The summaries of the Colorado Court of Appeals published opinions constitute no part of the opinion of the division but have been prepared by the division for the convenience of the reader. The summaries may not be cited or relied upon as they are not the official language of the division. Any discrepancy between the language in the summary and in the opinion should be resolved in favor of the language in the opinion.

SUMMARY
August 1, 2024

2024COA82

No. 23CA1226, *HCPI/CO Springs Ltd. Partnership v. El Paso County Board of Commissioners* — Taxation — Property Tax — Residential Property — Residential Improvements; Rehabilitation Hospitals

A division of the court of appeals reverses the Board of Assessment Appeals' conclusion that a rehabilitation hospital should be classified as residential property for tax purposes. The division holds that a rehabilitation hospital should be classified as commercial property for tax purposes because a rehabilitation hospital is not "designed for use predominantly as a place of residency." § 39-1-102(14.3), C.R.S. 2017.

COLORADO COURT OF APPEALS **2024COA82**

Court of Appeals No. 23CA1226
Board of Assessment Appeals Case No. 2021BA1115

HCPI/CO Springs Ltd. Partnership,

Petitioner-Appellee,

v.

El Paso County Board of Commissioners,

Respondent-Appellant,

and

Board of Assessment Appeals,

Appellee.

ORDER REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division III
Opinion by JUDGE DUNN
Yun and Moultrie, JJ., concur

Announced August 1, 2024

Spies, Powers & Robinson, P.C., Jack D. Robinson, Mark W. Gerganoff, Denver, Colorado, for Petitioner-Appellee

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¶ 1 In Colorado, residential property is taxed at a significantly lower rate than commercial property. The issue before us is whether a rehabilitation hospital should be classified as residential or commercial property for tax purposes.

¶ 2 The El Paso County Board of Commissioners (the County), appeals an order of the Board of Assessment Appeals (BAA) classifying Encompass Health Rehabilitation Hospital of Colorado Springs (rehabilitation hospital), owned by HCPI/CO Springs Ltd. Partnership (HCPI), as residential property. The County and its supporting amicus curiae, the Colorado Property Tax Administrator (the Administrator), argue that the BAA erred by classifying the rehabilitation hospital as residential property.

¶ 3 Because a rehabilitation hospital is "designed for use predominantly" to provide rehabilitative services and not "as a place of residency," § 39-1-102(14.3), C.R.S. 2017, we conclude that the BAA erred by classifying the rehabilitation hospital as residential

property for tax purposes.[1] We therefore reverse the BAA's order and remand for further proceedings consistent with this opinion.

I. Background

¶ 4 The parties stipulated to the following facts. The subject property includes an approximately 82,701-square-foot, two-story building. The building was constructed in 1991 and was intended to be used — and most of it is currently used — as a rehabilitation hospital.[2]

¶ 5 Encompass provides rehabilitation services to patients following a stroke, an amputation, a brain injury, or the onset of Parkinson's disease or other complex neurological or orthopedic conditions with the "goal of returning each person receiving care" to "independent living." Encompass treats patients using an interdisciplinary team approach that includes physical, speech, and occupational therapists; rehabilitation physicians; rehabilitation nurses; case managers; dietitians; and respiratory therapists.

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[1] Because this case involves a property classification for the 2018 tax year and section 39-1-102 has since been amended, we cite the statute in effect at that time.

[2] For ease of reference, we refer to the subject property as the rehabilitation hospital and Encompass as the provider of rehabilitation services.

Patients receive at least three hours of therapy, five days a week; constant nursing care; and frequent physician visits.

¶ 6 The rehabilitation hospital has thirty-one rooms where patients stay while receiving inpatient rehabilitation services.[3] It also has common areas, including a lounge, a reception area, nursing stations, dining areas for residents and staff, a kitchen, and a rehabilitation gym with a pool. And patients "receiving overnight care" also receive laundry and housekeeping services.

¶ 7 Encompass is licensed by Medicare.[4] To maintain its Medicare license, Encompass is required to provide rehabilitation services, inpatient nursing care, and residential living. Encompass is also licensed by the Colorado Department of Public Health and Environment to operate as a rehabilitation center, and the property

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[3] During the relevant tax year, Encompass also provided outpatient rehabilitation services.

