BOARD OF ASSESSMENT APPEALS, STATE OF COLORADO 1313 Sherman Street, Room 315 Denver, Colorado 80203	Docket No.: 69727
Petitioner: **MICHAEL AND ROBIN AWE,** v. Respondent: **LA PLATA COUNTY BOARD OF COMMISSIONERS.**	

ORDER

THIS MATTER was heard by the Board of Assessment Appeals on March 20, 2017, Debra Baumbach and Amy J. Williams presiding. Petitioners were represented by F. Brittin Clayton III, Esq. Respondent was represented by Kathleen Lyon, Esq. Petitioners are protesting the 2014 and 2015 classification of the subject property.

Petitioners and Respondent stipulated to admission of all exhibits including Petitioners' Exhibits 1-6 and Respondent's Exhibits A-G. To avoid duplicative testimony, the Board agreed to consolidate six dockets pertaining to different properties for purposes of the hearing only. The Board will decide each case solely on its own merits without regard to discussion pertaining to the five properties with separate decisions issued for each. The dockets addressed in the hearing include: Docket No.69058 Michael Awe & Robin Awe v. La Plata County Board of Equalization; Docket No.69727 Michael Awe & Robin Awe v. La Plata County Board of Commissioners; Docket No. 69060 Charlene Dimacali v. La Plata County Board of Equalization; Docket No. 69729 Charlene Dimacali v. La Plata County Board of Commissioners; Docket No. 69061 Twilight Ridge LLC v. La Plata County Board of Equalization and Docket No. 69723 Twilight Ridge LLC v. La Plata County Board of Commissioners.

Description of the Subject Property

Lot A, Exemption Plat Proj 83-256,
La Plata County Schedule No. R002702

This appeal involves the relationship between two legal and platted residential lots located in the above described Exemption Plat, La Plata County, Colorado. The subject is a

vacant, buildable residential lot classified as *vacant land* by La Plata County, hereafter identified as Subject Lot. This lot contains 3.0 acres, is vegetated with trees, shrubs and native grasses with an open meadow area along the eastern boundary. The Subject Lot is generally rectangular in shape, and slopes upward. Access to this parcel is via a private access easement off of a public roadway identified as Falls Creek Circle. Said access easement enters the Subject Lot along its southern boundary. County records indicate that the Subject Lot is owned by Michael and Robin Awe. There are no residential or recreational improvements on this lot as of the assessment date.

Michael and Robin Awe own an additional residential lot, which is not a subject of this appeal, located at 2005 CR 205, hereafter identified as Residential Lot. Unlike the Subject Lot, this lot is improved with a 2,114 square foot residence and several outbuildings and is classified as *residential property* by La Plata County. The improved parcel consists of 2.0 acres and access to the Residential Lot is via a private access easement along the northern boundary also along Falls Creek Circle.

The Subject Lot and the Residential Lot are located adjacent to one another, sharing east and west property boundaries.

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. Petitioners argue that the subject parcel 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]arcels 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

Petitioners called Curt Settle, Deputy Director of the Division of Property Taxation as their first witness. Mr. Settle testified that he was familiar with the Assessor's Reference Library (ARL) and the portions of the ARL relevant to residential classification of contiguous parcels of land with residential use. He also reviewed the legal memorandum of law prepared by Petitioners. Mr. Settle stated that there does not have to be improvements on an adjacent, vacant, parcel for it to be considered for residential classification. He opined that the four questions bulleted in the ARL, and cited above, for consideration by Assessor's prior to assigning a residential classification to an adjacent vacant parcel are suggested criteria only. He testified that the DPT does not have any specific uses in mind relevant to the fourth bulleted question, rather the DPT recommends that "support and enjoyment" be considered broadly. Mr. Settle stated that both passive and active uses of an adjacent, vacant parcel could qualify for re-classification to residential. When asked if an adjacent, vacant parcel were listed for sale on January 1st separate from the adjacent residential parcel, would that disqualify the vacant parcel from residential classification. Mr. Settle responded that the listing would be a red flag, something to be considered. Mr. Settle stated that appraisal judgement is involved with classification decisions, but no valuation judgement is necessary. While each assessor is asked to use their judgement when classifying property, similar results should result from similar facts by various assessors. The DPT hopes for uniform application of law.

On cross examination, the process for adoption of changes and additions to provisions within the ARL was discussed. Mr. Settle confirmed that the DPT drafts suggested changes and

presents said changes to the Statutory Advisory Committee for approval. State Board of Equalization and Legislative Legal Services also review the proposed changes prior to final adoption. Mr. Settle testified that he was involved in changes to the ARL which occurred in 2015 incorporating the *Fifield* decision into ARL, Vol. 2, Section 6.10-6.11 titled "Special Classification Topics; Contiguous Parcels of Land with Residential Use." Mr. Settle indicated that the DPT does provide training to assessor staff on how to properly classify property and that Colorado is a "use" state, meaning classification is based on use as of January 1st of each year and a use must be shown to receive a classification.

