SUMMARY
July 26, 2018

2018COA108

No. 2017CA0939 Twilight Ridge v. Bd. of Cty. Comm'rs — Taxation — Property Tax — Residential Land

In this property tax case, a division of the court of appeals upholds orders of the Board of Assessment Appeals that denied petitions by the owner of residential property to change the classification of the owner's contiguous property from vacant to residential. The division concludes that the Board did not misconstrue section 39-1-102(14.4)(a), C.R.S. 2017, when it ruled that the contiguous vacant parcel was not "used as a unit" with the residential parcel. The division rejects the owner's argument that section 39-1-102(14.4)(a) requires applying the standards articulated in single-parcel cases to this multi-parcel situation, so as to find that mere enjoyment of the vacant parcel can show that it was "used as a unit" with the residential parcel. To the extent that

Hogan v. Board of County Commissioners, 2018 COA 86, supports a contrary conclusion, the division declines to follow it.

COLORADO COURT OF APPEALS **2018COA108**

Court of Appeals No. 17CA0939
Board of Assessment Appeals Case Nos. 69061 & 69723

Twilight Ridge, LLC,

Petitioner-Appellant,

v.

Board of County Commissioners of La Plata County, Colorado; and Board of Equalization of La Plata County, Colorado,

Respondents-Appellees,

and

Board of Assessment Appeals,

Appellee.

ORDERS AFFIRMED

Division VI
Opinion by JUDGE VOGT*
Terry and Navarro, JJ., concur

Announced July 26, 2018

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*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2017.

¶ 1 Twilight Ridge, LLC appeals from two orders of the Colorado Board of Assessment Appeals (BAA) denying its petitions challenging the classification of its property for the 2014-15 and 2016 tax years. We affirm.

I. Background

¶ 2 Elmo and Patricia Robinson are the sole members of Twilight, a Colorado limited liability company. In 2013 Twilight purchased two contiguous platted parcels of land in La Plata County, Colorado. The first parcel has a home on it (Residential Parcel). The second parcel is a 0.763-acre buildable but undeveloped lot (Subject Parcel).

¶ 3 The La Plata County Assessor classified the Subject Parcel as vacant land, which is taxed at a higher rate than residential property. Twilight appealed the decision for the 2014-15 tax years to the Board of County Commissioners of La Plata County, and it appealed the decision for the 2016 tax year to the Board of Equalization of La Plata County, arguing to both bodies (collectively, the County) that the Subject Parcel should be reclassified as

residential land.[1] Both Boards upheld the County Assessor's classification.

¶ 4 Twilight appealed to the BAA, which consolidated the two proceedings for a de novo hearing.[2] At the hearing, Elmo Robinson testified that he and his wife bought the two parcels together, intending that the Subject Parcel would give them privacy and serve as a buffer to help ensure that their views to the north would not be impeded by a house built on the Subject Parcel. He also said that the Subject Parcel was to be a place where his grandchildren could play when they came to visit, as the Residential Parcel had little flat land on which the children could safely play. Although he was currently offering only the Residential Parcel for sale, Robinson intended to sell both parcels together.

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[1] For the 2014-15 tax years, Twilight filed an "abatement" proceeding under section 39-10-114, C.R.S. 2017, which was heard by the La Plata County Board of County Commissioners. For the 2016 tax year, Twilight filed a "protest" proceeding under section 39-8-106, C.R.S. 2017, which was heard by the La Plata County Board of Equalization.

[2] The BAA also consolidated the hearing with two unrelated petitions — one by Michael and Robin Awe, and the other by Charlene Dimacali — that raised similar issues.

¶ 5 Twilight also offered testimony by Curt Settle, Deputy Director of the Colorado Division of Property Taxation, who was designated by the Property Tax Administrator (PTA) to testify regarding the Division's policies as embodied in the PTA's Assessors' Reference Library (ARL). Settle testified about how assessors determine the classification of property for tax purposes, the standards applicable to such determinations as set forth in the ARL, and the types of use that can qualify for residential classification.