[4] Though an affidavit from Encompass's Chief Executive Officer stated that Encompass is a "Medicare-licensed facility," the Colorado Department of Public Health and Environment refers to Medicare approval not as a license but rather as an optional "certification" that allows providers to bill Medicare for reimbursement. Colo. Dep't of Pub. Health & Env't, *Medicare and Medicaid Certification for Health Care Facilities*, https://perma.cc/Z4A9-R9ZN. To the extent a license is different from a certification, it doesn't matter for our purposes.

is zoned as an “office complex” suitable for mixed commercial and residential use.

¶ 8 Approximately 2,235 square feet of the building is leased to a private, independent medical practice.

¶ 9 The County classified the rehabilitation hospital as commercial property for the 2018 tax year. HCPI petitioned for an abatement, arguing that the rehabilitation hospital should have been classified as residential property. The County denied the petition.

¶ 10 HCPI then appealed the commercial classification to the BAA. Before the BAA, the parties agreed that the portion of the building leased to a private medical practice was properly classified as commercial, stipulated to the facts recounted above, and requested that the BAA decide the appeal without a hearing.

¶ 11 Reversing the County’s decision, the BAA reclassified the property as mixed use for the 2018 tax year. More specifically, the BAA classified the portion of the building leased to the private medical practice as commercial and the approximately 80,000 remaining square feet — the rehabilitation hospital — as

residential.[5] The BAA then entered an order under section 39-8-108(2), C.R.S. 2023, determining that its decision is "of statewide concern."

II. Analysis

¶ 12 The County appeals the BAA's classification. It contends that the rehabilitation hospital is not designed for use predominantly as a place of residency, and, thus, that the BAA should've affirmed the County's commercial property classification.

A. Standard of Review

¶ 13 A BAA's property classification decision involves mixed questions of law and fact. *Thibodeau v. Denver Cnty. Bd. of Comm'rs*, 2018 COA 124, ¶ 6. Where, as here, the parties do not dispute the facts, we review the BAA's legal conclusions de novo. *See id.* at ¶¶ 6-7. We may reverse the BAA's decision if, among other things, the BAA failed to abide by the statutory scheme for calculating property taxes. *Id.* at ¶ 6; *see also* § 24-4-106(7)(b)(IX),

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[5] No one challenges the BAA's commercial classification of the portion of the building leased to the private medical practice. The only issue before us is the classification of the rehabilitation hospital.

C.R.S. 2023 (reviewing court must “set aside” a decision that’s “[o]therwise contrary to law”).

B. Agency Deference

¶ 14 The property classification here is somewhat unusual because it involves competing agency determinations as to whether a rehabilitation hospital should be classified as residential or commercial property. As reflected in the *Assessors’ Reference Library* (ARL), the Administrator classifies rehabilitation hospitals as commercial property.[6] 2 Div. of Prop. Tax’n, Dep’t of Loc. Affs., *Assessors’ Reference Library* § 6, at 6.31, 6.59 (rev. Mar. 2024). The BAA determined that the rehabilitation hospital here is residential property.

¶ 15 The parties argue at length — indeed almost exclusively — about whether we should defer to the Administrator’s classification or the BAA’s. But we needn’t resolve their dispute about which agency is the “superior tribunal” deserving of deference.

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[6] The ARL is a set of manuals created by the Administrator, binding on county assessors, for assessing and valuing property. *See* § 39-2-109(1)(e), C.R.S. 2023; *Huddleston v. Grand Cnty. Bd. of Equalization*, 913 P.2d 15, 17 (Colo. 1996).

¶ 16 That's because neither agency interpretation is binding. *Nieto v. Clark's Mkt., Inc.*, 2021 CO 48, ¶ 38 ("[W]hile agency interpretations should be given due consideration, they are 'not binding on the court.'") (citation omitted); § 24-4-106(7)(d) (Reviewing courts "shall determine all questions of law and interpret the statutory and constitutional provisions involved."); *cf. Loper Bright Enters. v. Raimondo*, 603 U.S. ___, ___, 2024 WL 3208360, at *12 (June 28, 2024) (concluding that, under the federal Administrative Procedure Act, it's the court's responsibility "to decide whether the law means what the agency says" (quoting *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 109 (2015) (Scalia, J., concurring in the judgment))).