Petitioners called Mr. Michael Awe, owner, to testify as a second witness. Mr. Awe testified that he purchased the Residential Lot in 1989 and acquired the adjacent Subject Lot in 1993. He purchased the Subject Lot to prevent another residence from being constructed adjacent to his residence. During the relevant two-year period Mr. Awe stated the Subject Lot was used for recreation, view protection, sledding and skiing. He also mowed the meadow area adjacent to the Residential Lot and planted trees along the southern boundary. He created a brush pile that sits partly on the Subject Lot, but mostly on the Residential Lot. Also, while there is a primitive fire pit on the Subject Lot, Mr. Awe testified that the fire pit had not been used during the relevant two-year time frame. Additionally, he does not mow the meadow area every year, possibly every two years.

On cross examination, Mr. Awe affirmed that the Subject Lot is a buildable lot. He stated that the trees along the southern boundary were planted in 2003 with many dying off over time; none have been replanted. He also agreed that the majority of the lot was in an unaltered, natural state.

Respondent presented the testimony of Diana Cole, Appraiser with the La Plata County Assessor's Office. Ms. Cole testified she inspected the Subject Lot in March of 2016 and at that time saw some mowing and the planted trees. Ms. Cole referred to several photos in Exhibit D and indicated she did not see any trails or pathways on the property. Based upon her inspection whereby she saw no visible evidence of use, Ms. Cole testified that she denied Petitioners' request for residential classification of the Subject Lot.

On cross examination, Ms. Cole was asked if a residential use is satisfied when the property is one parcel, would it not be satisfied if the parcel is split in two? Ms. Cole responded negatively; each parcel must be considered individually. Ms. Cole also did not consider buffering to be an adequate use to meet the requirements for residential classification of an adjacent, vacant parcel. Neither did Ms. Cole consider enhancing and protecting views or walking or hiking to be qualifying uses. On re-direct, Ms. Cole testified that the only evidence she saw of use on the Subject Lot was some mowing and trees planted along the southern boundary, none of which were considered uses integral to the residence on the Residential Lot.

Respondent called Craig Larson as a second witness. Mr. Larson testified that he was aware of the *Fifield* decision and understood that no structures are necessary for an adjacent, vacant parcel to achieve residential classification. Mr. Larson further testified that he did not believe buffering or enjoyment were qualifying uses. The planted trees were also not an integral use and the trees had not been maintained. Additionally, Mr. Larson testified that sledding and

skiing are incidental uses and that no use integral to the adjacent residence was evident, therefore, the Subject Lot is properly classified as vacant.

On cross examination, Mr. Larson testified that view preservation and enjoyment of the Subject Lot alone are not qualifying uses to achieve residential classification. Considering there are houses all around the Subject Lot, Mr. Larson opined that a house being built on the Subject Lot may not have a significant impact. Further, the Subject Lot must still have a use for the enjoyment of said use to qualify.

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 Petitioners failed to meet their 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 Residential Lot. Pursuant to the County records, both parcels are owned by Michael and Robin Awe.

Contiguity

The parties had entered into a stipulation that there is contiguity between the Subject Lot and the Residential Lot. Factually, the two lots are adjacent to one another, sharing the east and west boundary lines.

Use

The Board is not persuaded that the Subject Lot is used as a unit in conjunction with the residential improvements located on the Residential Lot. In making this finding, the Board was not convinced by Petitioners' claimed uses of the Subject Lot. Instead, the Board was persuaded by Respondent's witnesses, both Craig Larson and Diana Cole, who conducted multiple site visits to view the Subject Lot and did not observe any evidence of use of the Subject Lot in conjunction with the residential improvements located on the Residential Lot. Mr. Awe's testimony further diminished the credibility of Petitioners' claimed uses in that he stated the primitive fire pit had not been used for many years and his mowing was intermittent. No convincing evidence of use which reasonably connect the Subject Lot to the residential improvements located on the Residential Lot was provided by Petitioners. The Board was also persuaded by Mr. Larson's testimony that the development on the Subject Lot would not have a significant impact on the views from the residence on the Residential Lot.

After carefully weighing all of the evidence and considering the credibility of the witnesses, the Board is convinced that no portion of the Subject Lot was used by Petitioners as a unit in conjunction with the residential improvements located on the Residential Lot for tax years 2014 and 2015. Accordingly, the Board does not believe that any portion of the Subject Lot is entitled to residential classification for tax years 2014 and 2015. See *Farny v. Bd. of Equalization*, 985 P.2d 106, 110 (Colo. App. 1999) and *Fifield*, 292 P.3d at 1210 (determination of acreage entitled to residential classification is question of fact for BAA).

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

ORDER:

The petition is denied.

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 16th day of May, 2017.

BOARD OF ASSESSMENT APPEALS

Deborah Baumbach

Amy J. Williams

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

Milla Lishchuk