BOARD OF ASSESSMENT APPEALS, **STATE OF COLORADO** 1313 Sherman Street, Room 315 Denver, Colorado 80203	**Docket No.:** 76296
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 August 18, 2020, Diane DeVries and Valerie Bartell presiding. Petitioner Trautner was represented by her husband, Dean Bosworth. Respondent was represented by Dennis R. Goldbricht, Esq. Petitioner protests the actual value of the subject property for tax year 2019. Petitioner also requests the subject be classified as residential property.

EXHIBITS

The Board admitted into evidence Petitioner's Exhibit A, *Petitioner Estimate of Value/Classification*; Exhibit B, *Reference Appraisals*; Exhibit C, *Comparable Property Data*; Exhibit D, *Adverse Site Condition References*; and Exhibit E, *Building Costs/Permit Documents*. The Board also admitted Respondent's Exhibit A, *Appraisal of Subject Property*; and Exhibit B, *Avalanche Hazard in the Town of Silverton*.

DESCRIPTION OF THE SUBJECT PROPERTY

Address: 302 E. 12th Street, Silverton, CO 81433
County Property ID: 48291730180021

The subject property is a 2,500 square foot site, improved as of the January 1, 2019 assessment date with a partially constructed 1,386 square foot garage. The subject property's actual value, as assigned by the County Board of Equalization ("CBOE") below and as requested by Petitioner, are:

CBOE's Assigned Value:	$ 180,000
Petitioner's Requested Value:	$ 110,000
Board's Concluded Value:	$ 175,242

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 or classification 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 taxpayer also 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); *Johnston v. Park Cty. Bd. of Equalization,* 979 P.2d 578, 580 (Colo. App. 1999).

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.

FINDINGS AND CONCLUSIONS

I. Classification

The first item at issue is the classification of the subject.

A. Facts

The subject property is a 2,500 square foot site, improved as of the January 1, 2019 assessment date with a partially constructed 1,386 square foot garage. The garage was under construction on January 1, 2019. Petitioner's husband and testifying witness at hearing, Dean Bosworth, estimated the percent complete on January 1, 2019 to be 2/3 (67%). Mr. Bosworth stated that as of January 1, 2019, that the garage was unfinished, uninsulated, unplumbed, with no siding uninstalled, no electrical wiring installed, the garage door installation incomplete, framing

incomplete, with doors partially installed and no windows installed. There was no water, and no septic or sewer lines to the structure. The garage has a three-car capacity. At some point after the assessment date, the garage was put to use as residential storage and for the storage of a vehicle. Mr. Bosworth also testified the process of converting it to a residence "has now begun."

Mr. Bosworth testified that although the garage was designed and built as a garage with no living quarters, he intended the use to progress in phases, with the intent that the garage be used in the future as mixed residential and commercial use. His intent when he took out his building permit was building the first phase of a mixed use project. At the time construction of the garage started he had plans for a residential addition partially within the garage and partially adjacent to it. He testified the structure has a firewall to be used between the garage and the "future residential portion of the property." The building plans for the garage, identified as "Trautner Garage," include reference to a 1-hour firewall, a label for a "Non Habitable Storage Loft," "Future Const.," "Future Restroom and a "Future Build-Out." (Petitioner's Exhibit E, pp, 7, 11.) In February 2019, while the garage was under construction, Mr. Bosworth discovered or was alerted to fact that the garage is located in an avalanche zone, and is now unsure what use is permitted by the Town of Silverton. He stated he has started a process with the Town of Silverton to look at allowing mixed use of the structure, with mostly residential and a small commercial aspect.

The property is zoned BP - Business Pedestrian - by the Town of Silverton. Mr. Bosworth testified both that zoning allows mixed and is restricted to residential. The property is located within an avalanche zone, which restricts the permissible uses, and requires an avalanche development study prior to development.

B. Argument

Petitioner requested that the subject property be classified as residential, because the Town of Silverton zoning limits the use of the garage to use as a residential garage. Petitioner cited section 3(1)(b) of Article X of the Colorado Constitution, along with references from 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.

The San Juan County Assessor, Kim Buck, assigned a classification to the property of non-residential, designating it as a warehouse/storage facility. Ms. Buck testified in support of a non-residential classification. Ms. Buck testified that the garage was constructed with no residential space, and the building plans and permit showed no residential space. She also testified that Mr. Bosworth told her at some point during construction of the building that he had no plans to put a residential apartment into the structure. She testified that while the building plans did contain some indication that in the future a residential use may occur, those residential aspects were not part of what was built. Ms. Buck testified the structure was permitted and has been used as a garage.

