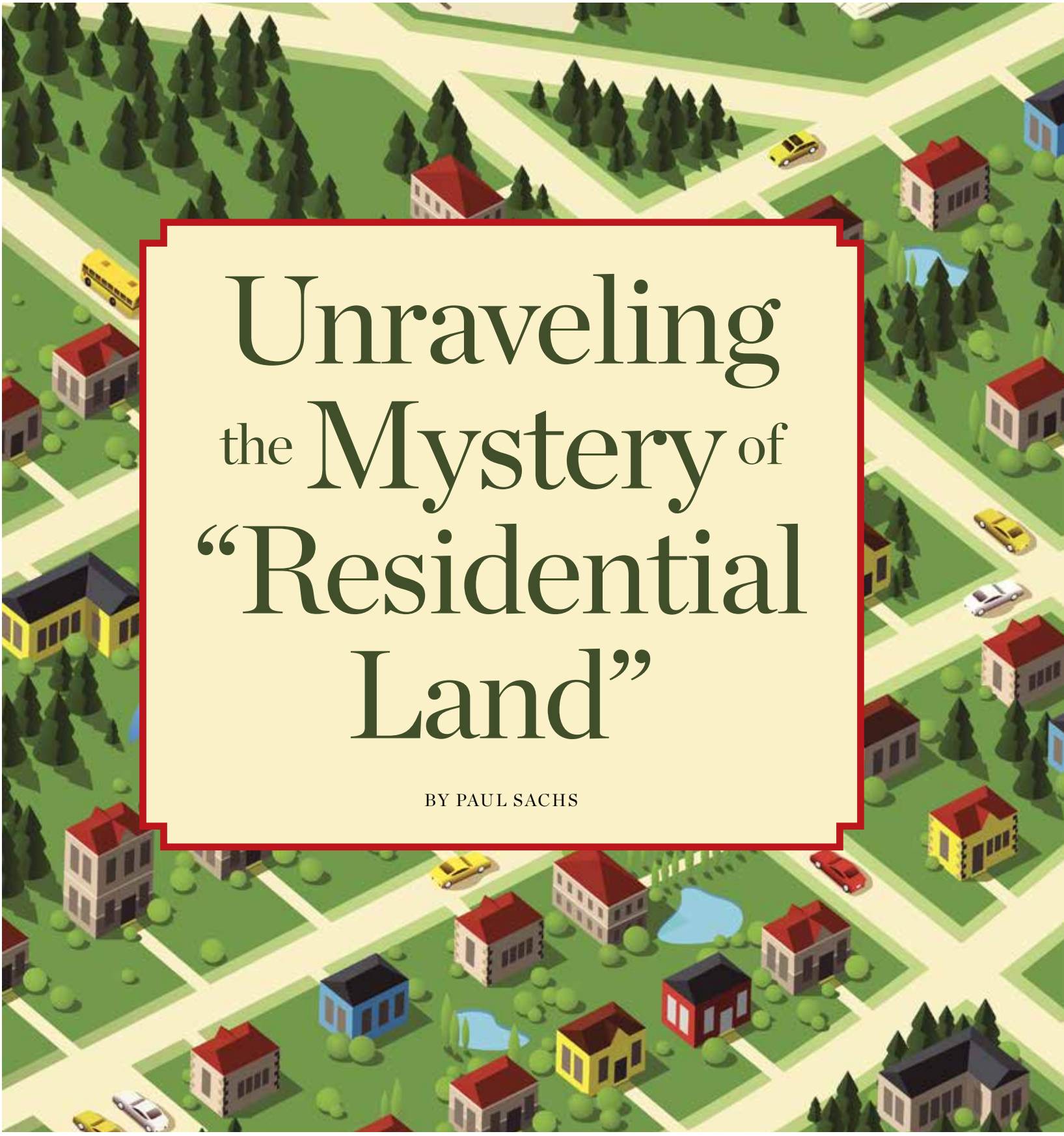

Unraveling the Mystery of "Residential Land"

BY PAUL SACHS

This article discusses recent Colorado appellate opinions on taxation of vacant land parcels that are adjacent to residential parcels.

