COLORADO

Department of Local Affairs

Board of Assessment Appeals

The Board of Assessment Appeals issued two Final Agency Orders in this appeal. Please scroll to page 9 of this PDF for the Final Agency Order issued on remand on 3/3/2021.

BOARD OF ASSESSMENT APPEALS, STATE OF COLORADO 1313 Sherman Street, Room 315 Denver, Colorado 80203 Petitioners: **SUGARBUSH HOLDINGS LLC,** v. Respondent: **JEFFEERSON COUNTY BOARD OF COMMISSIONERS.**	**Docket No.: 74092**

ORDER

THIS MATTER was heard by the Board of Assessment Appeals on December 7, 2018, Debra A. Baumbach and Sondra W. Mercier presiding. Mr. Brett Champine appeared *pro se* on behalf of Petitioner. Respondent was represented by Jason W. Soronson, Esq. Petitioner is requesting an abatement on the subject property for tax year 2017.

The subject property is described as follows:

1271 Sugarbush Dr.
Evergreen, CO 70439
Jefferson County Schedule No.: 300202465

Respondent assigned commercial classification to the subject property for tax year 2017. Petitioner is requesting an abatement/refund on the subject property for tax year 2017 based on mixed-use (75% residential and 25% commercial) classification. Valuation of the subject is not in dispute.

BACKGROUND

Petitioner purchased the subject property in May of 2016. The subject property, prior to Petitioner's purchase, was historically used as an office space and classified and taxed as commercial property. Shortly after acquiring the subject, in mid-2016, Petitioner applied for and obtained rezoning of the subject property from commercial to a mixed-use. The mixed-use rezoning

permitted Petitioner to convert the subject structure from 100% commercial to 75% residential (six condominium units) and 25% commercial (two office units).

A week after the re-zoning, Petitioner began demolition and construction work on the subject in order to convert the structure from offices to mixed-use residential/commercial. Mr. Brett Champine testified that, after initially being gutted, the subject was re-framed into six condominium units and two office units in accordance with the new zoning. By the end of 2016, the residential units were already framed; some of the unit doors were installed; all of the units had fireplaces installed; dry wall was finished for each of the units; interior trimmings around the doors were finished for some of the units; insulation was installed for all units; alarm systems, heating and air conditioning, phone lines, gas and electric lines were also in the process of being put in for all of the units; six residential storage units as well as six garage spaces were already in place for each of the residential units.

Although the building permit was not issued until after the assessment date, Mr. Champine testified that he applied for the building permit months before the issuance date. Mr. Champine also testified that the Building Department allowed Petitioner to start construction months before the issuance of the building permit because the project involved an already-existing structure as opposed to a new construction. According to Mr. Champine's testimony, by the end of 2016 and before the building permit was issued, over $250,000 was already expended on construction of the subject property. Mr. Champine testified that as of January 1, 2017 assessment date, his insurance business occupied two office spaces on the ground floor of the subject property in accordance with the mixed-zoning regulations.

As part of its Exhibits, Respondent presented a copy of a certificate of occupancy for one of the residential condos, Unit 5, that was issued in March of 2018. Petitioner testified, however, that the sale of the subject condominium units started as early as in late 2017. Petitioner alleged that certificate of occupancy for Unit 5 was one of the last certificates of occupancy issued for the building and Unit 5 was one of the last condominiums sold at the subject development.

Furthermore, Mr. Champine testified that at the time when Respondent's appraiser, Mr. Sayer, inspected the subject property in late 2016, the mixed-use nature of the subject property was readily apparent. When Mr. Sayer inspected the subject, the reconfiguring of the property from offices into condominiums/offices was already more than half way completed. Although Mr. Sayer was not permitted to inspect the subject's interior, the construction site had a "Luxury Condos" sign displayed; Mr. Champine specifically told Mr. Sayer that residential construction was under way; and six residential storage units and six residential garage spaces were also readily apparent.

ANALYSIS

Respondent argues that the subject property should be classified as commercial property for 2017 tax year. According to Respondent, a property is classified for the tax year according to its actual use on January 1, the assessment date. Respondent alleges that the subject property was not actually used as residential property on the January 1, 2017 assessment date because: (a) a

"residential dwelling" did not exist on the subject parcel on January 1, 2017; (b) the subject's rezoning from commercial property to a mixed-use property in 2016 is immaterial for purposes of classification; and (c) on the assessment date, a certificate of occupancy for residential use of the subject property had not been issued. Further, Respondent contends that any expected future use of the subject property beyond the January 1, 2017 assessment date is irrelevant to determining classification for tax year 2017.

Petitioner argues that the subject property should be classified as mixed-use residential/commercial for 2017 tax year. Petitioner points out that the subject was re-zoned from commercial to a mixed-use property in May, 2016, well in advance of the January 1, 2017 assessment date. Further, Petitioner contends that the subject's actual use on the assessment date was that of a mixed use property, as the subject was in the process of being converted from commercial into a mixed-use property, with majority of the construction work already completed by January 1, 2017. According to Petitioner's testimony, by the end of 2016, over $250,000 was already spent on various construction projects in an effort to convert the subject from commercial into a mixed-use property. Petitioner also testified that the mixed-use nature of the subject was readily apparent to Respondent's appraiser during the physical inspection of the subject property in late 2016.

