BOARD OF ASSESSMENT APPEALS, STATE OF COLORADO 1313 Sherman Street, Room 315 Denver, Colorado 80203	Docket No.: 69724
Petitioner: **THE MARTIN TRUST,** v. Respondent: **LA PLATA COUNTY BOARD OF COMMISSIONERS.**	

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 2014 and 2015 classification of the subject property.

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 issues in this case for tax year 2014 are common ownership and use of the subject property. The only disputed issue in this case for tax year 2015 is use of the subject property. The parties agreed to the admission of Petitioner's Exhibits 1 through 8 and Respondent's Exhibits A through H.

Subject property is described as follows:

Lot 40, Rockridge P.U.D. Phase II, Durango, CO

La Plata County Account No. R 418284

This appeal involves the relationship between two legal and platted residential lots located in the Rockridge P.U.D. Phase II subdivision in the city of Durango in La Plata County, Colorado. The subject lot is a vacant buildable residential lot classified as _vacant residential_ land by La Plata County, hereinafter identified as Subject Lot. This lot contains 0.72 acre, has relatively flat topography and minimal trees. Most of the Subject Lot has a generally rectangular shape; access to the primary portion of the parcel is via a narrow "flagpole" area that is the width of an access drive and extends from the Rockridge Drive cul-de-sac past the Residential Lot to the Subject Lot. The Subject Lot is adjacent to Division of Wildlife natural open space land on two sides, the Residential Lot on one side and a third party improved residential lot on one side. There were no residential or recreational improvements on the Subject Lot as of the assessment date.

Petitioner owns an additional residential lot, which is not a subject of this appeal, at 213 Rockridge Drive, hereafter identified as Residential Lot. The two lots share common borders. This lot is improved with a two-story residence, built in 1996, and is classified as _residential_ by La Plata County. The residence is oriented to take advantage of views to the west and northwest. The residence also has views to the north. The improved parcel is 0.62 acre in size and access to the Residential Lot is also from the Rockridge Drive cul-de-sac.

Petitioner claims the Subject Lot is 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 Assessors' Reference Library (ARL), which is binding on the Assessor. Respondent placed vacant land classification on the Subject Lot for tax years 2014 and 2015. Petitioner disputes the classification, arguing the Subject Lot should be re-classified as residential land for those tax years.

On February 28, 2017, the Board received Respondent's Motion to Dismiss Petition for Tax Year 2014 with Legal Authority. Petitioner filed a Response to Respondent's Motion to Dismiss for Tax Year 2014 on March 7, 2017 and Respondent filed a Reply to Petitioner's Response on March 10, 2017.

Respondent has requested the Board include a recommendation that its decision in this appeal is a matter of statewide concern.

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 Lot and improved Residential Lot are contiguous; and there was common ownership for tax year 2015. The parties dispute common ownership for tax year 2014. The valuation of the Subject Lot 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 Lot. 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 parcel 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. James T. Martin testified on behalf of Petitioner. The witness testified the Subject Lot and Residential Lot were purchased by him in the same transaction in 2000. At that time, the Residential Lot was offered for sale as a single parcel. However, Mr. Martin made it a condition of sale that he be allowed to buy both the Residential Lot and Subject Lot, stating that he would not have purchased the Residential Lot without the Subject Lot. Petitioner purchased the larger property to maintain a large space to preserve privacy and views from the residence to Division of Wildlife land beyond the Subject Lot. The Division of Wildlife erected fences along the two Subject Lot lines that are adjacent to the Division's open space land. The residence is the full-time home for Mr. Martin and his wife, Virginia S. Martin. The witness testified the Subject Lot is behind the residence and is used as an extension of the back yard. The Martin family has historically used the Subject Lot as private open space and to preserve views. The witness testified his children played on the Subject Lot and threw a ball around there. Even with the fences, wildlife cross the Subject Lot. The witness testified there has been no commercial use of the lots. There is no visible demarcation between the two lots and the family uses the Residential Lot and Subject Lot as a single, integrated property. Mr. Martin estimated 75% to 80% of the Subject Lot was used as described, excluding the area used for access, which is adjacent to the side of the residence. Mr. Martin stated his opinion that the value of the residence would be diminished without the Subject Lot because it is necessary to the enjoyment of the residence. Further, he stated he would not plan to consider selling the two lots separately. On cross examination, the witness testified he had not considered lot consolidation because there is no doctrine of merger in this county and the owner would then have to separate the lots to sell just one.

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 Lot and Residential Lot. Mr. Larson testified he found no evidence of the uses described by Petitioner's witness, Mr. Martin, on the Subject Lot. Mr. Larson testified passive uses do not meet the definition of residential property, stating further that Colorado is a "use state" in reference to determining land classification. The witness testified it is subjective whether looking at a property is a "use". The witness testified the uses described by Petitioner's witness are incidental, at best, and not qualifying uses for residential classification. The witness considers whether the activities described on the Subject Lot can be done on the Residential Lot itself. The witness stated a septic system or leach field extending onto the Subject Lot, or road access across the Subject Lot to reach the Residential Lot are examples of qualified uses. In his opinion, the

Subject Lot is not integral to the Residential Lot. Residential improvements on the Subject Lot are not required, but it helps if they are present. There are utilities to the Subject Lot, so it can be developed separately from the Residential Lot. The witness stated he looks at whether both lots can be conveyed separately. The difference between having one combined lot and two lots is the ability to use them differently and to sell one. The witness stated the residence would still have north views if the Subject Lot were to be developed.