¶ 17 Rather, we interpret the statute de novo. *See Thibodeau*, ¶ 6. And when the statute is unambiguous, as it is here, we apply it as written, giving words and phrases their plain and ordinary meanings. *Nieto*, ¶ 12.

C. Property Tax Classifications

¶ 18 Colorado's constitution defines "[r]esidential real property" as "all residential dwelling units and the land, as defined by law, on which such units are located." Colo. Const. art. X, § 3(1)(b).

¶ 19 In turn, the legislature defines "[r]esidential real property" as "residential land and residential improvements." § 39-1-102(14.5), C.R.S. 2017. "Residential land" means "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." § 39-1-102(14.4)(a), C.R.S. 2017. And "[r]esidential improvements" means "a building, or that portion of a building, *designed for use predominantly as a place of residency* by a person, a family, or families," including "buildings, structures, fixtures, fences, amenities, and water rights that are an integral part of the residential use." § 39-1-102(14.3), C.R.S. 2017 (emphasis added).

¶ 20 In this context, "designed for use predominantly" means that the building is "mostly" or "mainly" intended for actual use as a place of residence. *See Mission Viejo Co. v. Douglas Cnty. Bd. of Equalization*, 881 P.2d 462, 464 (Colo. App. 1994); *Farny v. Bd. of Equalization*, 985 P.2d 106, 109-10 (Colo. App. 1999); *see also* Merriam-Webster Dictionary, https://perma.cc/E5W9-95GR (defining "predominantly" as "for the most part" or "mainly"); Merriam-Webster Dictionary, https://perma.cc/C8X7-5JBX

(defining "design" as "to have as a purpose," "intend," or "to devise for a specific function or end").

¶ 21 While the legislature hasn't defined "commercial property," this court has defined "commerce" according to its plain meaning to include activities "having profit as a primary aim" and other "dealings between individuals or groups in society." *Mission Viejo*, 881 P.2d at 466 (quoting Webster's Third New International Dictionary 456 (1986)); *accord O'Neil v. Conejos Cnty. Bd. of Comm'rs*, 2017 COA 30, ¶ 14; *see also Assessors' Reference Library* § 6, at 6.26 (defining "commercial property" as "all lands, improvements, and personal property used as a commercial enterprise"). Property may qualify as commercial even if it isn't "for profit." *Mission Viejo*, 881 P.2d at 466; *accord O'Neil*, ¶ 14 ("The 'commercial' nature of property does not depend on its profitability.").

¶ 22 "Whether property is classified 'residential' or 'commercial,' then, depends, respectively, on whether it was 'designed for use predominantly as a place of residency' or whether it was used for

activities 'having profit as a primary aim' or 'other dealings between individuals or groups in society.'"[7] *O'Neil*, ¶ 15.

¶ 23 To determine the proper classification, we start with the property's actual use. *Mission Viejo*, 881 P.2d at 464; *Hogan v. Bd. of Cnty. Comm'rs*, 2018 COA 86, ¶ 15, *aff'd sub nom. Mook v. Bd. of Cnty. Comm'rs*, 2020 CO 12. Among other factors, we also consider the use for which the property was originally designed. *See Mission Viejo*, 881 P.2d at 465; *O'Neil*, ¶ 16.

D. A Rehabilitation Hospital Is Not Designed for Use Predominantly as a Place of Residency

¶ 24 Considering the relevant classification factors and the undisputed facts that the rehabilitation hospital was "originally constructed" and "intended to be used" as a rehabilitation hospital — not as a place of residency — and that it is currently actually used as a rehabilitation hospital, we have little difficulty in concluding that a rehabilitation hospital is not "designed for use

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[7] "In the case of an improvement which is used as a residential dwelling unit and is also used for any other purpose," a mixed-use classification may be appropriate. § 39-1-103(9)(a), C.R.S. 2023. If so, "each portion" of the improvement is separately valued. *Id.* No one argued, and the BAA didn't consider, whether the rehabilitation hospital itself should receive a mixed-use classification. Accordingly, neither do we.