¶ 6 The County provided testimony from its appraiser, Diana Cole, who had visited Twilight's parcels after Twilight requested reclassification and had seen no activity or evidence of use on the Subject Parcel when she visited. Her testimony was followed by that of Craig Larson, the La Plata County Assessor, who had also visited the Twilight parcels. Larson opined that using the Subject Parcel as a place for children to play and to protect a view were simply "incidental" uses and were not the sort of "integral" use of the Subject Parcel in conjunction with the residential improvements that would warrant classifying the Subject Parcel as residential.

¶ 7 The BAA upheld the County's classification of the Subject Parcel as vacant land. Crediting Cole's and Larson's testimony over Robinson's, it concluded that Twilight

> did not meet its burden of proving that the [Subject Parcel] 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 in BAA's order.)[3]

II. Analysis

¶ 8 Twilight contends that, in denying its challenge to the classification of its property, the BAA misconstrued the "used as a unit" element of section 39-1-102(14.4)(a), C.R.S. 2017, and made clearly erroneous findings of fact. We discern no reason for reversal.

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[3] The BAA issued two separate orders, upholding the vacant land classification for the 2014-15 tax years and the 2016 tax year. Because the orders are substantially identical, we treat them as a single order in this opinion.

A. Standard of Review and Applicable Law

1. Standard of Review

¶ 9 A BAA decision classifying property for tax purposes involves mixed issues of law and fact. *Aberdeen Inv'rs, Inc. v. Adams Cty. Bd. of Cty. Comm'rs*, 240 P.3d 398, 400 (Colo. App. 2009); *E.R. Southtech, Ltd. v. Arapahoe Cty. Bd. of Equalization*, 972 P.2d 1057, 1059 (Colo. App. 1998). We review the BAA's legal conclusions de novo, but we defer to its factual findings. *Rust v. Bd. of Cty. Comm'rs*, 2018 COA 72, ¶ 6. Thus, we will sustain the BAA's classification if it is reasonably based in law and is supported by substantial evidence in the record as a whole. *Farny v. Bd. of Equalization*, 985 P.2d 106, 109 (Colo. App. 1999); *E.R. Southtech, Ltd.*, 972 P.2d at 1059; *see* § 24-4-106(7), C.R.S. 2017.

¶ 10 In proceedings before the BAA, the County Assessor's classification is presumed correct, and the burden to rebut that presumption is on the taxpayer challenging the classification. *Gyurman v. Weld Cty. Bd. of Equalization*, 851 P.2d 307, 310 (Colo. App. 1993).

¶ 11 The interpretation of statutes is a question of law that we review de novo. *See Fischbach v. Holzberlein*, 215 P.3d 407, 409

(Colo. App. 2009). In interpreting statutes, our primary objective is to effectuate the intent of the General Assembly, which we do in the first instance by looking to the plain meaning of the language used, considered within the context of the statute as a whole. *Fifield v. Pitkin Cty. Bd. of Comm'rs*, 2012 COA 197, ¶ 5.

¶ 12 When the statute concerns property tax, we also owe deference to, but are not bound by, the PTA's interpretation of the statute he or she administers. *See Rust*, ¶ 6. The PTA is directed by statute to create "manuals, appraisal procedures, and instructions . . . concerning methods of appraising and valuing land . . . [and] improvements, . . . and to require their utilization by assessors in valuing and assessing taxable property." § 39-2-109(1)(e), C.R.S. 2017. To that end, the PTA publishes the ARL to provide guidance for classifying land, and county assessors are bound to use it. *Huddleston v. Grand Cty. Bd. of Equalization*, 913 P.2d 15, 17 (Colo. 1996).

2. Classification of Real Property for Tax Purposes

¶ 13 Pursuant to the Colorado Constitution, "residential" real property is valued for assessment at a lower rate than other real property. *See* Colo. Const. art. X, § 3(1)(b). Section

39-1-102(14.4)(a) 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."

¶ 14 The ARL includes a section intended to provide guidance for assessors in applying section 39-1-102(14.4)(a). The section, captioned "Contiguous Parcels of Land with Residential Use," states in relevant part 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." 2 Div. of Prop. Taxation, Dep't of Local Affairs, *Assessors' Reference Library* § 6, at 6.10 (rev. Apr. 2018). It goes on to state that the assessor's judgment is crucial in determining whether contiguous parcels can be defined as residential property, that a physical inspection will provide information critical to this decision, and that suggested judgment criteria include the following:

- 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?

