

**BOARD OF ASSESSMENT APPEALS,**  
**STATE OF COLORADO**  
1313 Sherman Street, Room 315  
Denver, Colorado 80203

**Docket No.: 68818**

Petitioner:

**DONALD L. KENNEN,**

v.

Respondent:

**SUMMIT COUNTY BOARD OF COMMISSIONERS.**

**ORDER**

**THIS MATTER** was heard by the Board of Assessment Appeals on November 28, 2016, James R. Meurer and Diane M. DeVries presiding. Petitioner was represented by F. Brittin Clayton III, Esq. Respondent was represented by Franklin Celico, Esq. Petitioner is protesting the 2014 and 2015 classification of the subject property.

The parties agreed to the admission of Petitioner's Exhibits 1 through 8 and Respondent's Exhibits A through I. Also, the Board agreed to incorporate into the record for this hearing all of the testimony from a hearing earlier in the day in Docket Number 68820, Jayne A. Gilson v. Summit County Board of Commissioners.

Description of the Subject Property

**Lot 10 Angler Mountain Ranch Sub #2**  
**71 Pheasant Tail Lane**  
**Summit County Schedule No. 6513091**

This appeal involves the relationship between three legal and platted residential lots located in the Angler Mountain Ranch Subdivision in Summit County, Colorado. The subject is a vacant buildable residential lot classified as *vacant land* by Summit County, hereinafter identified as Subject Lot. This lot contains 0.74 acres, has some trees, generally triangular in shape with sloping topography. Access to this parcel is via the cul-de-sac at the end of Pheasant Tail Lane. County records indicate that this lot was acquired by Donald L. Kennen on May 30, 2007. There were no residential or recreational improvements on this lot as of the assessment date.

Donald L. Kennen owns two additional residential lots, which are not subject of this appeal, located at 84 Pheasant Tail Lane and 85 Pheasant Tail Lane. Unlike the Subject Lot, 84 Pheasant Tail Lane is improved with a 5,025 square foot residence and is classified as *residential property* by Summit County. The improved parcel consists of 0.91 acres and was built by Mr. Kennen and completed in 2010. 85 Pheasant Tail Lane parcel was under construction with a residence on the assessment date.

There is a common border between the Subject Lot and 85 Pheasant Tail Land parcel. The subject parcel has been used as a construction area holding site for the construction activities on 85 Pheasant Tail Land parcel. Access to all three parcels owned by Petitioner is off Pheasant Tail Lane.

The value of the subject is not in dispute; the parties only dispute the classification of the subject during the 2014-2015 tax years. Respondent has placed vacant land classification on the subject during the 2014-2015 tax years. Petitioner argues that the Subject Lot should be re-classified as residential land during the tax years in question.

#### Applicable Law

Section 39-1-102(14.4), C.R.S. defines “residential land” as:

“...a parcel or **contiguous** parcels of land under **common ownership** upon which residential improvements are located and that is **used as a unit** in conjunction with the residential improvements located thereon ...” (Emphasis added).

The Property Tax Administrator (PTA) interprets Section 39-1-102(14.4), C.R.S. to mean that “[p]arcel(s) of land, under common ownership, that are contiguous and used as an integral part of a residence, are classified as residential property.” See Assessors Reference Library (the ARL), Volume 2, Section 6.10. Citing *Sullivan v. Denver County Board of Equalization*, 971 P.2d 675 (Colo.App.1998) and *Fifield v. Pitkin County Board of Commissioners*, 292 P.3d 1207 (Colo.App.2012) the PTA adds that the primary residential parcel must conform to the definition of residential real property as defined in Section 39-1-102(14.5), C.R.S.

Further, the Property Tax Administrator, *see* ARL, Vol. 2. Section 6.10-6.11 titled “Special Classification Topics; Contiguous Parcels of Land with Residential Use,” emphasizes that the assessor’s judgment is crucial in determining if contiguous parcels can be defined as residential property and that a physical inspection provides information critical to the determination whether a contiguous lot can be classified as residential. Moreover, the PTA suggests several judgment criteria to be considered when making such a determination:

- Are the contiguous parcels under common ownership?
- Are the parcels considered an integral part of the residence and actually used as a common unit with the residence?
- Would the parcel(s) in question likely be conveyed with the residence as a unit?
- Is the primary purpose of the parcel and associated structures to be for the support, enjoyment, or other non-commercial activity of the occupant of the residence?

The Property Tax Administrator's interpretation of statutes pertaining to property taxation is entitled to judicial deference as the issue comes within the administrative agency's expertise. *Huddleston v. Grand Cty. Bd. of Equalization*, 913 P.2d 15, 16-22 (Colo. 1996) ("Judicial deference is appropriate when the statute before the court is subject to different reasonable interpretations and the issue comes within the administrative agency's special expertise.")

