BOARD OF ASSESSMENT APPEALS, **STATE OF COLORADO** 1313 Sherman Street, Room 315 Denver, Colorado 80203	**Docket No.: 79420**
Petitioner: **ELK MEADOW RV ESSENTIAL GROUP LLC,** v. Respondent: **LARIMER COUNTY BOARD OF EQUALIZATION.**	
FINAL AGENCY ORDER	

THIS MATTER was heard by the Board of Assessment Appeals ("Board") on April 8, 2021, Sondra Mercier and John DeRungs presiding. Attorney Thomas E. Downey, Esq. appeared on behalf of Petitioner. Respondent was represented by Frank Haug, Esq. Petitioner appeals the actual value of the subject property for tax year 2020. Petitioner also appeals assessed value of the subject property for tax year 2020, on grounds that the County misclassified portions of the subject property.

PETITIONER'S POST-HEARING MOTION

On April 14, 2021, Petitioner filed "Petitioner's Post-Hearing Motion." The County responded. Petitioner requested that the Board exclude from consideration the testimony of Respondent's witness relating to 2018 valuation data, and her testimony regarding rental rate data that the Board elicited through questioning.

The Board may not consider valuation data from after June 30, 2018 in determining whether the County assigned an incorrect value to the subject for tax year 2020. § 39-1-104(10.2)(a), (d), C.R.S. The Board notes that the County's appraiser, Ms. Thornton, testified that she weighted her consideration of the data and her conclusions to account for the fact that some of the data was outside the statutory data collection period. The Board finds this testimony credible. The post-June 30, 2018 data is given no weight by the Board.

The Board has resolved this appeal without consideration of testimony given by Ms. Thornton that was responsive to the challenged questioning by the Board, including testimony concerning rental rates at the comparable sales.

EXHIBITS

The Board admitted into evidence Petitioner's Exhibits 1-5 and Respondent's Exhibit A.

DESCRIPTION OF THE SUBJECT PROPERTY

Elk Meadow RV Park
1655 Highway 66, Estes Park, CO
County Schedule No R0578053

The subject property is 30.67 acres north of the Big Thompson River southwest of downtown Estes Park. It abuts Rocky Mountain National Park and is within a mile of an entrance. It has 169 RV pad sites, eight cabins, three teepees, 36 tent sites and various amenities including a stocked fishing pond, mini-golf course, heated pool and hot tub, restrooms and office/gift shop.

The subject property's actual value, as assigned by the County Board of Equalization ("CBOE") below and as requested by Petitioner and Respondent, are:

CBOE's Assigned Value:	$5,500,000
Respondent's Recommended Value:	$5,100,000
Petitioner's Requested Value:	$4,180,000

The Assessor's Office has classified the subject property as mostly commercial, and partly residential. Petitioner argued in favor of expanded residential classification.

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, 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 AND AUTHORITY

1. Valuation

For property taxation purposes, the value of residential properties must be determined solely by the market approach to appraisal. *See* Colo. Const. art. X, § 20(8)(c); § 39-1-103(5)(a), C.R.S. 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 income approach is a common method for calculating the value of commercial properties. *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*.

2. Classification

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); *Johnston v. Park County Bd. of Equalization*, 979 P.2d 578, 580 (Colo. App. 1999).

Property classifications are based on the use and characteristics of the property as of January 1 of the tax year. *Johnston*, 979 P.2d at 581; *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). Relevant factors for determining classification include the original design, zoning and other restrictions, and probable use. *Mission Viejo v. Douglas County Bd. of Equalization*, 881 P.2d 462, 465 (Colo. App. 1994); *see also Gyurman v. Weld County Bd. of Equalization*, 851 P.2d 307 (Colo. App. 1993); *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).

The definition of residential improvements and residential land are 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*, 881 P.2d at 464. "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 value and valuation for assessment of improvements which are used as a residential dwelling unit and are also used for any other purpose, the actual value must be determined by a process of apportionment of classification based on use. § 39-1-103(9)(a), C.R.S.

Motor vehicles, such as "RVs" are taxed as personal property, "in lieu of all ad valorem taxes upon such property." Colo. Const. art. X, § 6.