Some landowners own adjacent parcels of land where one parcel contains their residence and the remaining parcels are vacant. Because vacant parcels are taxed at a much higher rate than residential parcels, these property owners often seek abatements and reclassification of the vacant parcels as residential property.

This article explores the recent spate of Colorado appellate opinions on the taxation of vacant parcels that are adjacent to residential parcels. An early Court of Appeals opinion on this issue was released in 1998, and another followed 14 years later in 2012. In 2018, the Court of Appeals issued five separate opinions with varying degrees of agreement among the panels. In 2020, perhaps as a result of the number of disparate opinions and consequent confusion, the Colorado Supreme Court issued opinions in four cases attempting to "unravel the mysteries of what constitutes 'residential land'" under CRS § 39-1-102(14.4)(a).[1]

Consistent with the cases, this article refers to the vacant parcel as the "subject parcel" and the parcel containing the residence as the "residential parcel."

The Framework

Under the Colorado Constitution, the term "residential real property," which includes "all residential dwelling units and the land, as defined by law, on which such units are located," is valued for assessment at a significantly lower rate than other taxable real property.[2] In fact, it is almost one-third the tax rate for vacant land. Pursuant to its authority under Colo. Const. art. X, § 3, the General Assembly further refined the term "residential real property" to mean "residential land and residential improvements."[3] "Residential land" is "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."[4] "Residential improvements" 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 includes "fixtures" and "amenities" that are "an integral part of the residential use."[5]

The Property Tax Administrator (PTA) is statutorily required to create manuals, appraisal procedures, and instructions concerning methods of appraising and valuing land and improvements.[6] The PTA created the Assessor's Reference Library (ARL), which county assessors are required to follow.[7] As relevant here, the ARL formerly interpreted CRS § 39-1-102(14.4) 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."[8] In determining whether a contiguous

parcel is used in conjunction with a residential parcel, the ARL stated that an assessor should consider whether the parcels:

- are under common ownership;
- are considered an integral part of the residence;
- are contiguous;
- are used as a common unit with the residence;
- would likely be conveyed with the residence as a unit; and
- along with associated structures, are for the support, enjoyment, or other non-commercial activity of the residence's occupants.[9]

Some of this PTA direction was rejected by the Colorado Supreme Court,[10] and the ARL has been updated to reflect the Court's guidance in the cases discussed below.[11]

Common Ownership

Sullivan v. Board of Equalization of Denver County[12] is the prototypical example of a taxpayer owning a parcel of land on which a residence is located and an adjacent vacant parcel. In *Sullivan*, the Denver Board of Equalization classified the subject parcel as nonresidential for tax year 1996. The taxpayer asserted that he used the subject parcel as part of his backyard. It was zoned for residential use and had a sprinkler system and landscaping. However, on the relevant assessment date for 1996, the subject parcel was titled solely in the name of the taxpayer's wife. The Board of Assessment Appeals (BAA) found the lack of "common ownership" between the subject and residential parcels to be dispositive. Because the parcels were separately owned, there was no basis for granting the lower assessment rate, and the BAA denied the taxpayer's challenge to the classification.

On appeal, the taxpayer conceded that there was no common ownership but argued that the vacant land nonetheless qualified for residential classification as a matter of law. The Court of Appeals rejected this argument, reasoning that a parcel of land may only qualify for residential classification independent of other parcels if it has a residential dwelling unit on the property.[13] And because there was no common ownership on the assessment date, which is a threshold requirement for applying the residential tax rate to vacant land, the Court affirmed the BAA's decision.

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The Court of Appeals revisited the common ownership issue in 2018 in *Kelly v. Board of County Commissioners of Summit County*.[14] In *Kelly*, the residential parcel, which had a home on it, and the subject parcel were held in the names of two different trusts. Kelly was the settlor, trustee, and beneficiary of both trusts. In 2016, Kelly sought to change the subject parcel's classification to residential under CRS § 39-1-102(14.4)(a), and she sought a tax abatement for years 2014 and 2015. Both the county and later the BAA found that because each trust was a separate and distinct legal entity, the record titleholders were different, and there was no common ownership.