The Colorado Court of Appeals has cited favorably the PTA's interpretation of the statutory definition of "residential land" per Section 39-1-102 (14.4), C.R.S. as well as the PTA's proposed "judgment criteria" that assessors must consider when determining whether contiguous parcels are residential land. *Fifield*, 292 P.3d 1207.

Moreover, the procedures contained in the ARL promulgated by the Property Tax Administrator pursuant to Section 39-2-109(1)(e), C.R.S. are binding upon county assessors. *Huddleston*, 913 P.2d 15, 16-22.

#### Evidence Presented Before the Board

Petitioner's first witness, Travis Stuard, Senior Associate with Duff & Phelps testified to the contents of Petitioner's Exhibits 1-8. Mr. Stuard stated that 85 Pheasant Tail parcel and the Subject Lot share a common boundary where the two lots "touch." Mr. Stuard also testified that there is a driveway that crosses the Subject Lot to access 85 Pheasant Tail parcel.

Owner, Donald L. Kennen, testified that the building permits were taken out in March of 2008 for 84 and 85 Pheasant Tail Lane parcels. The residential construction on 84 Pheasant Tail Lane was completed in late 2010. According to Mr. Kennen, 84 Pheasant Tail Lane, where Mr. Kennen lives occasionally, has been classified as residential and 85 Pheasant Tail Lane has also been classified as residential based on the presence of the foundation. According to Mr. Kennen, the Subject Lot is used as a view corridor for wildlife such as mule deer, moose, bear and osprey. Trees were planted on the west side of the subject in 2008 as a buffer from the adjoining public road. He believes that the Subject Lot is an asset for 85 Pheasant Tail Lane parcel. Also, he believes that the subject is essential to 84 Pheasant Tail Lane's access and is necessary for accessing 85 Pheasant Tail Lane. Mr. Kennen also added that there is no visual boundary between 85 Pheasant Tail Lane and the subject.

Mr. Kennen testified that Pheasant Tail Lane is a private road owned by abutting lots along Pheasant Tail Lane. There are eight lots on Pheasant Tail Lane. Each lot is assessed \$800.00 per year in homeowners' dues, 2/3<sup>rd</sup> of which goes to the snow plowing and maintenance of the Pheasant Tail Lane.

Respondent presented the testimony of Michael Petersen, Certified General Appraiser with the Summit County Assessor's Office. Mr. Petersen testified to the contents of Respondent's Exhibits A-I. He testified as to Angler Mountain Ranch's Covenants, Conditions and Restrictions, specifically Common Elements in Respondent Exhibit H page 4, Access Control, page 32 and Easements, page 43. Mr. Petersen testified that the meeting of the lot lines of 84 Pheasant Tail Lane and the subject represents the center line of the easement (last 25-feet

along the lot lines of each adjoining parcel are subject to the easement) for extension of the Pheasant Tail Lane.

Next, Respondent presented the testimony of Beverly Breakstone, Summit County Assessor. Ms. Breakstone testified that she personally inspected the subject property. According to her observations, the residence located on 84 Pheasant Tail Lane has been listed for sale, and 85 Pheasant Tail Lane lot is under construction and to date has not received a certificate of occupancy. 71 Pheasant Tail Lane, the Subject Lot, has been in use as a construction holding site for the construction on 85 Pheasant Tail Lane. Ms. Breakstone stated that once a certificate of occupancy for 85 Pheasant Tail Lane is issued and the property is occupied, then it is her judgement that the Subject Lot at 71 Pheasant Tail Lane could be used as a unit in conjunction with 85 Pheasant Tail Lane for the support and enjoyment of the residence at 85 Pheasant Tail Lane. Ms. Breakstone testified that the Subject Lot is necessary for accessing 85 Pheasant Tail Lane parcel.

According to Ms. Breakstone, in order for the Subject Lot to qualify for residential classification based on its use in conjunction with 85 Pheasant Tail Lane, the residence on 85 Pheasant Tail Lane must be completed and occupied. According to Ms. Breakstone, because as of the January 1 of 2014 and 2015 there was only a foundation of the residence in place on lot 85 Pheasant Tail Lane, the subject does not qualify for residential classification.

#### The Board's Findings

The burden of proof in BAA proceedings is on the taxpayer to establish the basis for any reclassification claims concerning the subject property. *Home Depot USA, Inc. v. Pueblo Cty. Bd. of Comm'rs*, 50 P.3d 916, 920 (Colo. App. 2002). The Board finds that Petitioner met its burden of proving that the subject meets the definition of "residential land" which is defined in Section 39-1-102(14.4), C.R.S. as "a parcel or **contiguous parcels** of land under **common ownership** upon which residential improvements are located and that is **used as a unit** in conjunction with the residential improvements located thereon." (Emphasis added).

#### Common ownership

The parties had entered into a stipulation that there is a commonality of ownership between the Subject Lot and the other two residential parcels located at 84 and 85 Pheasant Tail Trail. Pursuant to the County records, all three parcels are owned by Donald L. Kennen.