If answers to all of these criteria are yes, then it is likely that the parcel would fall under the residential classification.

Id. at 6.11.

¶ 15 Divisions of this court have examined the BAA's classification of contiguous parcels of land in *Fifield* and in *Sullivan v. Board of Equalization*, 971 P.2d 675, 676 (Colo. App. 1998). In *Fifield*, the division held that neither section 39-1-102(14.4)(a) nor the ARL required that a parcel contiguous to the residential lot must itself contain residential improvements in order to be classified as residential for tax purposes. *Fifield*, ¶ 11. In *Sullivan*, 971 P.2d at 676, the division upheld the BAA's determination that the contiguous parcel did not qualify as residential because it was not under common ownership with the residential parcel. The division then went on to address the taxpayer's alternative contention that the contiguous parcel could qualify independently as residential. That avenue for residential classification was equally inapplicable

because "in order for a parcel of land to qualify for residential classification *independently* from other parcels, there must be a residential dwelling unit on the property." *Id.* (emphasis added).[4]

¶ 16 The BAA's classification of contiguous or allegedly contiguous parcels of land has been addressed more recently in *Kelly v. Board of County Commissioners*, 2018 COA 81M, ¶¶ 39-41 (concluding BAA abused its discretion in rejecting parties' stipulation that contiguous parcels were under common ownership); *Hogan v. Board of County Commissioners*, 2018 COA 86, ¶¶ 15-44 (remanding for

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[4] The County stated in closing argument at the BAA hearing that the County had "not argued that you have to have a structure on the vacant lot in order to satisfy the [used as a unit] requirement. It is clear with *Fifield* that that is not necessary." On appeal, however, both the County and the BAA argue that *Sullivan v. Board of Equalization*, 971 P.2d 675, 676 (Colo. App. 1998), should control here and that, under *Sullivan*, the Subject Parcel cannot qualify for residential classification because there are no residential units on it. We disagree. First, the language from *Sullivan* that appellees now seize on addressed the requirements for classifying a parcel of land independently from other parcels, not the requirements for classifying a parcel contiguous to a commonly owned residential parcel. Second, we find no language in the applicable statute that would support applying such a rule in a contiguous parcel situation. Third, we conclude that *Fifield v. Pitkin County Board of Commissioners*, 2012 COA 197, ¶ 13, and *Hogan v. Board of County Commissioners*, 2018 COA 86, ¶¶ 39-42, both of which rejected similar arguments based on *Sullivan*, correctly state the law on this issue.

redetermination of vacant parcel's classification where BAA based its ruling on an erroneous interpretation of "residential land"); *Bringle Family Trust v. Board of County Commissioners*, 2018 COA 64, ¶ 7 (affirming BAA's determination that vacant parcel was not residential because it was not contiguous to residential parcel); and *Rust*, ¶ 9 (affirming BAA's determination that vacant parcel was not used as a unit with residential parcel, where use made by taxpayers of vacant parcel was not integral to the residential parcel).

¶ 17 Divisions of this court have also considered the BAA's application of section 39-1-102(14.4)(a) in cases involving single, rather than contiguous, parcels. In *Farny*, the primary issue was whether a small cabin built on a 320-acre mountain parcel and used approximately twenty-five days every year could qualify as a "residential improvement." 985 P.2d at 110. The division upheld the BAA's ruling that it could, and it also declined to say as a matter of law that the BAA had erred in classifying the entire parcel as residential as well. In support of the latter holding, the division noted that, "based upon the evidence presented at the BAA hearing, there is no basis for saying that some part of the land was used for

a different purpose." *Id.* Beyond that statement, *Farny* said nothing about the purposes for which the taxpayer used the land.