predominantly as a place of residency." § 39-1-102(14.3), C.R.S. 2017. Put another way, a rehabilitation hospital's predominant purpose and use are not as a place of residency but rather to restore patients to ordinary daily living. *See Est. of Hays v. Mid-Century Ins. Co.*, 902 P.2d 956, 958 (Colo. App. 1995) ("'Rehabilitation' is the physical restoration of an injured person to daily living through therapy and education."); Merriam-Webster Dictionary, https://perma.cc/PJ6X-546E (defining "rehabilitation" as "restoration especially by therapeutic means to an improved condition of physical function").

¶ 25 True, as part of its rehabilitative purpose and use, and as required to maintain Medicare licensure, some patients receive overnight care and thus live at the rehabilitation hospital, at least temporarily. But that fact doesn't transform the rehabilitation hospital's historical and actual intended purpose and use. Rather, it highlights that the hospital's residential amenities are ancillary services that simply supplement the rehabilitative services. *See* Merriam-Webster Dictionary, https://perma.cc/5V4X-E6WH (defining "ancillary" as "subordinate," "subsidiary," "auxiliary," or "supplementary"). Indeed, absent the rehabilitative services, no one

would receive any care at the hospital, let alone overnight care. All this undermines the BAA's determination that the rehabilitation hospital is "designed for use predominantly as a place of residency."[8] § 39-1-102(14.3), C.R.S. 2017.

¶ 26 Even so, HCPI insists that the rehabilitative services are "residential improvements" that are "an integral part of the residential use," *id.*, because patients "would not and could not live" there without the rehabilitative services. But that proves our point — without the rehabilitative services, the rehabilitation hospital wouldn't exist, and no one would live at the hospital for any purpose.

¶ 27 Nor do we agree with HCPI that *Mission Viejo* supports the BAA's classification. In *Mission Viejo*, a division of this court concluded that a property originally constructed for use as a residence, but later used as a community center, was properly reclassified from residential property to commercial property. 881

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[8] To the extent the BAA alternatively found that the rehabilitation hospital "contains residential dwelling units," and its "actual use was as a dwelling place for residents receiving rehabilitative care," *see* Colo. Const. art. X, § 3(1)(b), HCPI doesn't make a constitutional argument on appeal.

P.2d at 463, 465. In so holding, the court focused on the property's current actual use. *Id.* at 464-65. Doing that here leads to a similar conclusion. As already explained, the rehabilitation hospital was always intended to be used — and is currently used — as a rehabilitation hospital. It therefore was not "designed for use predominantly as a place of residency." § 39-1-102(14.3), C.R.S. 2017.

¶ 28 Finally, to the extent HCPI offers policy reasons that it believes favor tax relief for rehabilitation hospitals, that's not our call. *See Kaiser v. Aurora Urb. Renewal Auth.*, 2024 CO 4, ¶ 37 (When interpreting unambiguous statutes, it's "not up to the court to make policy or to weigh policy." (quoting *Edwards v. New Century Hospice, Inc.*, 2023 CO 49, ¶ 27)). It's entirely the legislature's prerogative to decide whether rehabilitation hospitals should be classified as residential property. Should it so decide, it may amend section 39-1-102(14.3) to include rehabilitation hospitals within the definition of a residential improvement. *See People v. Rau*, 2022 CO 3, ¶ 34 ("It is for the legislature, not our court, to rewrite a statute."); *see also* Ch. 310, sec. 1, § 39-1-102, 2022 Colo. Sess.

Laws 2226-27 (amending section 39-1-102(14.3) to include nursing homes in the definition of residential improvements).

¶ 29 We conclude that the BAA's decision to classify the rehabilitation hospital as residential property is contrary to law because a rehabilitation hospital is designed for use predominantly to provide rehabilitative services and not as a place of residency. As a result, the rehabilitation hospital is properly classified as commercial property.

III. Disposition

¶ 30 We reverse the BAA's order and remand for further proceedings consistent with this opinion.

JUDGE YUN and JUDGE MOULTRIE concur.