

BOARD OF ASSESSMENT APPEALS, STATE OF COLORADO 1313 Sherman Street, Room 315 Denver, Colorado 80203	Docket No.: 79967
Petitioner: PAULA M. TRAUTNER, v. Respondent: SAN JUAN COUNTY BOARD OF EQUALIZATION.	
FINAL AGENCY ORDER	

THIS MATTER was heard by the Board of Assessment Appeals (“Board”) on May 5, 2021, Samuel M. Forsyth and Sondra W. Mercier presiding. Dean Bosworth, the spouse of Petitioner Paula Trautner, appeared for Petitioner, without objection from Respondent. Respondent was represented by Dennis Goldbricht, Esq. Petitioner appeals the actual value and classification of the subject property for tax year 2020.

EXHIBITS

The Board admitted into evidence Petitioner’s Exhibits 1 - 8 and Respondent’s Exhibits A - F.

DESCRIPTION OF THE SUBJECT PROPERTY

302 E 12th Street, Silverton CO 81433
County Schedule No. 4829-173018-0015

The subject property is a partially completed 1,386-square foot garage on a 3,750-square foot lot. The siding and interior drywall/insulation were partially completed on the January 1, 2020 assessment date for tax year 2020. The zoning is BP - Business Pedestrian. The subject property’s appealed actual value, as assigned by the San Juan County Board of Equalization (“CBOE”), and the value requested by Petitioner and Respondent, are:

CBOE’s Assigned Value:	\$ 216,000
Respondent’s Recommended Value:	\$ 216,000
Petitioner’s Requested Value:	\$ 150,000

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, in this appeal, 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. (2020).

APPLICABLE LAW

The market approach relies on comparable sales, as required under section 39-1-103(8)(a)(I), C.R.S., which states:

Use of the market approach shall require a representative body of sales, including sales by a lender or government, sufficient to set a pattern, and appraisals shall reflect due consideration of the degree of comparability of sales, including the extent of similarities and dissimilarities among properties that are compared for assessment purposes.

The cost approach involves estimating the cost of replacing the improvements to the property, less accrued depreciation. *Bd. of Assessment Appeals v. E.E. Sonnenberg & Sons, Inc.*, 797 P.2d 27 (Colo. 1990). The land value as if unimproved, usually derived from sales of comparable sites, is added to the improvement cost to arrive at a total value. Appraisal Institute, *The Appraisal of Real Estate* (15th ed. 2020), Ch. 29.

The income approach is a common method for calculating the value of commercial properties, especially apartment buildings, office buildings and shopping centers. *Sonnenberg*, 797 P.2d at 31. It generally involves calculating the income stream (rent) the property is capable of generating, capitalized to value at a rate typical within the relevant market. *Id.*

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. 76296 4 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, 2020 assessment date for tax year 2020 is the primary factor to be considered in determining classification. *Farny v. Board of Equalization of Dolores Cty.*, 985 P.2d 106, 109 (Colo. App. 1999); § 39-1-104(10.2)(d); 2 Div. of Prop. Taxation, Dep’t of Local Affairs, Assessors’ Reference Library Ch. 6 at 6.1 (rev. Jan. 2021); 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).

Residential use can be analyzed by considering 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.* Whether property is classified as “residential” or “commercial” depends on whether it was “designed for use predominantly as a place of residency” or whether it was used for activities “having a profit as a primary aim” or “other dealings between individuals or groups in society.” *O’Neil v. Conejos Cty. Bd. of Comm’rs*, 395 P.3d 1185 (Colo. App. 2017). “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 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.

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 distills the constitutional, statutory and case law guidance and 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). The ARL also 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).

ARGUMENTS

Dean N. Bosworth, the spouse of the Petitioner Paula M. Trautner, appeared and testified for the Petitioner. Mr. Bosworth presented his opinion of the subject’s value under a cost approach to value.