Residential Real Property

Under the provisions of Colorado statutes, "residential real property" is defined as residential land and residential improvements. Section 39-1-102(14.5), C.R.S. "Residential land" is further defined as "a parcel or contiguous parcels of land under common ownership upon which residential improvements are located and which is used as a unit in conjunction with the residential improvements located thereon." Section 39-1-102(14.4) (a), C.R.S. The statute defines "residential improvements" as "a building, or that portion of a building, *designed for use* predominantly as a place of residence by a person, a family or families." Section 39-1-102(14.3), C.R.S. (Emphasis added).

To meet the statutory definition of a residential improvement, "a structure must be 'designed for use predominantly as a ... residence,' rather than simply 'actually used' as a residence." *Mission Viejo v. Douglas County Board of Equalization*, 881 P.2d 462, 464 (Colo. App. 1994). "Designed for use" as contemplated in Section 39-1-102(14.3), C.R.S. means that a structure is "devoted" to or "intended" for a particular use *at the time its status is under review*. *Mission Viejo* 881 P.2d at 464 ("designed for use" . . . contemplates that a structure is 'devoted' to or 'intended' for a particular use at the time its status is under review). In arriving to this interpretation, the Court emphasized that the word "designed" does not refer only to the original architectural design, and relied on the Webster's definition of "design" to mean "to conceive, to plan out in the mind," "to devise for a particular purpose," and also to "devote" or "intend." *Id.* at 464.

Although the subject building was originally designed as and constructed for commercial office use, the Board finds that *at the time its status was under review*, that is, on January 1, 2017 assessment date, the subject's use designation had changed from commercial to mixed-use. To begin with, Petitioner pursued and obtained re-zoning of the subject property from commercial to

mixed-use in 2016, well in advance of the relevant assessment date. Hence, as of January 1, 2017 assessment date, exclusive commercial use of the subject was no longer legally permitted; the subject could only be used legally as a mixed-use property.

Furthermore, since Petitioner's purchase of the subject property in mid-2016 and by the January 1, 2017 assessment date, substantial construction efforts took place on the subject property converting the structure from commercial office space into 75% luxury condominiums and 25% offices. As of January 1, 2017 assessment date, the subject property was completely gutted and re-framed into two offices and six residential units, equipped with alarm systems, heating and air conditioning, gas and electric lines, insulation, phone lines, doors, baseboards, and fireplaces. The evidence before the Board was compelling that by the January 1, 2017 assessment date, the subject had already lost most, if not all, of its previous architectural attributes and the new 75% - 25% residential - commercial configuration has become prominent.

In sum, there can be no doubt that as of January 1, 2017 assessment date, the subject structure in question was "devoted" or "intended" for mixed use as residential/commercial property. As such, 75% of the subject (six condominium units) was designed for use predominantly as a place of residence as of January 1, 2017 assessment date, meeting the definition of "residential real property" as contemplated by Sections 39-1-102(14.5), C.R.S. and 39-1-102(14.4) (a), C.R.S. Because 75% of the subject property met the definition of "residential improvement" and "residential land" as of January 1, 2017 assessment date, and the remaining 25% of the subject was used as Mr. Champine's office, mixed-use classification (75% residential and 25% commercial) is supported for tax year 2017.

Dwelling Unit

Pursuant to the Colorado Constitution, Article X, Section 3(1)(b) residential real property includes residential dwelling units and land on which such units are located. *See* ARL, Vol. 2 at 6.9 (April 2018); Colo. Const. Art. X, Section 1(1)(b) ("Residential real property, which shall include all residential dwelling units and the land, as defined by law, on which such units are located . . ."). To meet the "dwelling unit" minimum requirement set out by the Constitution, a completed structural foundation for a residential improvement must be in place on January 1st of the tax year in question. ARL, Vol. 2 at 6.9.

The Board finds that the structure existing on the subject parcel as of January 1, 2017 assessment date, satisfies the minimum "dwelling unit" requirement necessary for the residential classification. According to the testimony of Mr. Champine, as of the January 1, 2017 assessment date, the subject property was well beyond the construction of a structural foundation for a residential improvement. In fact, on the assessment date, the subject was completely stripped of its previous architectural design associated with commercial use and reconfigured into two office units for Mr. Champine's insurance business and six residential condominium units, already equipped with alarm systems, heating and air conditioning, gas and electric lines, insulation, phone lines, residential storage units, doors, baseboards, and fireplaces.

The Board finds no legal support and Respondent presented none, for Respondent's argument that the re-classification from commercial to mixed use requires that construction of a

"residential dwelling" must be fully completed and improvements actually used as a residence on the relevant assessment date. Contrary to Respondent's contentions, a completion of a residential foundation as of January 1 assessment date is sufficient for residential classification for that tax year. See ARL, Vol. 2 at 6.9, "Partially Completed Structures." There is simply no requirement that the improvement must be fully completed and used as a residential dwelling as of January 1 assessment date for the re-classification from commercial to mixed-use to take place.