ARGUMENT

The Board heard the testimony of Bruce Cartwright. Mr. Cartwright maintained that the actual value should be based on capitalizing net income by developing an Income Approach. He supplied several quarters of actual operating income and expense data from which to reach an estimate of earnings before interest, taxes, depreciation and amortization (EBITDA) by a methodology commonly used to value hotel properties. He also deducted a charge for a reserve for replacement of short-lived items yielding $530,000, rounded. By "loading" his selected capitalization of 10% he applied a 12.141% rate to reach a value conclusion before deduction for personal property. As assessed by Larimer County in 2018 at $182,680, that produced a residual value for real estate only to arrive at his recommended value of $4,180,000.

The Petitioner objected to Respondent's reporting of calendar year data for 2018 in its Income Approach because it reflected operations for six months after the statutory value date of June 30, 2018. Mr. Cartwright also believed that taxes other than for real property had been misapplied, that the County had incorrectly classified portions of the property, and that no reserve for replacements had been considered.

The County presented the testimony of appraiser Kathy Thornton. Ms. Thornton adopted the same methodology for developing the Income Approach. In her testimony, Ms. Thornton

explained that by giving most weight to the 2017 data (in effect by three times that of the 2018 data) she accounted for the statutory appraisal date. She also acknowledged that corrections were needed to certain line items at issue: namely the real estate taxes and replacement reserves. On her part, she also excluded two other line items in Petitioner's reports, namely mortgage and investor expenses. Ms. Thornton testified in favor of the County's classification of the property.

FINDINGS AND CONCLUSIONS

As relevant to the testimony of Mr. Cartwright, generally, expert witnesses may not testify under contingent fee agreements. *City and Cty. of Denver, Colo. v. Bd. of Assessment Appeals*, 947 P.2d 1373 (Colo. 1997). *See also* Colo. Rev. Stat. § 12-61-712(1)(b). However, an expert witness may testify as a consulting service where a contingent fee arrangement is disclosed under Colo. Rev. Stat. §§12-61-702(2.5) and 12-61-712(1). *FirstBank - Longmont v. Bd. of Equalization of Boulder Cty.*, 990 P.2d 1109 (Colo. App. 1999). The Board finds Mr. Cartwright's agency and appraisal fee arrangements were clearly disclosed to the Board. Taking into consideration the nature of Mr. Cartwright's compensation, the Board regards Mr. Cartwright's appraisal as a consulting service, not an independent appraisal. In analyzing this case, the Board weighs the evidence provided by Mr. Cartwright in light of the disclosed bias shown by the contingency fee arrangement.

1. Valuation

The Board recognizes that RV parks vary tremendously by the number of pad sites, their layout, the type of secondary units offered for rent, including cabins, tent sites and teepees, and a range of amenities found. No two are really alike, let alone the very few that have recently sold statewide. It forced both the Petitioner and Respondent to use the same group of seven of these sales. Altogether, these RV Parks had 36 to 97 RV pad spaces and various other secondary units. On a raw unadjusted basis, both parties show that they yield a range of from $13,636 to $50,909 per pad site and a median unit price at $26,140 per pad site.

The Petitioner used the market approach as a test of reasonableness only. Using only the Income Approach, Mr. Cartwright's conclusion of value at $4,180,000 produces an indication at $24,734 per RV pad site, or close to the median unit price as shown.

The Board agrees with Ms. Thornton's exclusion of mortgage and investor expenses – they are not considered customary operating costs. That mitigates in favor of Respondent's decision to lower its estimate of value $4,330,000 using the Income Approach. However, the Board finds that Respondent's reconciled income and market approach still led to an incorrect overvaluation of the subject property.

The Respondent understandably gave slightly more weight to the only sale found of an RV Park in Estes Park at $32,558 per unit. (Exhibit A, p. 22.) But as the Petitioner noted, the Respondent applied their estimated unit value of $29,506 to not just the 169 RV pad sites but also to the cabins, teepees and tent sites, or a total of 216 units. Indeed, the Board believes that Respondent's resulting estimate using the market approach at $6,369,000, when given some

weight in their final conclusion, did overvalue the property as a result. The Board does not consider market data from outside the statutory data period (post June 30, 2018) in drawing its conclusions.

