Subject Lot 4 from the house on the Residential Lot.

Respondent also presented the testimony of Mr. Daniel Cornelius, a Certified Residential Appraiser employed by the La Plata County Assessor's office. Mr. Cornelius testified the subject subdivision was part of the economic area he oversaw for the relevant tax year. The witness stated he inspected the Subject and Residential Lots and the residence looked as if it had not been used in quite

some time. He saw no evidence of use on the Subject and Residential Lots at all. The witness drives past the properties once or twice a week and has not seen cars at the cabin or at the Subject Lots for years.

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 the 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

The parties had stipulated there is a commonality of ownership between the Subject Lots and the Residential Lot for tax year 2016. Pursuant to the County records, the three parcels are owned by Michael A. Erskine Living Trust.

Contiguity

The contiguity of the Subject Lot and the Residential Lot is not in dispute. The Subject Lots share a common boundary line and are separated from the Residential Lot only by a private road that serves the River Ranch Development.

Use

The Board was not persuaded that the Subject Lots were 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 Petitioner's claimed uses of the Subject Lots. Instead, the Board was persuaded by Respondent's witnesses, Craig Larson and Daniel Cornelius, who inspected the Subject Lots and testified that they did not see any of the uses claimed by Petitioner occurring on the Subject Lots or evidence of those uses.

Mr. Larson's testimony concerning the views from the residence was also credible. Although Petitioner claims there would be some loss in east and southeast views, the Board is convinced by the evidence, including photographs, the Residential Lot would still retain some, if more limited, view across the lots even if residences are constructed on the Subject Lots. Moreover, the Board is persuaded by the evidence that the views from the residence across the Subject Lots are inconsequential. Based on the evidence presented, the Board does not believe the Subject Lot and the Residential Lot were used as a unit in conjunction with the residence for the enjoyment of views.

After carefully weighing all the evidence and considering the credibility of the witnesses, the Board is convinced that the portion of the Subject Lots used by Petitioner as a unit in conjunction with the residential improvements was, at most, de minimis. Accordingly, the Board does not believe any portions of the Subject Lots are 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)

The Board finds that Respondent correctly applied Section 39-1-102(14.4) and the procedures contained in the ARL, which are binding upon the county assessors, *see Huddleston v. Grand County Board of Equalization*, 913 P.2d 15 (Colo. 1996), in determining that the Subject Lots do not meet the definition of residential land. Petitioner presented insufficient probative evidence and testimony to prove that the Subject Lots were incorrectly classified for tax year 2016.

Respondent's Motion to Dismiss

On January 26, 2017, the Board received Respondent's Motion to Dismiss Petition with Legal Authority (hereinafter "Motion to Dismiss"). On February 7, 2017, Respondent filed Supplemental Notice of Facts and Law to Motion to Dismiss. Petitioner filed a Combined Response to Respondent's Motion to Dismiss on February 21, 2017 and Respondent filed a Reply to Petitioner's Response on March 7, 2017.

In its Motion to Dismiss, Respondent argued that Petitioner's appeal should be dismissed for failure to state a claim because Petitioner failed to meet the requirements of Section 39-1-102 (14.4)(a), C.R.S. According to Respondent, the Board should grant Respondent's Motion to Dismiss either pursuant to C.R.C.P. 12 (b)(5) or C.R.C.P. 56.

First, Respondent argues that Petitioner failed to state a claim upon which relief can be granted under C.R.C.P. 12(b)(5) because on the Petition form filed to the BAA, Petitioner did not make any factual allegations but merely made conclusory statements that are not sufficient to satisfy pleading requirements under the Colorado Rules of Civil Procedure.

The Board finds no merit in Respondent's argument as there is no requirement that the Petition form filed with the BAA must satisfy pleading requirements under the Colorado Rules of Civil Procedure. BAA Rule 6 requires only that all petitions to the Board must be on the form prescribed by the Board. BAA rules nowhere indicate that a taxpayer's failure to comply with any of the C.R.C.P. pleading requirements constitutes a jurisdictional defect mandating the dismissal of the administrative appeal.

Second, Respondent contends that Respondent is entitled to judgment as a matter of law pursuant to C.R.C.P. 56 as no issues of material fact exist concerning Petitioner's failure to use the subject property as a unit in conjunction with residential improvements as required by Section 39-1-102, C.R.S. According to Respondent, the subdivision of the subject property by Petitioner; the existence of the road; and the fact that the subject is listed for sale - are all undisputed and establish that the subject is not used as a unit with the residential improvements on the adjoining parcel.

The Board is not persuaded that dismissal of this matter is appropriate pursuant to C.R.C.P. 56. Dismissal under C.R.C.P. 56 is a drastic remedy and is never warranted except on a clear showing that there is no genuine issue as to any material fact. *Hatfield v. Barnes*, 168 P.2d 552 (Colo. 1946). In a stark contrast to the allegations in Respondent's Motion to Dismiss, the issue of whether the subject is used as a unit with the residential improvements is highly disputed. Therefore, under the circumstances presented in this case, dismissal of the appeal pursuant to Rule 56 before Petitioner has had an opportunity to present its case is not appropriate. *See Tamblyn v. City & County of Denver*, 194 P.2d 299 (Colo. 1948).

Based on the above, Respondent's Motion to Dismiss is hereby DENIED.

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 16th day of May, 2017.

BOARD OF ASSESSMENT APPEALS

Diane M. DeVries

Louesa Maricle

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

Milla Lishchuk