Zoning

Zoning is one of the primary determining factors in ascertaining appropriate classification for property tax purposes. *See e.g.*, ARL, Vol. 3 at 2.3. ("The primary criteria for classification are as follows … [d]etermination of zoning and use restrictions.") Similarly, the *Mission Viejo* case cited by Respondent expressly states that "zoning [is] relevant consideration[s] in determining the proper classification of a property for tax purposes." *Mission Viejo*, 881 P.2d at 465.

The Board finds that subject's mixed use zoning on the assessment date is a compelling evidence that supports mixed-use classification of the subject for tax year 2017. The Board is swayed by Mr. Champine's testimony that once re-zoning was granted by the County in 2016, Petitioner was under the legal obligation to change the subject's use from 100% commercial to a 75%/25% residential/commercial use within a specific time frame as directed by the County. Once re-zoned, the subject could no longer be used as exclusively commercial; any use of the subject other than a mixed use became illegal. Mixed-use zoning of the subject on the January 1, 2017 assessment date as the only legally-permissible use weighs heavily in support of the mixed-use classification of the subject.

Actual Use

Property is classified according to its actual use on January 1. *Farny v. Board of Equalization of Dolores County*, 985 P.2d 106 (Colo. App. 1999); ARL, Vol. 2 at 6.1. The Assessor's Reference library outlines the following evidence which can be used for determining actual use: observations made during a field inspection; correspondence with the owner or other individuals; the legally permitted use; the use for which improvements were constructed or later modified; and, if the actual use cannot be determined, most probable use. See ARL, Vol. 2 at 6.1, *Property Classification Guidelines and Assessment Percentages*.

Consideration of the ARL factors for determining actual use provides further support for the Board's conclusion in favor of the mixed-use classification. The evidence before the Board was uncontroverted that as of the relevant assessment date, Mr. Champine was using 25% of the subject for his insurance business and the remaining 75% were being converted into six luxury condominiums that were in the final stages of construction at the time. Further, at the time of the field inspection by Respondent's appraiser, the architectural plans were posted on the subject's entrance door and "Luxury Condos" banner was displayed at the construction site. Moreover, multiple construction permit applications were submitted to the County's Building Department and Mr. Champine informed the County appraiser about the construction work at the subject modifying the previously existing office structure into a mixed-use space. Furthermore, even though the certificate of occupancy had not been issued until 2018, mixed use of the subject was the only

legally permitted use and, therefore, the most probable use of the subject as of January 1 assessment date.

Reasonable Future Use

Determination of reasonable future use is one of the primary considerations when classifying property for purpose of taxation. *See, e.g.*, ARL, Vol. 3 at 2.4. ("The primary criteria for classification are as follows . . . [d]etermination of reasonable future use"). Reasonable future use is based on the actions and expectations of the market and is consistent with the highest and best use concept that requires the future use to be physically possible, legally permissible, financially feasible, and maximally productive. ARL, Vol. 3 at 2.3.

The Board finds that, as of January 1, 2017 assessment date, the subject's reasonable future use was that of mixed use, which supports mixed-use classification of the subject for tax year 2017. As of January 1 assessment date, mixed-use of the subject was the only reasonable future use of the subject as evidenced by the numerous indicators: the recent re-zoning of the subject from commercial to mixed use; the building plans for the construction work at the subject; the construction work itself which was ongoing at the subject property; applications for various building permits pending with the County; and Mr. Champine's statements to the County appraiser during the physical inspection of the subject. On the relevant assessment date, mixed-use of the subject property was physically possible, legally permissible, financially feasible and maximally productive, thereby supporting mixed-use classification of the subject for tax year 2017.

ORDER:

The Petition is granted. Jefferson County Assessor is ordered to re-classify the subject property to mixed-use (75% residential and 25% commercial) for tax year 2017.

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 10th day of January, 2019.

BOARD OF ASSESSMENT APPEALS

Debra A. Baumbach

Debra A. Baumbach

Sondra W. Mercier

Sondra W. Mercier

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

Milla Lishchuk

BOARD OF ASSESSMENT APPEALS, **STATE OF COLORADO** 1313 Sherman Street, Room 315 Denver, Colorado 80203	**Docket No.: 74092**
Petitioner: **SUGARBUSH HOLDINGS LLC,** v. Respondent: **JEFFERSON COUNTY BOARD OF COMMISSIONERS.**	
FINAL AGENCY ORDER	

THIS MATTER is before the Board of Assessment Appeals ("Board") on remand from the Colorado Court of Appeals. This Order supersedes the Board's prior Order in this appeal, issued January 10, 2019.

I. BACKGROUND AND PROCEDURAL HISTORY

The subject property in this appeal is an approximately 2-acre site improved with a two-story building, located at 1271 Sugarbush Dr., Evergreen, CO 70439, and assigned Jefferson County Schedule Number 300202465. The Jefferson County Assessor classified the subject property as commercial for tax year 2017. Property owner Sugarbush Holdings LLC ("Sugarbush") petitioned for an abatement/refund of property taxes for the subject property for tax year 2017, based on its assertion that the property should instead have been classified as mixed-use (75% residential and 25% commercial).