¶ 18 In *Gyurman*, 851 P.2d at 308-09, the primary issue was whether there was any limit on the amount of acreage that could be entitled to residential classification as being part of a taxpayer's residence. The division held that there was not, and that the issue had to be resolved on a case-by-case basis. In the case before it, the taxpayer had testified that he bought the 36.75-acre parcel to get distance between himself and other people and to look at wildlife, and that "apart from the agricultural use he was planning, nothing else could be done with the land other than to live on it." *Id.* at 308. The division deferred to the BAA's determination that, based on the taxpayer's testimony, the entire parcel should be classified as residential. *Id.* at 310.

B. Application

1. Construction of Section 39-1-102(14.4)(a)

¶ 19 The BAA concluded that Twilight did not satisfy its burden of proving that the Subject Parcel was "used as a unit" with the Residential Parcel, as required under section 39-1-102(14.4)(a). As discussed below, this conclusion is consistent with the ARL and

with the testimony at the hearing here, where witnesses for both sides testified that "used as a unit" contemplates integral, not merely incidental, use of the Subject Parcel. *See Hogan*, ¶ 22 (deferring to ARL's interpretation that "used as a unit" means "integral" use, because that definition is "clearly compatible with the statute's language").

¶ 20 We do not agree with Twilight that the BAA erred in failing to find, as a matter of law, that use of undeveloped land "in any manner to enhance the use or enjoyment of the residence — including merely keeping other people off of the land" satisfies the "used as a unit" requirement of the statute. We disagree for the following reasons.

¶ 21 First, although, as Twilight points out, section 39-1-102(14.4)(a) refers both to "a parcel" and to "contiguous parcels of land under common ownership," it does not follow from this that the same facts as those found relevant in single-parcel cases must necessarily be of equal relevance or importance in contiguous-parcel cases. That the two situations may require different inquiries was recognized in *Sullivan*, 971 P.2d at 676.

¶ 22 Second, the PTA, to whom we owe deference, has apparently so concluded. The ARL prescribes a four-part inquiry, quoted above, to be used by assessors in determining whether a parcel contiguous to a residential parcel should itself be classified as residential. Two of the four questions (common ownership and conveyed with the residence as a unit) would generally, although not invariably, be of little if any relevance in single-parcel cases. Also, the ARL treats use and enjoyment of the property as a separate inquiry ("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?") from the inquiry at issue here ("Are the parcels considered an integral part of the residence and actually used as a common unit with the residence?"). 2 *Assessors' Reference Library* § 6, at 6.11.

¶ 23 Third, *Farny* and *Gyurman*, the two cases relied on by Twilight in support of its argument, do not stand for the proposition that use of land to enhance the enjoyment of a residence satisfies the statutory "used as a unit" requirement *as a matter of law*. As discussed above, both cases were primarily addressing different legal issues. Having resolved the legal issues, the divisions then

acknowledged the deference owed to the BAA on factual issues and declined to disturb the BAA's determinations that credited the taxpayers' evidence regarding the uses to which their properties were put. We are not persuaded that, based on two decisions *affirming* the BAA in single-parcel cases, we should now *reverse* the BAA's determination that the arguably similar facts of this case were not sufficient to satisfy the "used as a unit" requirement in a multi-parcel case.

¶ 24 Fourth, interpreting the "used as a unit" language in section 39-1-102(14.4)(a) as meaning no more than simply "used," as Twilight urges us to do, would effectively read language out of the statute, which we may not do. To require instead that there be evidence of integral, not merely incidental, use to satisfy the statutory requirement gives effect to the language chosen by the General Assembly. It is well within the BAA's discretion to determine that use of vacant land to look at wildlife or enjoy views is not the type of integral use that establishes that vacant land is being used as a unit with a contiguous residential parcel.

¶ 25 Finally, we are aware that *Hogan*, ¶¶ 27-35, includes language that appears to adopt the argument Twilight advances here. To the

extent it does, we decline to follow it. *See Valentine v. Mountain States Mut. Cas. Co.*, 252 P.3d 1182, 1195 (Colo. App. 2011) (a court of appeals division is not bound by the decision of another division). We agree instead with *Rust*, which rejected the taxpayer's argument that the division should apply the same standard for multiple parcels of land that it would apply in a single-parcel case. In declining to apply the single-parcel standard, the division stated: "The additional requirement for multiple parcels — that the subject parcel be integral to the residential parcel — is reasonable. This requirement is unnecessary where there is only one parcel because the parcel is already integrated by virtue of its inherently unified character." *Rust*, ¶ 11.