Mr. Bosworth argued in favor of a land value based on a \$20.51 per square foot value found by the Board in its Final Agency Order resolving the appeal of the 2019 value of the subject property. (The basis of this land value was sales of nearby similar properties.) From this land value, Mr. Bosworth made deductions for power line and avalanche zone influences. He argued that the power line “encroachment” that runs along the west length of the lot had a negative impact on value because it reduced the buildable area of the subject, and that the subject’s location in an avalanche zone increased development costs and limited permitted uses. He contended the county had erroneously refused to consider these factors in their valuation of the subject. His land value calculation was as follows:

3,750 square feet x \$20.51 per square foot	\$ 76,900
Less power line adjustment of 15% of lot value	-\$ 11,500
Less avalanche development adjustment	<u>-\$ 5,500</u>
Land value	\$ 59,860

Mr. Bosworth calculated the improvement value, based on its state of finish as of January 1, 2020, using the garage’s actual construction costs and the CoreLogic Swift Estimator (the same commercial cost estimator used by Respondent). He arrived at a \$97,000 cost of improvement. He asserted an additional adjustment of \$7,000 was warranted for the subject’s location in an avalanche zone.

Mr. Bosworth concluded to a value based on the replacement cost analysis as follows:

Land value	\$ 60,000
Improvement value	\$ 97,000
Less Adjustment for location in avalanche zone	<u>-\$ 7,000</u>
Total value	\$ 150,000

Petitioner also contended that the Respondent incorrectly classified the improvements as commercial. Petitioner requested that the classification be changed to residential. Mr. Bosworth argued that after the construction of the improvements were permitted by Silverton, the establishment of the Avalanche Zone has rendered the use as a commercial storage garage non-conforming. He contended that the garage “can only be used for activities that are accessory to a

residential dwelling due to the Avalanche Code Restrictions and the construction. It cannot be used as a storage rental or commercial operation.” (Exhibit A, page 15.) He stated that the Town of Silverton zoning limits the use of the improvement to a “residential garage.” Mr. Bosworth testified that negotiations with the City of Silverton to construct a residence adjacent to the existing improvement were “ongoing” as of the 2020 assessment date, and that a permit to construct a residential improvement had not been applied for nor approved. He cited section 3(1)(b) of Article X of the Colorado Constitution, along with the Assessors’ Reference Library, Volume 3, Real Property Valuation, stating that once a foundation is in place for a residential improvement, the criteria for the subject to be classified a residential unit has been met.

Respondent called Kimberly Buck as a witness. Ms. Buck is the Assessor for San Juan County. She is licensed as an Ad Valorem Appraiser with the State of Colorado. In support of the County’s valuation and classification of the subject, Ms. Buck offered a Restricted Appraisal Report, admitted Exhibit A.

Like Mr. Bosworth, Ms. Buck drew on her valuation information and the Board’s valuation findings from tax year 2019. Using the cost approach, Ms. Buck reached her value conclusion for land and improvements for tax year 2020, as informed by the Board ordered values from 2019, and to these values added the replacement cost of the additional finish work done on the improvements, and additional land added to subject, after the 2019 assessment date. She based her value for the additional land on the sale price per square foot of the actual purchase price of the land on October 8, 2018. She based her value for improvements added since the 2019 assessment date on Petitioner’s reported construction costs between January 1, 2019 and December 31, 2019, as reflected in Exhibit E, pages 1-3. Her calculation was as follows:

Tax year 2019 Board land value (2,500 square feet x \$20.50/sq. ft.)	\$ 51,250
Tax year 2019 Board improvement value	\$ 123,992
Additional value for 1,250 sq. ft. of land purchased in 2019	\$ 20,000
Additional value of costs of finished of improvements added in 2019**	\$ 36,309
Total appraised value	\$ 231,551

Respondent requested the Board sustain the CBOE value of \$216,000.

Ms. Buck assigned a classification to the property of nonresidential, designating it as a warehouse/storage facility. Ms. Buck testified that the garage was constructed with no residential space, and the building plans and permit showed no residential space. Ms. Buck testified the structure was designed and permitted as a garage and has been used as a garage.