The Board conducted an evidentiary hearing on December 7, 2018, and issued an Order on January 10, 2019 granting Sugarbush's petition and finding the Assessor should have been classified the property as mixed-use (75% residential and 25% commercial) for tax year 2017. The County appealed the Board's January 10, 2019 Order to the Court of Appeals.

In an opinion dated April 16, 2020, the Court of Appeals vacated the Board's Order and remanded the case for further proceedings consistent with its opinion. The Court of Appeals agreed with the County's contention that the Board's application of Colorado law to its factual findings was in error. The Court's opinion stated that, "the Board premised its ruling on underlying legal conclusions that are not supported by legal authority and otherwise lack record support." The erroneous legal conclusion underpinning the Board's prior Order was that the mixed-use rezoning led to a corresponding "illegality" of any other use for the property.

The Board was instructed to reweigh all of the evidence and relevant factors to decide whether a mixed-use reclassification was appropriate for the 2017 tax year, guided by the correct law. The Board was instructed to rely on relevant and controlling legal authority on local zoning laws as described in the opinion, namely the Jefferson County Zoning Resolution, in its evaluation. Further, the Board was instructed to consider the presumption that the county assessor's classification was correct. *See Gyurman v. Weld Cty. Bd. Of Equalization,* 851 P.2d 307, 310 (Colo. App. 1993).

II. APPLICABLE LAW

In conducting its analysis, the Board relies on the applicable law recited by the Court of Appeals in its opinion.

Property classifications are based on the use and characteristics of the property as of January 1 of the tax year. *Johnson v. Park Cty. Bd. of Equalization*, 979 P.2d 578, 581 (Colo. App. 1999); *Padgett v. Routt Cty. Bd. Of Equalization*, 857 P.2d 565, 565 (Colo. App. 1993; *see* § 39-1-105, C.R.S. (establishing January 1 as the assessment date).

The actual use of the property on the January 1 assessment date is a relevant factor. *See E.R. Southtech, Ltd. v. Arapahoe Cty. Bd. of Equalization,* 972 P.2d 1057, 1059 (Colo. App. 1998); *Mission Viejo Co. v. Douglas Cty. Bd. of Equalization,* 881 P.2d 462, 465 (Colo. App. 1994). Other relevant factors include the original design, zoning and other restrictions, and probable use. *Mission Viejo*, 881 P.2d at 465; *see also Gyurman*, 851 P.2d 307; *Vail Assoc., Inc. v. Bd. of Assessment Appeals,* 765 P.2d 593 (Colo. App. 1988).

County assessors are required to follow the guidance of the Property Tax Administrator laid out in the Assessors' Reference Library ("ARL"). *Huddleston v. Grand Cty. Bd. of Equalization*, 913 P.2d 15, 17-18 (Colo. 1996). The ARL instructs assessors to consider four primary criteria when making a classification decision: (1) the current use as of the assessment date; (2) zoning and use restrictions; (3) the most probable use when the current use or zoning and use restrictions cannot be determined; and (4) determination of reasonable future use. 3 Div. of Prop. Taxation, Dep't of Local Affairs, Assessors' Reference Library Ch. 2, at 2.3 – 2.4 (rev. Jan. 2021.)

Once a property is classified for property tax purposes, it remains so classified until the actual use changes or the assessor discovers that the classification is erroneous. *See* § 39-1-103(5)(c), C.R.S. The taxpayer bears the burden of proof in a Board proceeding to establish any qualifying basis for reclassifying the subject property. *See Home Depot USA, Inc. v. Pueblo Cty. Bd. of Comm'rs,* 50 P.3d 916, 920 (Colo. App. 2002); *Johnson,* 979 P.2d at 580.

III. ARGUMENT

Petitioner argued that the Assessor should have classified the subject property as mixed-use residential/commercial for the 2017 tax year. Petitioner points out that the subject was re-zoned from commercial to mixed-use in May 2016, well in advance of the January 1, 2017 assessment

date. Further, Petitioner contends that the subject's actual use on the assessment date was that of a mixed-use property, because on the assessment date the subject had been substantially converted from a commercial into a mixed-use property, in accordance with approved rezoning, architectural plans and building permit applications. Petitioner contended that the mixed-use nature of the subject was or should have been readily apparent to the Assessor's Office appraiser, Robert Sayer, who physically inspected the subject property around the assessment date.