Because neither the statute nor the PTA defined or offered guidance on what constitutes "common ownership," the Court focused on the term's plain meaning to find that "ownership goes beyond bare record title," and the inquiry should focus on "who has the power to possess, use, enjoy, and profit from the property."[15] Further, "[i]n property tax cases in particular, courts often look beyond record title to determine ownership."[16] The Court found that Kelly had all the power to possess, use, enjoy, and profit from the property. It thus concluded that the common ownership test was met and ordered the subject parcel to be reclassified as residential.

The Colorado Supreme Court granted the Board of County Commissioner's (BCC) and BAA's petitions for certiorari review.[17] Citing the plain language of CRS § 39-5-102(1), which directs that assessors must rely on county records to determine whether properties are held under common ownership, the Court reversed.[18] This put an end to further discussion on this issue.

The fruits of this clarification were quickly reaped in *Lannie v. Board of County Commissioners for Eagle County*.[19] Lannie and his wife owned two contiguous parcels of land in Eagle County. For tax years 2014 and 2015, Lannie held title to the subject parcel solely in his name, while he and his wife held title to the residential parcel as joint tenants. By the time

of the valuation for tax year 2016, Lannie had conveyed the subject parcel to himself and his wife as joint tenants.

The Lannies appealed the subject parcel's classification as vacant land for tax years 2014 and 2015 to the BCC of Eagle County and the classification for 2016 to the Board of Equalization of Eagle County (collectively, County). Both entities upheld the assessor's classification. The BAA upheld the County, finding that the subject parcel was not used as a unit in conjunction with the improvements on the residential parcel for any of the tax years in question, and for tax years 2014 and 2015, the parcels were not held under common ownership. On appeal, a Court of Appeals division affirmed the BAA's orders, finding that the parcels were not used as a unit, but the division did not address the common ownership issue. The Colorado Supreme Court vacated and remanded for reconsideration in light of *Mook v. Board of County Commissioners of Summit County* (discussed below).[20]

A different Court of Appeals division then considered whether the parcels were under common ownership and used as a unit. The division followed *Kelly* and looked solely to the county records to determine common ownership. Because the two parcels did not have identical owners for tax years 2014 and 2015, the Court affirmed the BAA's decision denying reclassification for those years on that ground alone. As to 2016, it remanded to the BAA to reconsider under the "used as a unit" standard enunciated in *Mook*.

Contiguity

In 2018, the Court of Appeals considered a property tax appeal by the Bringle Family Trust (Bringle Trust) to a BAA order upholding the subject parcel's classification as vacant land.[21] The Bringle Trust owned a residential parcel and a vacant parcel located across a public right-of-way.

The subject parcel was originally purchased in the 1950s, and a home and outhouse were built on it. In the 1960s, the residential parcel was purchased, and the house was moved from the subject parcel to the residential parcel (the outhouse remained on the subject parcel). In 2016, the Bringle Trust petitioned the BCC of Summit County for an abatement or refund of taxes pursuant to CRS § 39-10-114 for tax years 2013 to 2015. The county denied the request, and the BAA upheld the denial based on the parcels' non-contiguity.

On appeal, the Bringle Trust argued that the BAA erred in concluding that the subject parcel was not contiguous to the residential parcel. Deciding an issue of first impression, the Court of Appeals found, based on dictionary definitions, that two things must touch to be contiguous.[22] Because the two parcels did not touch at any point, the Court concluded that the statutory contiguity requirement was not met. The appellate panel explicitly left undecided whether obstacles between parcels other than a public right-of-way (such as a private easement) would defeat the contiguity requirement.[23]

Mook also addressed the contiguity requirement. There, the parties agreed that the residential and subject parcels did not physically touch because the homeowners' association owned a 17-foot-wide strip of land that completely separated the two parcels. The BCC denied the reclassification request, and the BAA upheld the BCC's decision, finding that because the two parcels did not physically touch, they were not contiguous. The Court of Appeals affirmed, finding the plain and ordinary meaning of contiguous is "touching along boundaries often for considerable distances."[24]

The Colorado Supreme Court granted the Mooks' petition for certiorari review. Based on the statute's plain language, the Court agreed with the BCC and the Court of Appeals in both *Mook* and *Bringle* and held that contiguous means physically touching.