#### Contiguity

There is no dispute that 85 Pheasant Tail Lane and the Subject Lot are contiguous.

Moreover, the evidence was presented before the Board that the subject parcel and 84 Pheasant Tail Lane parcel share a common border where the two parcels physically touch. Although the last 25 feet along the borders of each parcel is encumbered by an easement that allows for the Pheasant Tail Lane, a private road, to proceed between the two lots, the evidence before the Board was uncontroverted that the ground underlying the easement is owned in fee

simple by Petitioner. Therefore, under the facts of this case, the Board finds that the Subject Lot and 84 Pheasant Tail Lane are contiguous.

### Use

The Board did not find as persuasive the argument of the Summit County Assessor that the residential improvement on 85 Pheasant Tail Lane must be completed and occupied in order for the subject parcel to qualify for residential classification based on its use in conjunction with the residential parcel.

Pursuant to the directives in the Assessor's Reference Library, Vol. 2, Section 6.10-6.11 titled "Special Classification Topics; Contiguous Parcels of Land with Residential Use," "the primary residential parcel must conform to the definition of residential real property as defined in Section 39-1-102(14.5), C.R.S." – there is no requirement that the residential improvement must actually be completed and occupied as suggested by the Summit County Assessor.

Colorado courts have interpreted Section 39-1-102(14.4), C.R.S. to mean "that land on a parcel contiguous to another commonly owned parcel with a residential *dwelling unit* need only be used as a unit in conjunction with that residential dwelling unit (or associated residential improvement) to qualify as residential land." *Fifield v. Pitkin Cty. Bd. of Comm'rs*, 292 P.3d 1207 (Colo. App. 2012) (emphasis added). A completed structural foundation for a residential improvement in place on January 1st meets the *dwelling unit* minimum requirement set out by the Constitution and the Court of Appeals for a property to be classified as residential. *See* ARL Vol. 2, page 6.9.

There is no dispute that the residential foundation has been in place on 85 Pheasant Tail Lane property on 2014 and 2015 assessment dates. The evidence was presented before the Board that the lot at 85 Pheasant Tail Lane has been classified as residential land from 2011 forward since the completion of the residential foundation on that parcel in 2011.

The presence of a completed residential foundation as of January 1 assessment date meets the definition of a dwelling unit necessary for a residential classification. There is no basis in law for the Assessor's claim that a residential dwelling on the residential lot must be completed and occupied for the supporting vacant lot to receive residential classification based on its use in conjunction with the improved parcel. The Board finds that the same residential improvements that existed at 85 Pheasant Tail Lane parcel on the assessment date that were sufficient for that parcel to receive residential classification, are also sufficient for the subject vacant parcel to receive residential classification based on its use in conjunction with those residential improvements.

The Board is convinced that the subject parcel is used in conjunction with the 85 Pheasant Tail Lane parcel. Witnesses from both Petitioner and Respondent testified that access to 85 Pheasant Tail Lane parcel is through the subject parcel. Aerial photographs of the subject clearly indicate that the subject parcel is necessary to access 85 Pheasant Tail Lane parcel and that the driveway from the future residence on 85 Pheasant Tail Lane lies through the Subject Lot. The subject parcel has also been used as a construction area holding site for the construction

activities on the 85 Pheasant Tail Land parcel.

On the other hand, the Board is not persuaded that the subject parcel is used as a unit in conjunction with 84 Pheasant Tail Lane parcel. The Board does not agree that the observation of wildlife occasionally passing through the subject is sufficient to be considered a “use in conjunction” with 84 Pheasant Tail Lane lot. Similarly, the Board is not persuaded that Petitioner’s planting of a row of trees across the western boarder of the subject for a buffer from the Bald Eagle Road constitutes a “use in conjunction” with the residential parcel on 84 Pheasant Tail Lane. The Board was also not convinced by these facts that the Subject Lot is used as an integral part of the residence located at 84 Pheasant Tail Lane.

Petitioner presented sufficient probative evidence and testimony to prove that the subject property was incorrectly classified for tax years 2014 and 2015.

The Board considers the issue of classification in this appeal as a matter of statewide concern.

**ORDER:**

The petition is granted.

**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.

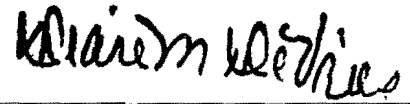
If the Board does not recommend its decision to be a matter of statewide concern or to have resulted in a significant decrease in the total valuation for assessment of the county in which the property is located, Respondent may petition the Court of Appeals for judicial review of such questions.

Section 39-10-114.5(2), C.R.S.

DATED and MAILED this <sup>th</sup> 25 day of January, 2017.

**BOARD OF ASSESSMENT APPEALS**

  
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James R. Meurer

  
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Diane M. DeVries

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

  
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Milla Lishchuk