2. Findings of Fact

¶ 26 Although the issue is closer, we are not persuaded that we must reverse based on the BAA's "clearly erroneous" findings of fact, as Twilight urges.

¶ 27 The parties stipulated that the Residential Parcel and the Subject Parcel are commonly owned and contiguous. The disputed issue at the hearing was whether the Subject Parcel was "used as a unit" with the Residential Parcel. As noted, Robinson testified that

he and his wife (who spend approximately eight weeks a year at the property) bought the parcels together so that the Subject Parcel could give them some privacy, serve as a buffer to prevent any potential house built on the Subject Parcel from impeding their views to the north, and afford a safe place for their grandchildren to play when the grandchildren came to visit.

¶ 28 Based on the foregoing legal analysis, the BAA could simply have held that, even accepting Robinson's testimony as true, these claimed uses were insufficient to satisfy the "used as a unit" requirement. However, the BAA did not do so. Instead, it supported its ultimate rejection of Twilight's petition by making findings of fact purportedly based on witness credibility. For example, based on Cole's testimony that the Subject Parcel had been "pretty undisturbed" during her visit, the BAA found that the Robinsons had not "used the Subject Lot as they claimed." Based on testimony by the County's witnesses and on photos, the BAA found that development of the Subject Parcel would not impede the quality of views from the Robinsons' residence, adding: "The Board was persuaded by Respondent's testimony that the primary views from the Residential Lot appear to be in the opposite direction from

the Subject Lot." Additionally, based on plat maps showing that the building envelope on the Subject Parcel was not directly level with the residence, "the Board did not believe that the Subject Lot was used for the buffer purposes."

¶ 29 We share Twilight's concerns about the logic of (1) finding that the Robinsons had not used the lot as a place for their grandchildren to play during their visits, by crediting a witness who had visited the property on a single occasion, when no one was present; and (2) finding that the Robinsons did not in fact use the Subject Parcel to protect their views, by crediting a witness (Larson) who testified that, in his admittedly subjective opinion, the view north across the Subject Parcel was "not a particularly nice view" and that he himself "prefer[red] the view of the golf course and the cliffs as to up the hill."

¶ 30 We nevertheless conclude that, because the BAA's ultimate determination is supported by other evidence in the record, a remand based on these findings is unwarranted. *Cf. Dep't of Human Servs. v. May*, 1 P.3d 159, 161 n.2 (Colo. 2000) ("We do not rely solely on the findings of fact made by the ALJ, but rather conduct our own review of the record to determine whether

substantial evidence exists on the record to support the findings and conclusions of the agency.").

¶ 31 Both Curt Settle,[5] called as a witness by Twilight, and Craig Larson, called by the County, testified that "used as a unit in conjunction with the residential improvements" required integral, not mere incidental, use. Larson testified that letting children play on a lot was "incidental use," and that, in his opinion, establishment of a view was not "an integral use of the lot in conjunction with the residential improvements." In addition, the evidence included plat maps showing the location of the building envelope on the Subject Parcel and photos showing that the windows and decks of the residence were not in fact oriented toward the Subject Parcel — thereby potentially calling into question the claimed use of that parcel to protect the residence's views and privacy. Finally, the maps showing the location of an

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[5] We reject appellees' contention that we should not rely on Settle's testimony because he was not testifying as an expert. Settle had been Deputy Director of the Colorado Division of Property Taxation since 2004 and was designated by the PTA to testify regarding the Division's policies, practices, and procedures. The County made no objection to Settle's testimony on this basis at the hearing and, indeed, offered similar testimony from its own witness, Craig Larson, without separately qualifying him as an expert.

easement for access supported the BAA's finding that the Subject Parcel was not otherwise used to provide access to the residence.

III. Conclusion

¶ 32 The orders are affirmed.

JUDGE TERRY and JUDGE NAVARRO concur.