The Board concludes that Petitioner has met its burden of proving that the assigned value for tax year 2020 is incorrect, and that the correct value is $4,180,000.

2. Classification

The Board next considers Petitioner's classification argument. Petitioner argued that the subject should be classified as a hotel, because the subject meets the definitions of "hotel" contained in statute at § 39-1-102(5.5)(a) and "hotel unit" at § 39-1-102 (5.5)(c), C.R.S. Mr. Cartwright presented the definition of "camping" contained in statute at § 33-10-102(2), testifying he had relied on it for clarification of the definition of "camping" included in § 39-1-102(5.5)(a). Based on his conclusion that the subject is a hotel because it provides camping, Mr. Cartwright argued that the subject may be assigned mixed residential and commercial use, using a method from the Assessors' Reference Library that allocates a residential classification percentage based on extended stays over 30 nights. Mr. Cartwright presented a calculation of stays over 30 nights at the RV pad sites, cabins, teepees, and tent sites, using this "room night analysis methodology" to arrive at a percentage of the land and improvements he asserted qualify for residential classification.

The Board rejects Petitioner's argument that the subject is a hotel or hotel unit.

In relevant part, hotels are statutorily defined as "improvements and the land associated with such improvements that are used by a business establishment primarily to provide lodging [or] camping…." § 39-1-102(5.5)(a), C.R.S. An "improvement" is defined by statute in pertinent part as "all structures, buildings, fixtures, fences, and water rights erected upon or affixed to the land…." § 39-1-103(6.3), C.R.S.

The Board finds the portions of the subject containing unimproved RV pad sites and unimproved tent sites are not hotel property, because these sites contain no "improvements" qualifying them as hotels under the statutory definition. They are not structures, buildings, or fixtures. The Board does not need to evaluate whether RVs are improvements, because the RVs are not owned by Petitioner or the subject of this appeal. It is the unimproved RV pad sites which are owned by Petitioner. The RVs are motor vehicles and are already taxed as personal property, specifically in lieu of ad valorem real property taxation.

Petitioner did not provide sufficient evidence to prove that the teepees are structures, buildings or fixtures; in addition, the Board cannot determine from the evidence whether they are affixed to the land and have a structural foundation. The requirement of a residential foundation and for a structure to be affixed to the land is highlighted in the assessors' guidelines for analysis of whether partially completed structures should be classified as residential. "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).

The Board notes Petitioner's reliance on the opinion of the Colorado court of appeals in *E.R. Southtech, Ltd. v. Arapahoe County Bd. of Equalization*; however, that case involved the assignment of residential classification based on long term occupancy to a portion of a hotel property containing 10 separate buildings. *E.R. Southtech, Ltd. v. Arapahoe County Bd. of Equalization*, 972 P.2d 1057, 1058 (Colo. App. 1998). Likewise, the division of the court of appeals deciding *Manor Vail Condominium Assoc. v. Bd. of Equalization of the County of Eagle, et al.* analyzed the mixed use of a 123-unit condominium complex. *Manor Vail Condominium Assoc. v. Bd. of Equalization of the County of Eagle, et al.*, 956 P.2d 654, 655 (Colo. App. 1998). The court referenced a statutory scheme that contemplates that a "single building" may have multiple uses, in which case "the building" is to be apportioned and classified according to its uses. *Id*. at 657-658. The statute addressing mixed use addresses "an improvement which is used as a residential dwelling unit." § 39-1-103(9)(a), C.R.S. The RV pad sites and tent sites at the subject are not improvements or buildings, and Petitioner did not show that the teepees are improvements.

Hotel units are defined as "any residential unit included in hotel units." § 39-1-102(5.5)(c), C.R.S. Residential unit is further defined as "a condominium unit, a single family residence, or a townhome." § 39-1-102(5.5)(c)(V), C.R.S. The subject is not a hotel unit because RV pad sites, teepees, tent sites, and cabins are not "residential units" under the statutory definition.