C. Law

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 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-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); *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). In addition, 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 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).

D. Analysis

The Board finds that the current use of the property as of the assessment date was commercial. Petitioner and Respondent each provided a copy of building plans submitted to the Town of Silverton for permitting of the improvement on the subject property. The plans do not identify the improvement as a residential improvement. The plans identify the structure as a garage, and this is how it is referred to by Petitioner throughout her own exhibits. While the plans indicate a 1-hour firewall on the south side of the building, and reference a future restroom, future build out and future construction, these items are not sufficient to indicate any portion of the foundation in place is for a residential unit, as these items could just as easily been in place for a future commercial addition. Even if the intent was to at some point change or add to the design of the garage in order to create a residence, that use was not in place as of the assessment date. If it was the loft in the garage that was the portion intended to be used as a residence, the Board notes the plans designated it a "Non Habitable Storage Loft." The Board finds the design and use of the structure as of the assessment date is as a garage, with no residential use. The garage was not designed for use predominantly as a place of residency, and does not meet the definition of a "dwelling unit." The residential aspect, if it occurs, may be through a remodel and/or addition to the garage, but does not yet exist.

The Board also 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. Mr. Bosworth stated both that the zoning allows mixed use and is restricted to residential. Ms. Buck concluded that the existing use is the highest and best use, which the Board interprets to mean the current commercial use may be allowed by the current zoning. The parties focused more closely on the use restrictions imposed by the Avalanche Hazard Zoning applicable to the subject due to its location within the Avalanche Hazard Zoning District, found in Town of Silverton Ordinance 2005-02, "Avalanche Hazard Districts," and Municipal Code section 16-4-240. As noted by Ms. Buck, the Town of Silverton issued a building permit for the existing use without enforcing the avalanche zone permitting provisions. It is unclear to what extent the Town will enforce the Code in the future, and Mr. Bosworth 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, and so the Board rejects the argument that the

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.

The Board determines reasonable future use of the subject to be its current use as a garage, as of the January 1 assessment date. 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). 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 2019. 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 2019.

E. Conclusion

The Board finds the subject does not meet the requirements for classification as a residential property during tax year 2019. The actual use of the property on the January 1 assessment date 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). Although the status of zoning and permitting may be unclear, the improvement on the subject property as of the assessment date was designed, permitted, and constructed as a garage, not as a residence, and the Board therefore cannot find residential classification is appropriate. The Board finds that Petitioner has not met her burden of proof to show that the Assessor's classification was incorrect.

II. Valuation

The second item at issue is the valuation of the subject property.

A. Facts

The characteristics and location of the subject property were not at issue, and the subject property as of the January 1 assessment date is as described above – a partially complete 1,386 square foot garage located on a 2,500 square foot site.

B. Argument

Petitioner asserted that Respondent has not adequately considered the subject property's condition, allowable uses, or site restrictions in its valuation. Mr. Bosworth testified that the subject's value was negatively impacted by adverse site conditions that had not been adequately accounted for by Respondent. These include the subject's location in an avalanche zone, as a result of which certain uses are not allowed, and studies and mitigation may be required before certain uses could be employed. He also pointed out the subject's location adjacent to the railroad tracks

and a propane center, and outside of the central business district. He further noted a power line encroachment, which reduces the buildable area of the subject site by an estimated 15%. Mr. Bosworth also argued the subject was valued higher than similar properties nearby, and that Respondent did not comparable properties or proper costs. Mr. Bosworth testified the town enforces its use restrictions. He argues Respondent chose comparables that are not similar to the subject due to their location in the central business district. He also contends Respondent's comparables were also not similar to the subject in that they are not unfinished garages. He argued in favor of the application of a cost approach to value.

Respondent rejoins that it has considered these characteristics in reaching its conclusion of value. Respondent presented the testimony and supporting appraisal of the San Juan County Assessor, Kim Buck, and argued this should be given greater weight by the Board than the testimony and evidence presented by Mr. Bosworth, who is not a licensed appraiser.

C. Law

For property taxation purposes, the value of non-residential property shall be determined "by appropriate consideration of the cost approach, the market approach, and the income approach to appraisal." § 39-1-103(5)(a), C.R.S.

