

BOARD OF ASSESSMENT APPEALS, STATE OF COLORADO 1313 Sherman Street, Room 315 Denver, Colorado 80203	Docket No.: 76620
Petitioner: ALPERT DEVELOPMENT II INC v. Respondent: COUNTY BOARD OF EQUALIZATION	
FINAL AGENCY ORDER	

THIS MATTER was heard by the Board of Assessment Appeals (“Board”) on May 5, 2020, Diane M. DeVries and Amy J. Williams presiding. Petitioner was represented by Brent Eisen, Esq. Respondent was represented by Benjamin Swartzendruber, Esq. Petitioner protests the classification of the subject property for tax year 2019, seeking to reclassify it from vacant land to residential.

EXHIBITS

The Board admitted into evidence Respondent’s Exhibits A and B.

DESCRIPTION OF THE SUBJECT PROPERTY

8811 East Iliff Avenue, Denver, Colorado 80231
 County Schedule No.: 031269458

As of the assessment date of January 1, 2019, the 3.526-acre subject property contained at least one improvement—an abandoned, boarded-up 1,140-square-foot house which was slated for demolition—and may also have contained a 140-square-foot shed. The assessor has not assigned any value to either the shed or the boarded-up house, and classified the property as vacant land for tax year 2019. Petitioner seeks a residential classification.

BURDEN OF PROOF AND STANDARD OF REVIEW

In a proceeding before this Board, the taxpayer has the burden of proof to establish, by a

preponderance of the evidence, that the assessor's valuation is incorrect. *Bd. of Assessment Appeals v. Sampson*, 105 P.3d 198, 204 (Colo. 2005). Proof by a preponderance of the evidence means that the evidence of a circumstance or occurrence preponderates over, or outweighs, the evidence to the contrary. *Mile High Cab, Inc. v. Colorado Public Utilities Comm'n*, 302 P.3d 241, 246 (Colo. 2013). The evaluation of the credibility of the witnesses and the weight, probative value, and sufficiency of all of the evidence are matters solely within the fact-finding province of this Board, whose decisions in such matters may not be displaced on appeal by a reviewing court. *Gyurman v. Weld Cty. Bd. of Equalization*, 851 P.2d 307, 310 (Colo. App. 1993). The determination of the degree of comparability of land sales and the weight to be given to the various physical characteristics of the property are questions of fact for the Board to decide. *Golden Gate Dev. Co. v. Gilpin Cty. Bd. of Equalization*, 856 P.2d 72, 73 (Colo. App. 1993).

The Board reviews every case de novo. *See Bd. of Assessment Appeals v. Valley Country Club*, 792 P.2d 299, 301 (Colo. 1990). In general, the de novo proceeding before the Board "is commonly understood as a new trial of an entire controversy." *Sampson*, 105 P.3d at 203. Thus, any evidence that was presented or could have been presented in the county board of equalization (CBOE) proceeding may be presented to this Board for a new and separate determination. *Id.* However, the Board may not impose a valuation on the property in excess of that set by the CBOE. § 39-8-108(5)(a), C.R.S. (2019).

APPLICABLE LAW

When assessing taxable property, assessors must follow the guidelines established in The Assessors' Reference Library. See also § 39-1-104(11)(a)(I), C.R.S. (2019). The Assessors' Reference Library provides the following criteria for determining the classification of property:

The primary criterion for classification is the actual use of the land on the assessment date. When actual use cannot be determined through physical inspection, the property owner should be contacted. The assessor may also consider such things as zoning or use restrictions, historical use, or consistent use, in determining land use. When unable to determine actual use, the assessor may consider the land's most probable use, as of the assessment date, based on the best information available. Assessors' Reference Library Volume 3 at 2.3 (revised 1/20) (emphasis added).

The Court of Appeals also recognizes these factors in determining property classification. See, e.g. *Vail Assocs. v. Bd. of Assessment Appeals*, 765 P.2d 593 (Colo. App. 1988) (zoning); *O'Neil v. Conejos Cnty. Bd. of Comm'rs*, 395 P.3d 1185 (Colo. App. 2017) (actual use, zoning, and reasonable future use). The Court of Appeals in *O'Neil* explained as follows:

Whether property is classified "residential" or "commercial" then, depends, respectively, on whether it was "designed for use

predominantly as a place of residency” or whether it was used for activities “having profit as a primary aim” or “other dealings between individuals or groups in society.” In making this determination, we consider several factors – to wit, the use for which the property was originally designated; current, actual use of the property; zoning and any other applicable use restrictions; and reasonable future use of the property.

O’Neil, 395 P.3d at 1189.

FINDINGS AND CONCLUSIONS

As this hearing is not a valuation appeal, rather a classification appeal, no appraisal was supplied by either Petitioner or Respondent. The property is currently classified as vacant land and Petitioner is requesting a residential classification for tax year 2019.

Petitioner offered two photos of the home located on the subject property as evidence of its residential nature. Petitioner’s witness, Scott Alpert, President, Alpert Development II, Inc., testified that the subject residence was occupied by a tenant in 2018 and tenant occupancy continued into 2019, though mostly for storage purposes. Mr. Alpert testified that the building was still a residential structure as of January 1, 2019 even though it was boarded up and without electric service.

Respondent provided aerial photos and ground photos in support of the vacant land classification of the property for tax year 2019, along with statutory references of the definition of residential land. Respondent’s expert witness, Karen Hart, Appraiser for the Arapahoe County Assessor’s Office, testified that via several inspections of the property, she determined that no one was occupying the property on January 1, 2019 and that the residential improvement did not have electric service as of January 1, 2019. Additionally, Ms. Hart testified that a court-ordered eviction notice had been issued in May of 2018 in an attempt to vacate the residence. Ms. Hart stated that the property was zoned commercial, with a legal, non-conforming residence located on the property. Further, the subject property has historically been classified as a mixed-use property, with the primary use being the sale of firewood from the shed.

The subject property, on the relevant assessment date, January 1, 2019, unquestionably had a boarded-up residence located on the property. Further, it is undisputed that the building in question was “designed for use predominantly as a place of residency,” as described in *O’Neil*, 395 P.3d at 1189. It is less clear if the shed existed on the assessment date. Petitioner testified that the residence was the only structure on the property as of January 1, 2019, but Respondent testified that the shed was still in existence at that time. Further, based on testimony, the residence was occupied through at least May of 2018, and possibly beyond that date. However, the Board does not find occupancy of a residential structure or connection to utility services to be the primary determinative factors of residential classification. Considering that the residence had

historically been utilized for residential occupancy, that the residential use was a legal, non-conforming use on commercially zoned land, and that the property was not conclusively being used for any commercial purpose as of the assessment date, the Board finds the proper classification of the subject property to be residential for tax year 2019.

Summarily, the Board concludes that the preponderance of the evidence and testimony supports a residential classification as requested by Petitioner.

ORDER

Petition is GRANTED. Respondent is ordered to change the classification of the subject property to residential for tax year 2019. The Arapahoe County Assessor is directed to adjust his/her records accordingly.

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. (2019) (rights to appeal a tax protest petition); *see also* § 39-10-114.5(2), C.R.S. (2019) (rights to appeal on an abatement petition).

DATED and MAILED this 3rd day of June, 2020.


BOARD OF ASSESSMENT APPEALS:

Drafting Board Member:



Amy J. Williams

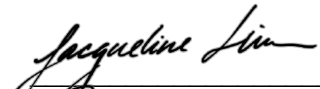
Concurring Board Member:



Diane M. DeVries
*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 order of the Board of Assessment Appeals.



Jacqueline Lim