On the same day that *Mook* and *Kelly* were announced, the Colorado Supreme Court also issued *Ziegler v. Park County Board of County Commissioners*.[25] Ziegler owned four parcels of land in Park County. One parcel was classified as residential and the other three were classified as vacant land. The residential parcel contained a house, and subject parcel 1 directly bordered that parcel. Subject parcels 2 and 3 bordered subject parcel 1 but didn't physically touch the residential parcel.

Common ownership and contiguity were admitted as to subject parcel 1. Ziegler testified that he lived on the property four to six weeks a year, and when there he treated all four parcels as a single unit to ride horses, hike, ride all-terrain vehicles, shoot guns, and camp. The BAA determined the subject lots were not essential to his enjoyment of the residential improvements and the uses were not in conjunction with the residential improvements, and it upheld the BCC's rejection of Ziegler's request to reclassify the subject parcels as residential land. Ziegler appealed, and the Colorado Supreme Court accepted jurisdiction pursuant to CRS § 13-4-109 and C.A.R. 50(b).[26]

The Supreme Court followed its reasoning in *Mook* to hold that for a multi-parcel assemblage to satisfy the contiguity requirement, a parcel of land must physically touch another parcel, and added that a vacant parcel must touch a parcel containing a residential improvement.[27] This does not mean, however, that it must touch a parcel with a residence. As an example, the Court stated that if one parcel contained a residence, and the contiguous parcel had, for example, fencing, a garage, or a shed that was an "integral part of the residential use," "then a third, undeveloped parcel that physically touches the parcel containing that improvement would satisfy the contiguity requirement."[28] Because the BAA did not make any findings on this issue, the order was reversed and the case was remanded for findings on the contiguity requirement for subject parcels 2 and 3.

Used as a Unit

In 2012, in *Fifield v. Pitkin County Board of Commissioners*, the Court of Appeals considered the "used as a unit" concept in deciding what constitutes "residential land."[29] In *Fifield*, the taxpayers subdivided their property in 2007 into two contiguous residential lots, both of which they owned. Lot 1 contained their home. Lot 2 had no buildings or structures, but it had a paved road and a utility line. The paved road was the only road access to the taxpayers' home, and it also served a neighboring subdivision.

Following the subdivision, the assessor classified Lot 2 as vacant land for tax years 2008 and 2009. The BAA denied the taxpayers'

petition to have it reclassified as residential because it had no residential improvement. The Court of Appeals reversed, holding that under the plain language of the statute, residential land must (1) contain a residential dwelling unit and (2) be used as a unit in conjunction with the residential improvements on the residential land. Accordingly, the taxpayers' residential land consisted of those portions of Lot 1 and Lot 2 that were used as a unit in conjunction with the home on Lot 1. The Court bolstered this reasoning by pointing to the PTA's interpretation of "residential land" as "[p]arcels of land, under common ownership, that are contiguous to land used for a residence and used as an integral part of a residence."[30]

The Court also noted the three "judgment criteria" to be used under ARL guidance when determining whether contiguous parcels are residential land: "(1) Are the parcels considered and actually used as a common unit with the residence? (2) Would the parcel(s) in question be conveyed with the residence as a unit? (3) 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?"[31]

All of these criteria were consistent with the Court's conclusion that land on a parcel contiguous to another commonly owned parcel containing a residential dwelling unit only need be used as a unit in conjunction with that residential dwelling unit to qualify as residential land. Contrary to the BAA's reasoning, there is no requirement that "residential land" contain a residential improvement. The proper inquiry is whether the subject parcel is used in conjunction with the residential improvement on the residential parcel, so the case was remanded for a redetermination after further proceedings on this issue.[32]

In 2018, the Court of Appeals again looked at the "used as a unit" element of CRS § 39-1-102(14.4)(a) in *Rust v. Board of County Commissioners of Summit County*.[33] Rust bought a parcel of residential property, and a year later he purchased the adjacent, undeveloped parcel. Rust and his family used the two parcels for decades, primarily for winter vacations. Rust challenged the vacant land classification of the undeveloped parcel for the years 2013 to 2015.