FINDINGS AND CONCLUSIONS

The Board resolved Petitioner’s appeal of the 2019 taxable value of the subject in a Final Agency Order issued in docket no. 76296. Both parties’ arguments about the correct value and classification of the property for tax year 2020 relied partly on the Board’s findings in that Order. Absent unusual conditions, it is expected that the valuation for 2019 and 2020 would be the same. The Board finds such unusual conditions did exist, in the form of an addition to the structure and the addition of newly purchased land to the subject, increasing the subject land size by 1,250 square

feet. See § 39-1-104(11)(b)(I), C.R.S. The parties agreed that between the 2019 assessment date and the 2020 assessment date 1,250 square feet of land were added to the subject property. It was also uncontested that improvements were made to the garage during 2019, such that on the 2020 assessment date the garage's features included partial drywall, partial insulation, partial electric, and that 25% of the exterior cladding was installed. These conditions warrant a revaluation for tax year 2020.

I. Classification

The Board finds the subject does not meet the requirements for classification as a residential property during tax year 2020. The actual use of the property on the January 1, 2020 assessment date is the primary factor to be considered in determining classification. *Farny*, 985 P.2d at 109. It was uncontested that the garage was not designed as a residence and was not in use on the assessment date as a residence. Mr. Bosworth testified that the building was designed as a garage "with commercial expansion potential," with no residential living space, and was also constructed with no residential living space. He testified the use on January 1, 2020 was solely as a garage. Although there was a firewall in place, due to the planned addition of an adjacent residential living space, this does not warrant the residential classification of the garage. It is irrelevant that a garage foundation was in place on the assessment date, because the foundation was not for a residential structure. The garage does not meet the definition of a residential dwelling unit.

Petitioner testified that he has been in "negotiations" with the City of Silverton since 2019 to add residential space to the subject, and concerning residential construction and permitting, but that delays beyond his control were preventing application and approvals. The residential aspect, if it occurs, may be through a remodel and/or addition to the garage, but did not exist on the assessment date.

The Board considered the "Business Pedestrian" zoning of the subject, along with the use restrictions inherent in the subject's avalanche zone designation. Neither party provided the Board with clear evidence of the uses allowed by the "Business Pedestrian" zoning. It was uncontested that Avalanche Hazard Zoning, found in Town of Silverton Ordinance 2005-02, "Avalanche Hazard Districts," and Municipal Code section 16-4-240, is applicable to the subject due to its location within the Avalanche Hazard Zoning District. However, despite Mr. Bosworth's argument that any use other than residential would violate zoning, no evidence was presented of how the zoning has prohibited the garage use. The Town of Silverton issued a building permit for the existing structure without enforcing the avalanche zone permitting provisions. It is unknown to what extent the Town will enforce the Code in the future, and Petitioner has not submitted a "use subject to review" application. Regardless, under the Code, uses subject to review for which the structure could qualify include its current use, and uses other than residential. The Board rejects the argument that a non-residential structure must be classified as residential because that is the only permitted use.

To the extent the Board is unable to determine current zoning or use restrictions, the Board finds the most probable use of the subject is its current use as a garage. 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). The Board determines reasonable future use of the subject to be its current use as a garage, as of the January 1, 2020 assessment date. As of the January 1 assessment date, the building plans and completed construction support that commercial use of the garage was physically possible, legally permissible, financially feasible and maximally productive, thereby supporting commercial classification of the subject for tax year 2020. To the extent indicia of a future residential use exists, it is minimal and subject to future unknowns, including permitting permissions and the construction of a residential dwelling (whether it be via conversion of the garage or accessory to the garage), and does not support residential classification for tax year 2020.

The Board finds that Petitioner has not met her burden of proof to show that the Assessor's classification was incorrect.

II. Valuation

Colorado case law requires that “[Petitioner] must prove that the assessor’s valuation is incorrect by a preponderance of the evidence in a de novo BAA proceeding.” *Bd. of Assessment Appeals v. Sampson*, 105 P.3d 198, 204 (Colo. 2005). Petitioner provided sufficient probative evidence to convince the Board that Respondent’s valuation of the subject for tax year 2020 is incorrect.