Because the subject is not a hotel, there is no need for the Board to analyze Mr. Cartwright's calculation of asserted residential use under the ARL's "room night analysis methodology." The Board further finds that Mr. Cartwright's application of the "room night" methodology is not supported. Volume 3 of the ARL specifically defines hotels and motels as "land and improvements," but as discussed above RVs and tents are not "improvements," and the Board was not presented with sufficient evidence to analyze whether the teepees are "improvements."

There are also eight rental cabins at the subject, but there were no stays of 30 days or more in the cabins presented in Petitioner's material. (Exhibit 7, p. 85.) All of the stays of 30 days or more shown were at the RV pad sites. Even if the rental cabins could qualify the subject, or a percentage of its value, as a hotel, since none of the extended stays took place at the cabins, these stays cannot form the basis under the room night analysis methodology for the assignment of a residential classification to the subject property.

The County classified some portions of the subject as residential. Ms. Thornton testified to an Assessor's Office practice of allowing residential classification for year-long residents of the RV park, where the tenants have signed a year-long lease and use the RV as their primary residence. In addition, the Assessor's Office also allows residential classification for sites that are used by employees of the park for at least 30 days. The Assessor's Office does not allow residential classification for sites used for stays by visitors. Ms. Thornton testified that although Larimer County calculates extended stays over 30 nights for hotel properties, and assigns a residential classification as a result, she did not do so for the subject. Notwithstanding a mistaken reference in her appraisal report to the subject as being in use as a motel, Ms. Thornton testified it was not her intention to represent that the subject property was, or should be, classified as a motel.

The Board understands that Petitioner argued that the subject is a hotel and therefore did not need to meet the definition of residential land; Petitioner's argument rested on its contention that as a hotel, portions of the subject used for extended stays qualified for residential classification under the ARL's mixed use, room night analysis. Nevertheless, having rejected that argument, the Board also finds it worth noting that hotels and motels are specifically excluded from the definition of "residential real property" by statute. § 39-1-102(14.5), C.R.S., and that the subject does not satisfy the statutory definitions for residential classification.

Residential real property includes residential dwelling units and land on which such units are located. Colo. Const. Art. X, Section 3(1)(b); 2 Div. of Prop. Taxation, Dep't of Local Affairs, Assessors' Reference Library Ch. 6 at 6.9 (rev. Jan. 2021). Residential land is defined by state statute as land upon which residential improvements are located and which is used in conjunction with those improvements. § 39-1-102(14.4)(a), C.R.S. RVs, teepees, tents and rental cabins are not residential improvements under the statutory definition of "residential improvement," because they are not "a building, or that portion of a building, designed for use predominantly as a place of residency by a person, a family, or families." § 39-1-102(14.3), C.R.S. Without a residential improvement, the contested portions of the subject properties cannot qualify as residential land.

The Board also notes that the Estes Park Development Code, applicable to the subject, states that RV parks "shall not be used as a permanent residence." (Exhibit A, p. 49.) Zoning and use restrictions are relevant to classification determinations. *Mission Viejo v. Douglas County Bd. of Equalization*, 881 P.2d 462, 465 (Colo. App. 1994); *see also Gyurman v. Weld County Bd. of Equalization*, 851 P.2d 307 (Colo. App. 1993); *Vail Assoc., Inc. v. Bd. of Assessment Appeals*, 765 P.2d 593 (Colo. App. 1988); 3 Div. of Prop. Taxation, Dep't of Local Affairs, Assessors' Reference Library Ch. 2, at 2.3 – 2.4 (rev. Jan. 2021).

The Board finds that Petitioner has failed to meet its burden of showing that Respondent's classification of the subject property is incorrect. The Board affirms Respondent's classification of the subject property.

ORDER

The petition is **GRANTED**, in that Petitioner has met its burden of proving that the assigned value for tax year 2020 is incorrect, and that the correct value is **$4,180,000**. The Larimer County Assessor's Office is ordered to update 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 8th day of June, 2021.

BOARD OF ASSESSMENT APPEALS:

Drafting Board Member:

John DeRungs

Concurring Board Member:

Sondra Mercier
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 order of the Board of Assessment Appeals.

Casie Stokes