Respondent argued that the subject property should remain classified as commercial property for the 2017 tax year. While not disputing the intent of Petitioner and the actions taken by January 1, 2017 (including rezoning) to convert the property to mixed-use, Respondent argued that the subject property was not entitled to residential classification on January 1, 2017, for reasons centered on its incomplete status as of that date. Respondent argued a "residential dwelling" did not exist on the subject parcel on January 1, 2017 because construction on the planned condominium units was not complete. Respondent pointed to the fact that the Building Permit for the subject was not issued until after the assessment date. Respondent also argued that the property should not be classified residential for 2017 because as of the assessment date, a certificate of occupancy for residential use of the subject property had not been issued. Respondent further asserted that the property could not be considered residential until the property "was actually being used as a residential – until somebody was actually living there." (Transcript, p. 37, lines 19-21.) Additionally, Respondent contended that any intended future use of the subject property beyond the January 1, 2017 assessment date was irrelevant to determining classification for tax year 2017.

IV. ANALYSIS

The Board will review and reweigh the facts in evidence under the framework of the four criteria outlined in the Assessors' Reference Library, which draw from and mirror statute and case law to summarize the factors an assessor must consider in determining the proper classification of real property. These criteria are: (1) the current use as of the assessment date; (2) zoning and use restrictions; (3) the most probable use when the current use or zoning and use restrictions cannot be determined; and, (4) determination of reasonable future use.

A. Current Use as of the Assessment Date

1. The current use of the subject property on the assessment date was mixed-use (75% residential, 25% commercial).

The actual use of a property on the relevant assessment date is the primary factor to be considered in determining its classification. *Farny v. Board of Equalization of Dolores Cty.*, 985 P.2d 106, 109 (Colo. App. 1999); § 39-l-104(10.2)(d); 2 Div. of Prop. Taxation, Dep't of Local Affairs, Assessors' Reference Library Ch. 6 at 6.1 (rev. Jan. 2021). The Board finds that the subject property's current use as of the assessment date was mixed commercial/residential use.

To decide what qualifies as residential use, the Board looks to the definition of residential improvements and residential land contained in sections 39-1-102(14.3), (14.4)(a), and (14.5),

C.R.S. They state, in pertinent part, that residential real property means residential land and improvements. A residential improvement is "a building, or that portion of a building, designed for use predominantly as a place of residency by a person, a family, or families," and residential land is "land upon which residential improvements are located and that is used as a unit in conjunction with the residential improvements located thereon." *Id.* To meet the statutory definition of a residential improvement, a structure must be designed for use predominantly as a residence, rather than simply actually used as a residence. *Mission Viejo v. Douglas County Board of Equalization*, 881 P.2d 462, 464 (Colo. App. 1994). "Designed for use" means that a structure is "devoted" to or "intended" for a particular use at the time its status is under review. § 39-1-102(14.3), C.R.S.; *Mission Viejo*, 881 P.2d at 464. "Designed" does not refer only to the original architectural design, but "to conceive, to plan out in the mind," "to devise for a particular purpose," and also to "devote" or "intend." *Id.* at 464. In addition, section 3(1)(b) of article X of the Colorado Constitution requires that residential real property include a residential dwelling unit. *Vail Assoc., Inc. v. Bd. of Assessment Appeals,* 765 P.2d 593 (Colo. App. 1988).

The evidence showed that on the January 1, 2017 assessment date a portion of the subject improvement (75%) was designed for use predominantly as a place of residency by a person, a family, or families, and qualified as a dwelling unit. A portion of the subject improvement (25%) was designed for office (commercial) use.

Petitioner purchased the subject property in May of 2016. Prior to Petitioner's purchase, the subject's improvement was used as office building, and classified as commercial property. Shortly after acquiring the subject, in mid-2016, Petitioner applied for and obtained rezoning of the subject property to mixed-use. The mixed-use rezoning permitted Petitioner to convert the subject structure from 100% commercial to a combination of residential and commercial uses. Specifically, it permitted up to six residential units, one six-bay detached garage, and the maintenance of 50% of the ground floor area as office or commercial use. (*See* Exhibit 2; Exhibit 3; Exhibit A.) Demolition began in May, 2016 and continued for six months. Mr. Champine was told by the Jefferson County Building Department that work could begin without a permit due to the fact that the building was an existing building, but that before beginning work on additions, such as the new detached garage structure, a permit was required. (The evidence supports the fact that Mr. Champine was working closely with and under the oversight the Jefferson County Building Department, who at one point issued a stop work order when a permit was required for the construction on the residential garages.) On November 4, 2016, Mr. Champine submitted a building permit application, including a complete set of architectural plans. (*See* Exhibit 2 "In Date"; Transcript, p. 72, lines 16-17; p. 73, line 1.)

The testimony of Mr. Brett Champine, and supporting invoices dated July 2016 through December 2016, showed that by the end of 2016 a considerable amount of money, over $250,000, had been spent on various demolition and construction projects converting portions of the subject from solely commercial use to a mixed-use commercial/residential use. (Exhibits 4, 5, 6, 7, 8.) Respondent did not contest this fact. Mr. Champine testified that as of the January 1, 2017 assessment date, his insurance business occupied two office spaces on the ground floor of the

subject property. On the assessment date, significant construction had taken place to establish a residential use of 75% of the property. The condominium units were framed and dry-walled; for some units, doors and trim were installed; all units had fireplaces installed; all units had insulation installed; alarm systems, heating and air conditioning, plumbing and electrical was installed; phone lines, gas and electric lines were also in the process of being put in; and six basement storage units, as well as six garage spaces, were in place - one for each of the residential units.