Actual value shall be determined "by appropriate consideration of the cost approach, the market approach, and the income approach to appraisal." § 39-1-103(5)(a), C.R.S.; *CTS Investments v. Garfield Cty. Bd. of Equalization*, 342 P.3d 451 (Colo. App. 2013). However, the nature of the property being appraised or the lack of sufficient data may rule out reliance on one or more of these approaches. *See e.g. Creekside at DTC, Ltd. v. Bd. of Assessment Appeals*, 811 P.2d 435, 438 (Colo. App. 1991).

D. Analysis

Respondent provided a restricted appraisal report authored by Ms. Buck, (Respondent's Exhibit A) which considers all three accepted appraisal methods to value the property - the cost approach, the sales comparison (market) approach, and income approach.

Mr. Bosworth stated the cost approach is most relevant to the subject, due to the unique characteristics of the property, including its partial completion. In the reconciliation of value, Ms. Buck agreed that the cost approach is most relevant; and placed the most weight on the cost approach in the final value conclusion. As both parties appear to agree that the cost approach was most relevant, the Board will analyze the merits of the cost approach developed by the Respondent, and arguments raised about the appraisal by Petitioner.

Ms. Buck provided seven land sales in the development of the land value. Three of the seven comparable sales have a similar site area, and none of the sales have a site area larger than 5,000 square feet. All seven comparable sales are in the Town of Silverton, however, none of the sales are within an avalanche zone. Ms. Buck placed most weight on comparable sales 1 and 3, which resulted in a reconciled value of $30.20 per square foot of land. Mr. Bosworth stated that instead comparable sales 5 and 7 (with adjusted values of $18.71 and $22.28 per square foot

respectively, for an average of $20.50 per square foot) are most comparable due to similar zoning and proximate location to the subject. While there is some merit to the point that sales 1 and 3 are most similar in size to the subject, the Board agrees with the Petitioner that comparable sales 5 and 7 would align more closely to the highest and best use of the subject than sales 1 and 3, which are along Greene Street, the primary vehicular thoroughfare in Silverton. Furthermore, Respondent's analysis includes a size factor adjustment to sales 5 and 7.

Petitioner further testified that the adjusted value provided by Respondent did not consider the subject's unique location within an avalanche zone and encumbrance by power lines. However, the Board finds Ms. Buck did perform sufficient analysis to determine that the subject's presence in an avalanche zone and presence of overhead power lines did not have a negative effect on its value.

Next, the Board was asked to consider the merits of the cost estimates provided by Petitioner and Respondent for the partially-completed garage on the subject property. Petitioner provided Exhibit E as well as testimony under oath regarding the expenses incurred on the property through January 1, 2019. These costs totaled $60,699.01. This itemized list did not include permitting costs of $4,562.50, which were itemized elsewhere in Exhibit E. Based on the figures provided, the cost per square foot incurred for construction is $47.08. Petitioner testified that the actual cost of construction thus far represented the best estimate of the contributory value of improvements utilizing the cost approach.

Respondent provided a cost estimate using the CoreLogic – SwiftEstimator, a nationally recognized cost estimating software platform. The cost estimate was provided in Respondent's Exhibit A, and the estimate did appear to consider the partial completion of the subject improvement, including lack of HVAC, plumbing, insulation and incomplete siding and loft area. Respondent testified that the default local cost multiplier was utilized, though the local multiplier often underestimates the cost of construction due to Silverton's remote location, limited local builders and short construction season. Estimated cost of construction was $89.46 per square foot, or $123,991.56. Respondent testified that Petitioner's cost estimates may be lower due to the fact that Petitioner is a professional engineer experienced in managing a construction project.

In reviewing the merits of each construction estimate, the Board is being asked whether to utilize the actual costs incurred by the property owner, or the likely value of said improvements to the open market. The Board concludes that Petitioner has not demonstrated the actual costs incurred by Petitioner would have an equivalent value in the market, and no entrepreneurial incentive need be considered.

E. Conclusion

The Board determined, based on the testimony and evidence provided by Petitioner and Respondent, the subject value to be:

Land Value: 2,500 square feet x $20.50 = $51,250

Contributory Value of Improvements: $123,992

Value of the Subject Property: **$175,242**

The Board finds that Petitioner has met her burden of proof to show that the Assessor's valuation of the property was incorrect.

ORDER

The petition to reclassify the subject property as residential property is **DENIED**.

The petition to reduce the 2019 actual value is **GRANTED**. The Respondent is ordered to reduce the 2019 actual value of the subject property to $175,242. The San Juan County Assessor's Office is directed to change its 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 26th day of February, 2021.

BOARD OF ASSESSMENT APPEALS:

Drafting Board Member:

Valerie C. Bartell

Concurring Board Member:

Diane 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.

Yesenia Araujo