BOARD OF ASSESSMENT APPEALS, STATE OF COLORADO 1313 Sherman Street, Room 315 Denver, Colorado 80203	Docket No.: 80025
Petitioner: **ANKIEWICZ FAMILY REVOCABLE TRUST,** v. Respondent: **MONTEZUMA COUNTY BOARD OF EQUALIZATION.**	

FINAL AGENCY ORDER

THIS MATTER was heard by the Board of Assessment Appeals ("Board") on May 5, 2021, Samuel Forsyth and Sondra Mercier presiding. Petitioner Sharon Ankiewicz appeared pro se on behalf of the Ankiewicz Family Revocable Trust. Respondent was represented by John Baxter, Esq. Petitioner appealed the County's classification of the subject property as vacant land for tax year 2020, and argued in favor of a residential classification.

EXHIBITS

The Board admitted into evidence Petitioner's Exhibits 1-12. The Board admitted Respondent's Exhibits A-J and L-P.

DESCRIPTION OF THE SUBJECT PROPERTY

Summit Estates, Lot 8,
14480 "G" Road 32.1, Mancos
Montezuma County Parcel Number 5359-361-01-008

The subject is a small structure constructed in 2012 situated on a 35.32-acre parcel. From tax year 2013 through 2019, the structure was considered a residence and the subject was classified as residential use. The Assessor reclassified the subject as "Vacant Land" with "Minor Structure – Vacant Land" for tax year 2020. (Exhibit E.)

The issue before the Board is the correct classification of the subject. The subject property's actual value, as assigned by the County Board of Equalization ("CBOE") is not at issue in this case.

CBOE's Assigned Value: $117,257

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 (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 Commission*, 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 the BAA, 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 Board reviews every case de novo. See *Bd. of Assessment Appeals v. Valley Country Club*, 792 P.2d 299, 301 (Colo. 1990). In general, a 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 board of equalization proceeding may be presented to the Board for a new and separate determination. *Id.*

APPLICABLE LAW AND AUTHORITATIVE SOURCES

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 in determining classification. *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.

FINDINGS AND CONCLUSIONS

After consideration of the testimony and exhibits presented, the Board relies on the testimony and documentary evidence presented by Sharon Ankiewicz to find in favor of Petitioner.

Mrs. Ankiewicz testified that in 2013, former Assessor's staff member Scott Davis informed her that in order to receive residential classification she and her husband could put up an 8' x 10' shed; that it would not need water, electric or septic service; and instructed her to call the office when construction was completed. Following completion of construction, she provided the Assessor's Office construction plans for a 10' x 12' cabin along with photos of the structure. (Exhibits 5 and 11.) The subject was subsequently classified as "residential" from tax year 2013 through tax year 2019.

Mrs. Ankiewicz reported that the structure was built on a concrete pier foundation, was unfinished inside, and had not been visited for the past year due to the pandemic. She testified that the shed contains a cot. She and her husband have hauled water to the cabin, which is served by a portable toilet, solar lighting and gas heater. Mrs. Ankiewicz acknowledged that the unit is "rustic" but testified that they "basically live" in the cabin when visiting the property. The subject has a driveway permit for access to the entrance. She reported that no complaints had been received from the homeowner's association or zoning jurisdiction regarding the structure itself or their use of it.

Respondent asserted that the County discovered relative to tax year 2020 that it had erroneously classified the subject as "residential" for the preceding seven years. Respondent argued the classification was erroneous because the subject did not meet the requirements of the Summit Estates Declaration of Restrictions which state residences shall not be smaller than 1,400 square feet, and did not meet Montezuma County's county-specific "residential status criteria" to be a residential cabin. The minimum criteria are as follows:

- Be in livable condition
- Structure affixed to the land (foundation)
- Septic system/waste disposal
- Septic permit and driveway permit paid for
- A minimum of 300 square feet living area
- Site evaluation to confirm

(Exhibit 8; Exhibit G; Exhibit H.)

The Board finds no statutory or legal support for the application of Montezuma County's minimum guidelines to determine the proper classification of the property for the purposes of ad valorem taxation, and Respondent provided none. The Board notes that the subject substantially meets Respondent's County-specific requirements to qualify as a cabin. It includes a foundation, is in livable condition, and Petitioner obtained a driveway permit. Although Petitioner has no septic permit, the structure is served with a portable toilet and hauled in water, as well as solar electric and a gas heater. The subject could well be described as a "tiny house" operated "off the grid." To the extent the subject does not meet the County's residential criteria, the Board was presented with

no legal authority to show why those more specific and demanding criteria should control over the state statutory and constitutional residential classification requirements.

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 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).

Relying on the testimony and photographic evidence submitted by Ms. Ankiewicz, the Board finds that the subject property consists of a residential improvement on residential land, and that the subject property's current use as of the assessment date was residential. The Board credits Ms. Ankiewicz's testimony that the cabin was conceived, designed, and used as a residence. The Board finds the subject residence was at least minimally suitable for residential purposes, and that this suitability is sufficient to support residential classification. *Farny*, 985 P.2d at 110 ("BAA could properly conclude that the cabin qualified for residential classification because taxpayers actually used it predominantly as a place of residence and it was at least minimally suitable for such residential purposes.") Although Ms. Ankiewicz had not visited the property since the pandemic, this does not nullify the property's residential use. *Mission Viejo*, 881 P.2d at 465 ("homes which stand empty for a period of time would not lose their residential classification simply because they were not 'actually' being used as a residence.")

The Assessors' Reference Library, addressing partially completed structures and the minimum requirements to reclassify land from vacant to residential, states 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). This Board finds this residential improvement does rest on a structural foundation.

The Board rejects the argument that the subject does not qualify for residential classification because the residential use is not legally permissible. No evidence was presented to show that a residential use is not permitted by zoning or otherwise. The County presented testimony in response to Board questioning that its residential criteria were part of the County land use code. However, this could not be substantiated by the Board from the evidence presented; the Board finds this statement alone was not sufficient evidence that the criteria as presented are part of the land use code. Although the Summit Estates Declaration of Restrictions requires a residence larger than the one on the subject, the Board will not, under the circumstances of this case, find that this alone means the subject cannot qualify for residential classification.

The Board also notes that the residential use appears to have been continuous and unchanged since 2013. While the Board recognizes that the burden of showing the 2020 vacant land classification is erroneous lies with Petitioner, the Board notes that Respondent did not allege or provide evidence of a change in use causing the property not to qualify for residential classification. Rather than being "erroneous," the reclassification appears to have occurred following a change in the individual who held the office of Montezuma County Assessor, and the implementation of the county-created "residential status criteria." The Board heard testimony from Leslie Bugg, Montezuma County Assessor, that the county-created criteria have been in place since June 2017, when she took office. (*See* Exhibit H.) Nevertheless, the subject remained classified as residential for tax year 2018 and 2019.

Based on the findings and conclusions presented, the Board finds that Petitioner presented sufficient probative evidence and testimony to prove that the subject property was incorrectly classified for tax year 2020 and should be classified as residential.

ORDER

The petition is **GRANTED**. The Board finds that Petitioner has met its burden of proving that the 2020 classification of the property is incorrect and that the property should be reclassified as residential.

The Montezuma County Assessor is directed to change 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. (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 June, 2021.

BOARD OF ASSESSMENT APPEALS:

Drafting Board Member:

Sondra W. Mercier

Concurring Board Member:

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

STATE OF COLORADO SEAL BOARD OF ASSESSMENT APPEALS

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

Casie Stokes

80025