Respondent also presented the testimony of Mr. Robert Jenson, a Certified Residential Appraiser employed by the La Plata County Assessor's office. Mr. Jenson testified the subject subdivision was part of the economic area he oversaw for the relevant tax year and the Subject and Residential Lots are at the extreme limit of the Rockridge Phase II subdivision. The witness stated he inspected the Subject and Residential Lots and he saw no evidence of uses on the Subject Lot. The witness testified there are significant views to the north from the residence as well as to the west. If the Subject Lot were developed, the views to the west might be affected, depending on the height of the new residence. Mr. Jenson stated that the Assessor's office practice is that passive uses do not qualify for residential classification.

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 met its burden of proving that a portion of the Subject Lot meets the definition of "residential land" for tax year 2015, 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). The Board finds that Petitioner failed to meet its burden of proving that a portion of the Subject Lot meets the definition of "residential land" for tax year 2014 because the Subject Lot and Residential Lot were not under common ownership on the assessment date.

Common 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 meanings.

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 as of 2014 assessment date the record owners of the Residential Lot, James T. Martin and Virginia S. Martin, were general partners of The Martin Family Partnership, LLP that was the record owner of the Subject Lot. Accordingly, Petitioner argues that there was substantial commonality of ownership and control between the two parcels, which satisfies "common ownership" for 2014 tax year.

In response, Respondent argues that "common ownership" must be determined from records of the La Plata 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 Petitioner 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 2014 assessment date was in different names: The Martin Family Partnership and James T. Martin and Virginia S. Martin, 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 Martin Family Partnership on January 1, 2014, and the adjoining Residential Lot was owned by the Martins as individuals. The evidence was also undisputed that the Subject Lot and Residential Lot had both been in the name of The Martin Family Partnership prior to May of 2009 for estate planning purposes. On May 4, 2009, the Residential Lot was transferred to the Martins as individuals, leaving the Subject Lot in the name of The Martin Family Partnership. 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 was separate and distinct from the ownership of the adjacent Residential Lot for tax year 2014.

On September 25, 2014, title in both the Subject Lot and Residential Lot was transferred to

The Martin Trust. The parties stipulated there is a commonality of ownership between the Subject Lot and the Residential Lot for tax year 2015. Pursuant to the County records, the two parcels are owned by The Martin Trust for tax year 2015.

Contiguity

The contiguity of the Subject Lot and the Residential Lot is not in dispute. The Subject Lot shares common boundary lines with the Residential Lot.

Use

The Board is persuaded that a portion of the Subject Lot was used as a unit in conjunction with the residential improvements on the Residential Lot on the assessment date. The Board is not convinced that anything more than a de minimis portion of the Subject Lot was used for the physical activities claimed by Petitioner. However, the Board is persuaded by Petitioner that the Subject Lot was purchased to preserve views from the Residential Lot, which is supported by the condition of the purchase of the Residential Lot that the buyer would also be allowed to purchase the Subject Lot. The Board was also persuaded by the taxpayer's long-term hold of the vacant Subject Lot. The residence is oriented to take advantage of the west views across the Subject Lot. The Board is persuaded by Petitioner's claim there would be a loss of west views if a residence is constructed on the Subject Lot.

Regarding the specific portion of the Subject Lot that is used as a unit in conjunction with the residence, the Board finds the "flagpole" area of the Subject Lot to the south of the Residential Lot does not contribute to the views from the residence. That conclusion is also consistent with the taxpayer's testimony. In addition, the Board does not believe that the southern most portion of the rest of the Subject Lot is used for the enjoyment of views from the residence. The Board is convinced that the portion of the Subject Lot that is directly west of the residence was used for the enjoyment of views from the residence. Although no land area measurement of this area was presented as evidence, the Board concludes from the photographs and site maps presented that two-thirds of the Subject Lot is located directly west of the residence located on the Residential Lot.

After carefully weighing all the evidence, including the orientation of the residence, maps of the Residential and Subject Lots, photographs, the location of the residence located to the south of the Subject Lot, and considering the credibility of the witnesses, the Board concludes that two-thirds of the Subject Lot was used as a unit in conjunction with the residential improvements on the Residential Lot 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).

ORDER:

The Petition is denied for tax year 2014.

Respondent is ordered to reclassify two-thirds of the Subject Lot as *residential* property for tax year 2015. The La Plata County Assessor is directed to change their records accordingly.

The decision of the Board for tax year 2015 is against Respondent. The Board recommends that its decision is a matter of statewide concern. See Section 39-10-114.5, C.R.S.

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 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

69724