The parties stipulated before the BAA that the residential and undeveloped parcels were commonly owned and contiguous, so the only question on appeal was whether they were "used as a unit." Rust testified that his family used the undeveloped property to create a buffer so there was not a neighbor right next to their house, to view wildlife, to park his truck and trailer, to ski, to sled, to store snow, to hike, and to enjoy peace and serenity. The assessor countered that she saw no evidence that the parcel was an integral part of the residence. She testified that she visited the property four times in five months and, based on her inspections, the truck appeared to be parked on the residential parcel, and the snow equipment storage area also appeared to be on the residential parcel. She saw no footprints or tracks on the subject parcel and noted that it was heavily treed and very steep. The BAA agreed with her conclusion that whatever use the Rusts made of the subject parcel was not integral to the residential parcel. The Court of Appeals affirmed because the subject parcel was also not used in conjunction with the residential property. It specifically declined to decide the scope of what use would be sufficient to qualify as being "used as a unit" for residential classification.[34]

Later in 2018 the Court of Appeals considered an appeal by Twilight Ridge, LLC (Twilight) regarding the classification of a vacant parcel contiguous to one that had a house on it.[35] The subject parcel was a 0.763-acre buildable but undeveloped lot. The owners testified before the BAA that they purchased the subject parcel to give them privacy and to serve as a buffer to help ensure their view to the north would not be impeded, and it was a place where their grandchildren could play when they visited. The owners were offering the residential parcel for sale, and there was testimony that they intended to sell the two parcels together.[36]

The county presented testimony that its appraiser had visited the subject parcel and had seen no activity or evidence of use. The appraiser was followed by the assessor, who testified that having a place for children to play and to protect views were incidental uses rather than "integral" uses of the subject parcel in conjunction with the residential improvements that would warrant residential classification.[37]

Twilight argued on appeal that the BAA misconstrued the "used as a unit" element of CRS § 39-1-102(14.4)(a). The Court agreed with the BAA that "integral" not merely "incidental" use of the subject parcel with the residential parcel must be established, but it found the county's witness's testimony, which the BAA relied upon, unpersuasive—the testimony was based on a single visit and the witness's subjective opinion that the views being protected were not all that nice. However, the Court found that letting children play on a lot and establishing a view corridor are simply not integral uses with the residential improvements on the residential property, and it therefore upheld the BAA's denial on those grounds.

In 2018 the Court of Appeals also decided *Hogan v. Board of County Commissioners of Summit County*.[38] This case involved three connected and contiguous parcels. The residential parcel (Lot 1) was purchased in 1983, and a home was built on it. An adjoining parcel (Lot 2) was purchased in 1988 and a deck was built that extended from the home on Lot 1 onto Lot 2. Finally, a third parcel (Lot 3) was purchased. Lot 3 was in a subdivision and had an underground sewer line and an unpaved driveway but was otherwise undeveloped.

The assessor classified both Lots 2 and 3 as vacant land. The Hogans appealed this classification, and the assessor and the BAA reversed the classification as to Lot 2 but upheld it as to Lot 3.

On appeal, the Hogans argued that the likelihood of the parcel being conveyed separately is irrelevant. The Court of Appeals determined that the property's actual use on the relevant assessment date is the primary factor to be considered in tax classification. Consequently, whether the owner has plans in the future to sell the parcel or make nonresidential use of it is irrelevant, and to the extent the ARL's guidance permits property classification based on the owner's predicted future actions, it is contrary to law. Because the BAA gave significant weight to testimony that the subject parcel would likely be conveyed separately in the future, it based its determination on a misapplication of the law.[39]

The Hogans also argued that the parcel's use need not be necessary or essential to qualify as integral. At the BAA hearing, the assessor testified that she interpreted the word "integral" in the ARL to mean "necessary" or "essential." The BAA found that the uses of the subject parcel for walking the dog, parking, protecting views, and acting as a buffer from neighboring parcels were not necessary or essential and therefore not integral to the residential land. However, the statute does not define "integral" as so limited, and by reading into it the "necessary" and "essential" components, the BAA incorrectly interpreted the statutory language.[40]

The Hogans further argued that the parcel's use need not be "active" as opposed to merely "passive." Before the BAA, the assessor stated that "active" uses would be the presence of physical improvements, fire pits, playgrounds, septic systems, garages, or other support structures, and the BAA found that the uses of the subject parcel were passive and not active. But the Court found nothing in CRS § 39-1-102(14.4)(a) to limit the definition of "used" to "active uses."[41]

