

WRITTEN TESTIMONY BY AMY KRAMER IN SUPPORT OF HB22-1296

My name is Amy Kramer, and I'm a shareholder in the Denver Office of the law firm Greenberg Traurig. Thank you for the opportunity to submit my testimony in writing in support of HB22-1296. I wanted to share my testimony on this bill with the Committee in person, but I am unfortunately out of town on business.

These comments are based on my experience in representing two different licensed skilled nursing facilities successfully in challenging their classifications as "commercial" properties by two different counties in two different forums over the past two years. Through passage of this bill, other identically licensed facilities in *all* Colorado counties will be ensured uniform tax treatment as required by the Colorado Constitution so that they can focus on their important public mission of serving the elderly and infirm citizens of Colorado rather than fight arbitrary tax classifications that have no legal basis as have now been confirmed by final decisions issued in one case by the Adams County District Court and in the other by the Board of Assessment Appeals. Copies of these decision will be submitted upon request.

A. The Colorado Constitution Broadly Defines "Residential" Real Property

Hotels and motels are the only exclusion to the residential real property classification in the Colorado Constitution. Even commercial properties like apartments are taxed as residential based on the nature of the use: Apartments are home to the people that rent them, just as rooms in licensed skilled nursing facilities are home to the residents that live in them – whether they live in the rooms for several days, weeks, months, or years.

B. The Colorado Property Tax Administrator, Without Legal Precedent, Attempted to Change the Tax Classification of Certain Licensed Skilled Nursing Facilities Based in a Memo in April 2019

Under longstanding guidance in the Assessor's Reference Library (a resource for county assessors making tax determinations), "nursing or rest homes" are classified as residential under the Multi-Unit Subclass.

But the Colorado Property Tax Administrator's Office issued a Bulletin in April 2019 purporting to limit the longstanding blanket classification of "nursing or rest homes" based on a single factor: the residents' length of stay. Specifically, the Bulletin limited the residential classification to only those "[f]acilities that provide long term nursing, rest, and assisted living services, where patrons reside on a longer term basis of more than 30 days."

This bulletin underwent no legislative, legal, or public review.

The 30-day stay threshold purported relied on the holding in a Colorado Court of Appeals case called *ER Southtech*. The case was decided over 20 years ago and related to the classification of a hotel. The rationale for a 30-day threshold to distinguish

commercial hotel stays from residential hotel stays was based on a sales tax analogy: under the statutory scheme, room rentals for less than 30 days are subject to sales tax whereas stays over 30 days are exempt from sales tax.

But nursing home residents don't pay a sales tax. And licensed skilled nursing facilities are not hotels.

This was made abundantly clear in both the Adams County District Court and the Board of Assessment Appeals cases when it was ruled that *ER Southtech* and the 30-day threshold are inapplicable to licensed skilled nursing facilities. In addition, and notably, the Boulder City Attorney even asked the PTA to rescind the memo because it was based on inapplicable case law even before the above decisions were rendered.

Since I cannot address every aspect of these cases in my limited time, I want to address the one key argument made by the proponents of this change to classify the two nursing homes as "commercial" which was ultimately rejected.

In both cases, the tax authorities argued that the facilities' provision of rehabilitation services somehow converted a licensed skilled nursing facility from "residential" to "commercial." But, as noted in the written decisions, the licensing regulations issued by the Colorado Department of Public Health and Environment and those of the federal Medicare program require these facilities to provide their residents with a residential living setting *and* in-patient nursing care regardless of their length of stay. In other words, provision of rehabilitation services is not inconsistent with the residential classification of these facilities under their licenses and program certifications.

C. This Bill Will Ensure Uniform Tax Treatment of Facilities Operating Under Identical Licenses as Required by the Uniformity Clause of the Colorado Constitution

The Colorado Constitution requires uniform treatment within a class of property. But due to confusion and random application of the PTA Bulletin, currently facilities operating under identical licenses can and could, if the present situation continues, be treated differently among the counties and across the state in violation of the Colorado Constitution.

The State Department of Public Health and Environment does not distinguish between skilled nursing homes on whether they provide rehabilitation services in terms of licensure or on a resident's length of stay.

For these reasons, we urge you to adopt and pass HB22-1296 to make these classifications uniform to ensure that all licensed skilled nursing facilities are "residential" for property tax classification purposes.