The Board finds that Ms. Buck considered the three traditional approaches to value. The parties agreed that the replacement cost was the most appropriate of the three approaches. The Board concurs that the cost approach is most appropriate. The Board presents its findings based solely on the cost approach analysis of the two parties.

Petitioner did not provide the Board with any market-based data supporting her contention that an adjustment is appropriate for the location of the subject in an Avalanche Zone and the presence of overhead power lines. Evident of the lack of convincing market data was the unsupported estimate of the amount of an adjustment for these factors. The Board concurs with the Respondent that the absence of market-based data precludes making an adjustment for these factors.

Ms. Buck testified she did not visit the site to perform an inspection for tax year 2020's valuation. She did not claim to have pursued other means of evaluation of the condition of the subject on the assessment date. She testified she did not attempt to determine the percent complete of the garage, and that her replacement cost new reflected a 100% complete interior. The Board finds that Ms. Buck's lack of due diligence to determine the factual nature of the state of finish of the subject property as of the assessment date is evidence of an overall non-credible analysis of the cost approach conclusion of value of the improvements. Ms. Buck agreed with the Petitioner that the exterior of the improvements was not finished on the assessment date. It was uncontested that the interior of the garage had unfinished drywall, incomplete insulation and no water or sewer, yet the Board is not convinced that the cost tables for this class of property, used by Ms. Buck, reflect that condition. To the contrary, the Board determines that a 100% finished exterior is

inherent in the final cost of the completed improvements in the cost estimator, even though it was uncontroverted that as of January 1, 2020 only 25% of garage's exterior was clad. Ms. Buck testified it was not appropriate to "quibble" about minor states of unfinish of the subject property, in part because it is a garage. Ms. Buck also believed that partially complete structure guidelines provided by the Assessor's Reference Library are only applicable to residentially classed improvements. However, the Board finds the degree of completion of improvements is also relevant to the valuation of commercially classed properties, and is not inherently of trivial significance.

The Board refers to the Respondent's replacement cost analysis found in Exhibit A, page 34. The Board concludes that Ms. Buck's replacement cost new conclusion assumes that the improvements are 100% complete as of the January 1, 2020 assessment date for tax year 2020. The Board concludes that Ms. Buck did not deduct the cost to complete the unfinished exterior siding. The basis of this conclusion is Ms. Buck's testimony and lack of any line item in the cost approach deducting for this unfinished component of the improvements. Petitioner provided credible and uncontradicted testimony that only 25% of the exterior was completely installed. The only line-item reference to the cost of exterior siding is found in Petitioner's Exhibit 2. Total cost of exterior wall framing was reported to be \$21,733. Based on this cost estimate, and the fact that the exterior is only 25% complete, the Board concludes that \$16,300 should be deducted from the Respondent's total replacement cost new of \$123,989, resulting in a replacement cost new of \$107,689.

During 2019, the subject property land size was increased by 1,250 square feet as a result of the purchase of an adjacent site. The subject property land now totals 3,750 square feet. The Board concludes to a value of \$20.50 per square foot, resulting in a value for the land of \$76,875.

The Board concludes that the value of the land and improvements as of the assessment date of January 1, 2020 based on the appraisal date of June 30, 2018 is as follows:

Land value	\$ 76,875
Improvement value	<u>\$ 107,689</u>
Total Value	\$ 184,564

As to Petitioner's concerns about the CBOE proceeding and other matters prior to this hearing, the Board of Assessment Appeals hears appeals from CBOE decisions in a de novo trial, meaning an entirely new consideration of the valuation controversy, including new evidence. How hearings are scheduled, conducted and the manner in which information is provided prior to the BAA hearing is not relevant to the resolution of this appeal.

ORDER

The petition to change the classification of the subject property to residential is **DENIED**.

The petition to reduce the 2020 actual value of the subject property is **GRANTED**. The San Juan County Assessor's Office is directed to update its records to reflect a value of **\$ 184,564** for the subject property for tax year 2020.

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 6th day of July, 2021.

BOARD OF ASSESSMENT APPEALS:

Drafting Board Member:



Samuel M. Forsyth

Concurring Board Member:



Sondra W. Mercier

*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.



Casie Stokes
Casie Stokes