At hearing, Mr. Sayer presented a written report, titled "Summary of Facts and Process," and admitted as Exhibit A. The Summary contained evidence that on the assessment date 75% of the subject was designed for use predominantly as a place of residency, and 25% for commercial use. The Summary included photographs taken by Mr. Sayer during his inspection of the property. There was conflicting evidence as to when the inspection took place. Mr. Sayer estimated it to have taken place in February 2017. (Transcript, p. 43, lines 14-15.) Mr. Champine estimated it was just prior to January 1. (Transcript, p. 8, line 8; Transcript, p. 12, lines 17-18.) The Board finds the condition of the property on January 1, 2017 was reflected in the photographs contained in the Summary and in Mr. Sayer's recollections of the state of the subject property from his site visit. Mr. Sayer took a photograph of a new, 6-unit residential garage that was substantially complete. (Exhibit A, p. 7.) Mr. Sayer also photographed a sign in front of the building stating: "Luxury Condo's for Sale," which displayed information about the features of the condominiums and a phone number to call to reach Brett Champine. (Exhibit A, p. 8.) Mr. Sayer additionally photographed the substantially complete individual basement storage units. (Exhibit A, p. 8.) The Summary noted the Petitioner's intention to convert the existing building to a mixed-use commercial and residential condominium property. (Exhibit A, p. 11.)

The Summary further noted construction progress and applications for permitting that support the mixed-use design and use. The Summary noted that, "Although renovation building permits were not issued until January 6, 2017, demolition was underway as of the assessment date for the conversion of the building from all commercial office, to a mixed-use with individually platted office and residential condo units." (Exhibit A, p. 11.) Mr. Sayer reported that there was ongoing construction during his site inspection. (Transcript, p. 52; lines 9-1; p. 53, lines 1-3.) The Summary also included a timeline referencing the approved Official Development Plan for mixed-used rezoning, the October 26, 2016 submission of a building permit application for commercial unit renovation, the November 8, 2016 submission of a building permit application for residential apartment conversion, the December 2, 2016 submission of a building permit application for the 6-car garage foundation, the December 13, 2016 submission of a building permit plan correction notice for the 6-car garage, and the December 24, 2016 review of the commercial remodel plans for code compliance by the Building Safety Department. (Exhibit A, p. 12.)

2. <u>The subject property satisfies the minimum "dwelling unit" requirement.</u>

The Board was not persuaded by Respondent's argument that the subject property could not be classified as mixed-use because a "residential dwelling" did not exist on the subject parcel on January 1, 2017.

As stated above, residential real property includes residential dwelling units and land on which such units are located. Colo. Const. Art. X, Section 3(1)(b); 2 Div. of Prop. Taxation, Dep't of Local Affairs, Assessors' Reference Library Ch. 6 at 6.9 (rev. Jan. 2021). The subject property was improved with six substantially complete dwelling units on January 1, 2017.

The Colorado Court of Appeals addressed the "dwelling unit" requirement in *Vail Assoc., Inc. v. Bd. of Assessment Appeals*, 765 P.2d 593 (Colo. App. 1988). In *Vail*, the court rejected the argument that vacant land with the amenities of residential platting, residential zoning, completed roads, natural gas lines, electricity lines, sanitary sewer lines, storms sewer lines, cable TV lines, telephone lines, water lines and ski ways should be classified as residential. On the assessment date, the subject property was not vacant land with the same level of indicia of an intended residential use as the properties in *Vail*. Instead, the subject property contained an existing structure that had been substantially remodeled on the interior to create condominium units, in accordance with architectural plans, and included the addition of a residential garage structure.

The Assessors' Reference Library addresses partially completed structures in a section titled "Special Classification Topics." It acknowledges the "dwelling unit requirement" set forth in the Colorado Constitution, and the holding of *Vail.* It then goes on to state that, "A completed structural foundation for a residential improvement must be in place on January 1 to meet the "dwelling unit" minimum requirement set out by the Constitution and the Court of Appeals for a property to be classified as residential." 2 Div. of Prop. Taxation, Dep't of Local Affairs, Assessors' Reference Library Ch. 6 at 6.10 (rev. Jan. 2021).[1]

The Board relies on the evidence cited above showing that as of the January 1, 2017 assessment date, the subject property had progressed beyond the completion of a structural foundation for a partially residential improvement. Its design and characteristics evidenced it was clearly intended for partial residential use. On the assessment date, the subject had been reconfigured into two first-floor office units for Mr. Champine's insurance business, and six second-floor residential condominium units, and was already equipped with alarm systems, heating and air conditioning, gas and electric lines, insulation, phone lines, residential storage units, doors, baseboards, and fireplaces.