The Court noted that its decision might conflict with *Rust*, but to the extent it was in conflict, it declined to follow that division's decision.[42] The Court also noted its agreement with the substantive holding in *Fifield* that there is no requirement for a subject parcel to contain residential improvements and, to the extent *Sullivan* disagreed with that holding, such language was dicta.[43] The Court found it undisputed that the subject parcel was contiguous and under common ownership with the residential parcel. It held that the BAA's order was based on an erroneous interpretation of "residential land" and reversed and remanded with directions for the BAA to employ the correct legal standards and redetermine whether the Hogans' parcel was entitled to reclassification.

The Colorado Supreme Court granted the BCC's petition for certiorari review.[44] The Court began its analysis by noting that "[d]isagreement abounds" as to what the "used as a unit" requirement means.[45] In largely agreeing with the *Hogan* division, the Court concluded that a landowner must use multiple parcels of land together as a collective unit of residential property to satisfy the requirement.

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The Court noted that normally it would defer to the PTA's and the BAA's construction of CRS § 39-1-102(14.4)(a) if it were subject to different reasonable interpretations. But in this case, the Court agreed with the Court of Appeals that no such deference was warranted because the assessor's guidelines were contrary to the statute's plain language, which only requires that contiguous parcels of land be "used as a unit." Relying on a dictionary definition of "unit," the Court found that if the Hogans treated all three parcels as a single residential unit, that was sufficient; reading in a requirement that the subject parcel be "necessary" and "essential" was going too far.[46]

Similarly, considering whether the subject parcel would be conveyed with the residence as a unit does not comport with the statutory language, which only requires that residential property "is used as a unit." This language focuses on the owner's present use of the land, so the ARL guidelines erroneously focused on an owner's plans for the subject property.[47] And the statute does not limit the permissible uses of residential land to "active" uses, so it was error to require an active use of the subject property.[48]

Lastly, the statute only requires that landowners use the collective unit of property together with the residential improvements located on the collective unit; there is no requirement for a residential improvement on each parcel. Because there was a house on the Hogans' residential parcel, it was error for the assessor to deny the petition for reclassification on grounds that the subject parcel did not also have a residential improvement.[49]

Due to the "multitude of cases pending around the state" the Court supplied succinct guidance for assessors on how the "used as a unit" requirement should be applied.[50] The Court stated that the residential and subject parcels must be used as though they are a greater, single parcel of land (i.e., a "unit"); the collective piece of property must be used "in conjunction with the residential improvements located thereon" (in the Hogans' case, that would be used with their house); and assessors should rely on the ARL guideline that

considers whether the primary purpose of the parcel and associated structures is for the support, enjoyment, or other non-commercial activity of the residence's occupants.[51]

Conclusion

The Colorado Supreme Court has clarified the circumstances under which vacant land may be classified as residential for tax purposes. In sum:

- "Common ownership" of the residential and subject parcels is a prerequisite, and assessors must rely on county records to determine whether properties are held under common ownership.
- "Contiguity" of the parcels is also a prerequisite, with contiguous meaning physically touching, often for a substantial distance. In a case involving more than two parcels, each vacant parcel must be contiguous with a parcel that contains "residential improvements."
- In determining whether parcels are "used as a unit," assessors may not use ARL guidance that considers (1) the likelihood of the parcel being conveyed separately; (2) the parcel's use as "necessary" or "essential" to qualify as integral; and (3) the parcel's "active" as opposed to merely "passive" use. Such considerations are outside of the plain meaning of the statute. Rather, when determining whether parcels are "used as a unit," the appropriate inquiry is whether the parcels are used as though they are a greater, single parcel of land. And the collective piece of property must be used in conjunction with the residential improvements located there.