The Assessors' Reference Library also contains binding guidance for assessors to use in the valuation of partially complete, residentially classified properties. 3 Div. of Prop. Taxation, Dep't of Local Affairs, Assessors' Reference Library Ch. 1 at 1.16 – 1.17 (rev. Jan. 2021). The fact that this guidance exists speaks to a clear underlying presumption that a dwelling unit need not be fully complete for it to satisfy the residential use requirement. If only 100% complete dwelling units could be classified as residential, there would be no need for a section instructing assessors how to value partially complete residential improvements. In a section titled "Partially Constructed Residential Improvements," the ARL directs that, "The percentage of completion of partially constructed residential improvements should be determined, as of the assessment date, within the

[1] Mr. Champine testified that the Jefferson County Assessor's Office informed him that construction of a foundation would be activity indicative of residential use. (Transcript, p. 16, lines 6-14.) Mr. Sayer also testified this was a possible "trigger point" for reclassification. (Transcript, p. 54, lines 1-5.)

framework of the following procedures developed by the Division. The percentages should be applied to the improvement portion of a fully constructed comparable property sale price." 3 Div. of Prop. Taxation, Dep't of Local Affairs, Assessors' Reference Library Ch. 1 at 1.16 (rev. Jan. 2021). The ARL reiterates, "The following guidelines should be employed by the county assessors in determining percentages of completion for residential improvements." *Id*. At 1.17 (emphasis in original).

The ARL guidelines defines 50% complete as "Rough framing, plumbing, electrical, and mechanical complete," and 75% complete as "Partial interior finishes including dry wall, finish carpentry, cabinetry, and painting in progress." 3 Div. of Prop. Taxation, Dep't of Local Affairs, Assessors' Reference Library Ch. 1 at 1.17 (rev. Jan. 2021). Relying on the ARL Percent Complete Description, the Board determines the residential units were between 50% to 75% complete on the assessment date. The residential units were framed; some of the unit doors were installed; all of the units had fireplaces installed; dry wall was finished for each of the units; interior trimmings around the doors were finished for some of the units; insulation was installed for all units; alarm systems, heating and air conditioning, phone lines, gas and electric lines were also in the process of being put in for all of the units; and six residential storage units, as well as six garage spaces were already in place for each of the residential units.

Based upon the evidence presented, the Board finds that as of the January 1, 2017 assessment date, 75% of the subject (six condominium units) was between 50% to 75% complete for use as a dwelling unit, meeting the definition of "residential real property" as contemplated by sections 39-1-102(14.3), (14.4)(a), and (14.5), C.R.S and Colo. Const. Art. X, Section 3(1)(b).

3. A Certificate of Occupancy was not required for mixed-use classification.

The Board finds no legal support, and Respondent presented none, for Respondent's argument that re-classification to a partially residential use requires that construction of a "residential dwelling" must be fully completed and improvements actually used as a residence on the relevant assessment date.

If a Certificate of Occupancy was required for a property to obtain residential classification, there would be little sense in the direction that assessors consider the most probable use when the current use, zoning, or use restrictions cannot be determined.

Contrary to Respondent's contention, as discussed above, the completion of a residential foundation as of January 1 assessment date is sufficient to support residential classification for that tax year. *See* 2 Div. of Prop. Taxation, Dep't of Local Affairs, Assessors' Reference Library Ch. 6 at 6.9 (rev. Jan. 2021). There is no requirement in the ARL (and Respondent cited no other authority) that a residential improvement must be fully completed and occupied as a residential dwelling as of January 1 assessment date for a re-classification to take place, or that a certificate of occupancy must have been issued. Instead, the ARL allows properties to be classified as residential before they are 100% complete, and contains valuation guidelines for assessors to use in determining percentages of completion for residential improvements. The fact that the ARL does not require 100% completion of a residential dwelling for a residential classification to apply leads

the Board to conclude that a Certificate of Occupancy is not a prerequisite to residential classification.

Mr. Sayer's testimony about when it would be appropriate to change the classification of the property was somewhat self-contradictory, and did not consistently support his assertion that the Assessor's Office requires a Certificate of Occupancy before changing a property's classification to residential. Mr. Sayer did testify the Assessor's Office would wait to assess the "final condition" of the property (Transcript, p. 49, line 6) and that it would be appropriate to change the classification of the property to mixed-use to account for the residential use "[w]hen the improvements are completed or there has been a CO [Certificate of Occupancy] or there's occupancy." (Transcript, p. 49, lines 19-20.) However, Mr. Sayer also testified that a variety of means could be used to determine a change in use, and a variety of factors could trigger such a change, including the existence of a foundation, (Transcript, p. 54, lines 1-5) "active permits," (Transcript, p. 44, lines 16-18; p. 53, lines 19-22), a "physical inspection" (Transcript, p. 44, lines 18-19), photographs (Transcript, p. 44, line 21) or a "set of plans" (Transcript, p. 44, line 19). In particular, his testimony that "[w]hat comes to light is visually going to be a building permit that triggers a change in use," also suggested that a Certificate of Occupancy would not be required, since a building permit pre-dates a Certificate of Occupancy.

Mr. Sayer's testimony also suggested that he could not change the classification of the property because he had been unable to visually confirm the residential configuration the property. Mr. Sayer testified it was apparent during his site visit that "there was construction going on," and that "the upstairs was being remodeled." However, he did not enter the areas that appeared to be under construction. The County's counsel asserted that,

> part of the consideration…is because it was being condominium – turned into condos – six condos, the County can't know exactly what the exact makeup of the inside of the property is until that's finished. So, you know, there could be – it could be completely gutted. There could be, you know – for instance, some of these – you know gas, plumbing, what have you going in. But still at the time there wasn't a way to know exactly the makeup of the property.

(Transcript, p. 38, lines 11-22.) Contrary to this assertion, a visual inspection would have made clear the makeup of the property. If an appraiser had visited the property to conduct an inspection with the required safety gear (a hard hat), s/he would have witnessed the redesign and substantial completion of the residential portions of the property.

The Board finds the fact that building permits were not issued by the assessment date is not a determinative factor in the classification analysis. Mr. Sayer testified that his office is often alerted to a change in use and classification by the issuance of a building permit. This might be an appropriate trigger in the case of new construction which would not begin until the building permit was issued. However, in this case, where an interior renovation was being performed to convert the existing building to mixed-use, substantial work had already taken place before the issuance of a building permit. Per the testimony of Mr. Champine, "the day we got our permit, we were six months into this project." (Transcript, p. 29, lines 10-11.)

B. Zoning and Use Restrictions

The Board finds the zoning and permitting status of the subject prior to and on January 1, 2017 support the classification of the subject property as mixed-use. The Board finds that the Official Development Plan for mixed-use rezoning was approved by the Planning & Zoning Department on June 9, 2016, and recorded June 21, 2016. The rezoning allowed construction of six residential units, with half of the ground floor available for office or commercial use. Further, it allowed construction of one six-bay detached garage. The record shows that a Building Permit (16-125214) application was submitted for commercial unit renovation on October 26, 2016. A separate Building Permit (16-124935) application was submitted on November 8, 2016 for residential apartment conversion. In addition, a Building Permit (16-126500) application was filed on December 2, 2016 for a 6-car garage foundation.

C. The Most Probable Use When the Current Use or Zoning and Use Restrictions Cannot Be Determined

The Board was able to determine the current use, zoning, and use restrictions, and therefore does not need to reach this factor. However, even if the incomplete nature of the construction, the fact that a Certificate of Occupancy had not yet been issued, or the fact that residential occupancy had not yet occurred as of the assessment date are viewed as clouding the determination of current use, based on the evidence and reasoning stated above it is clear that as of the assessment date the most probable use of the subject was mixed-use, with 25% commercial and 75% residential use. Overwhelming evidence showed that the subject property was devoted to and intended for mixed-use as a 75% residential, 25% commercial property. Contrary to the County's argument that a residential classification cannot be assigned prior to occupation or completion of a residential dwelling, because it would be speculative, the Board notes that probable use is a proper factor to consider. Its relevance is further bolstered by the guidance of the ARL that a completed residential structural foundation is evidence sufficient to support residential classification.

D. Determination of Reasonable Future Use

The Board finds that, as of January 1, 2017 assessment date, the subject's reasonable future use was that of mixed-use, which supports mixed-use classification of the subject for tax year 2017.

Reasonable future use is based on the actions and expectations of the market and is consistent with the highest and best use concept that requires the future use to be physically possible, legally permissible, financially feasible, and maximally productive. 3 Div. of Prop. Taxation, Dep't of Local Affairs, Assessors' Reference Library Ch. 2 at 2.3 (rev. Jan. 2021).

As of the January 1 assessment date, mixed-use of the subject was the only reasonable future use of the subject. This was evidenced by the building plans for the construction work at the subject; the construction work itself which was ongoing at the subject property; applications for various building permits pending with the County; the sign advertising condominium units for sale; the mixed-use zoning; and Mr. Champine's statements to the County appraiser during the physical inspection of the subject. On the relevant assessment date, mixed-use of the subject property was

physically possible, legally permissible, financially feasible and maximally productive, thereby supporting mixed-use classification of the subject for tax year 2017.

V. CONCLUSION

The Board finds that Sugarbush has shown, by a preponderance of the evidence, that the Assessor's classification of the subject property for tax year 2017 was incorrect. In doing so, Sugarbush has overcome the presumption that the county assessor's classification was correct. *See Gyurman v. Weld Cty. Bd. Of Equalization,* 851 P.2d 307, 310 (Colo. App. 1993).

ORDER

The Petition is **GRANTED**. The Jefferson County Assessor is ordered to re-classify the subject property to mixed-use (75% residential and 25% commercial) for tax year 2017.

APPEAL RIGHTS

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.

See § 39-8-108(2), C.R.S. (rights to appeal a tax protest petition); *see also* § 39-10-114.5(2), C.R.S. (rights to appeal on an abatement petition).

DATED and MAILED this 3rd day of March 2021.

BOARD OF ASSESSMENT APPEALS:

Drafting Board Member:

Sondra Mercier

Concurring Board Member:

Debra Baumbach
Concurring without modification pursuant to § 39-2-127(2), C.R.S.

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

Yesenia Araujo