It remains to be seen how the lower courts will interpret this guidance and whether it will result in consistent outcomes or show the need for future clarifications. CL

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NOTES

1. *Mook v. Bd. of Cty. Comm'rs of Summit County*, 457 P.3d 568 (Colo. 2020).
2. Colo. Const. art X, § 3(1)(b).
3. CRS § 39-1-102(14.5).
4. CRS § 39-1-102(14.4)(a).
5. CRS § 39-1-102(14.3).
6. CRS § 39-2-109(1)(e).
7. *Huddleston v. Grand Cty. Bd. of Equalization*, 913 P.2d 15, 17–18 (Colo. 1996).
8. Div. of Prop. Taxation, Dep't of Local Affairs, 2 Assessors Reference Library at 6.10 (rev. Apr. 2018).
9. *Id.* at 6.11.
10. *Mook*, 457 P.3d 568.
11. Div. of Prop. Taxation, Dep't of Local Affairs, 2 Assessors Reference Library at § 6.10 (rev. Jan. 2021), https://drive.google.com/file/d/1HVXjO8Ye2mO18NeO-hGaCygybZqQF7fq/view.
12. *Sullivan v. Bd. of Equalization*, 971 P.2d 675 (Colo.App. 1998).
13. *Id.* at 677 (citing *Writer Corp. v. Colo. State Bd. of Equalization*, 771 P.2d 13 (Colo.App. 1988); *Vail Assocs., Inc. v. Bd. of Assessment Appeals*, 765 P.2d 593 (Colo.App. 1988)).
14. *Kelly v. Bd. of Cty. Comm'rs of Summit Cty.*, 459 P.3d 621 (Colo.App. 2018).
15. *Id.* at 625.
16. *Id.* (citations omitted).
17. *Mook*, 457 P.3d 568.
18. *Id.* at 584.
19. *Lannie v. Bd. of Cty. Comm'rs for Eagle Cty.*, 471 P.3d 1207 (Colo.App. 2020).
20. *Id.*
21. *Bringle Family Trust v. Bd. of Cty. Comm'rs of Summit Cty.*, 459 P.3d 615 (Colo.App. 2018).
22. *Id.* at 619–29 (citing *Black's Law Dictionary* at 386 (10th ed. 2014); *Merriam Webster Dictionary*, https://perma.cc/B4C9-H4RS; *Oxford English Dictionary*, https://perma.cc/H7UX-YEAH).
23. *Bringle*, 459 P.3d at 621.
24. *Mook*, 457 P.3d at 572.
25. *Ziegler v. Park Cty. Bd. of Cty. Comm'rs*, 457 P.3d 584 (Colo. 2020).
26. *Id.* at 588.
27. Justice Samour's dissent is worth reading. He quotes the *Princess Bride* in arguing that if the parcels in this case are not "contiguous," then "'I do not think it means what [the majority] think[s] it means.'" *Id.* at 591 (Samour, J., dissenting).
28. *Id.* at 589–90.
29. *Fifield v. Pitkin Cty. Bd. of Comm'rs*, 292 P.3d 1207 (Colo.App. 2012).
30. *Id.* at 1209.
31. *Id.*
32. *Id.* at 1210. The division noted that dicta in *Sullivan* seemed to require that residential improvements be on the subject parcel for it to be classified as residential. To the extent that was *Sullivan*'s holding, the *Fifield* division explicitly declined to follow it.
33. *Rust v. Bd. of Cty. Comm'rs of Summit Cty.*, 2018 COA 72.
34. *Id.* at ¶ 10.
35. *Twilight Ridge, LLC v. Bd. of Cty. Comm'rs of La Plata Cty.*, 468 P.3d 43 (Colo.App. 2018).
36. *Id.* at 45.
37. *Id.*
38. *Hogan v. Bd. of Cty. Comm'rs of Summit Cty.*, 459 P.3d 629 (Colo.App. 2018).
39. *Id.* at 632–33.
40. *Id.* at 634–35.
41. *Id.* at 634.
42. *Id.* at 635–36 (it was not clear whether the other division was holding that the "used as a unit" element encompassed the same erroneous interpretation of "integral" or that the use had to be "active").
43. *Id.* at 636.
44. *Mook*, 457 P.3d 568.
45. *Id.* at 578.
46. *Id.* at 578–79.
47. *Id.* at 579.
48. *Id.* at 579–80.
49. *Id.* at 580.
50. *Id.* at 581.
51. *Id.* at 582.