BOARD OF ASSESSMENT APPEALS, STATE OF COLORADO 1313 Sherman Street, Room 315 Denver, Colorado 80203 **Petitioner:** **FERRUCO VAIL VENTURES, LLC,** v. **Respondent:** **EAGLE COUNTY BOARD OF EQUALIZATION.**	**Docket No.: 70438**

ORDER

THIS MATTER was heard by the Board of Assessment Appeals on February 5 - 6, 2019, Diane M. DeVries, Samuel M. Forsyth and Louesa Maricle presiding. Petitioner was represented by F. Brittin Clayton III, Esq. Respondent was represented by Christina Hooper, Esq. and M. Patrick Wilson, Esq. Petitioner is protesting the 2017 actual value of the subject property.

Petitioner's Exhibits 1, 2, 3, 4, 5, 6, 8, 9, 10, 14, 15, 16.1, 16.2, 16.3, 16.4, 26 and 27 were admitted into evidence. Respondent's Exhibits B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, R, T, U, V, X, U, Z and AA were admitted into evidence. Petitioner and Respondent each provided Memoranda of Law and Closing Arguments in writing.

Subject property is described as follows:

> **16 Vail Road, Vail, CO**
> **Eagle County Schedule Nos. R060337, R060338, R060339, R060340, R060341, R060342, R060343, R060344, R060345, R060346 and R060347.**

Petitioner is requesting an actual value of $19,600,000 for the subject property for tax year 2017. Respondent assigned a value of $32,423,800 for the subject property for tax year 2017 but is recommending a reduction to $28,508,399.

The subject property is an 84-unit full-service luxury hotel. The 11 account numbers under appeal include the Hotel Unit, Spa Retail Unit, Common Unit 2, Parking Unit, Management Unit, Loading Unit, Catering Kitchen Unit, Convention Unit, Service Unit, Spa Unit, and Restaurant Unit. All of the units listed above are considered to be one economic unit. Also, within the envelope of

the hotel are 38 separately owned Residential Condominium Units, 1 Penthouse Unit, and an Employee Housing Unit (also referred to as "EHU") consisting of 19 employee apartments. These residentially classified units are not under appeal. The subject is located in Vail Village, approximately ¼ mile from Vail Ski Resort's main lift, Gondola One.

The 11 account numbers under appeal are owned by Ferruco Vail Ventures, LLC ("FVV"). All of the components belong to an umbrella Home Owner's Association named Vail Plaza Condominium Association ("VPCA"). FVV contracted with Ferruco Vail Operating Corporation ("FVOC") to manage the hotel operations and the VPCA; FVV created the FVOC and the two entities are under common control. FVOC in turn contracted with the Timbers Management Company ("Timbers"), a third party company, to manage the hotel operations including the VPCA and the Condominium Rental Pool Program. The owners of the 38 Residential Condominium Units have the right to lease their units. The owners have the choice to rent the units themselves, contract with a third-party management company not connected with the hotel, or contract with Timbers which is under contract with the hotel operator to manage the leasing of these units. The leasing contract between the condominium owners and Timbers can be cancelled with 30-day notice.

There are 5 primary issues of dispute between the parties:

1. Is the net rental pool income (also referred to as rental agency income or "RAI") derived from the Condominium Rental Pool Program taxable for *ad valorem* purposes as real property?
2. Are the actual management fees assessed among the many components of the management of the hotel and home owner's association as determined by the actual hotel financials reasonable or excessive?
3. Does the capital reserve assessment of the home owner's association as reflected in the hotel's financials adequately account for replacement of all capital reserve items?
4. The appropriate overall capitalization rate to apply to the net operating income.
5. How to handle the income, expense, and value of the EHU which is a part of the hotel operations but is separately assessed, not under appeal, and classified as residential?

Petitioner's first witness was Kelly Polk, Director of Finance who is employed by FVOC, the designated manager of the hotel operations owned by FVV. Ms. Polk explained the relationship between the hotel owner (FVV), the hotel operations manager (FVOC), the nature of the homeowner's association (VPCA), and the management company designated by FVOC to manage the operations and VPCA, Timbers. Ms. Polk testified as to how the capital reserve expenses of the hotel are derived. Ms. Polk also testified regarding the purpose, income and expenses associated with the 19-unit EHU.

Petitioner next called Janessa Rinaker, Service Cultural and Residence Club Manager employed by FVOC. The witness testified regarding the management of the guests and transient tenants who occupy the separately owned condominium units within the Condominium Rental Pool. Ms. Rinaker's duties include managing transient guests who lease the separately owned condominium units.

Petitioner's witness, Brett Russell, Certified General Appraiser with HVS, prepared an appraisal report for the subject property placing the greatest weight on the income approach. Mr. Russell concluded to a value of $24,900,000 not including the RAI from the Condominium Rental Pool Program. From that value, Mr. Russell deducted the Eagle County assigned personal property value of $3,305,360 and the Eagle County assigned value of the EHU of $1,970,000 arriving to a value of $19,600,000 (rounded).

Petitioner's income approach relied largely on the actual trailing 12-month income and expenses from the FVOC Hotel Operating Profit and Loss ("P & L") statements. Importantly, the appraiser excluded the RAI revenue attributable to the Condominium Rental Pool Program. Mr. Russell determined that this income was an intangible asset because the income was derived from real estate not owned by the hotel and was based on contracts which could be cancelled at any time by the condominium owner.

Petitioner's capitalization rate of 6.5% was based on a reconciled analysis of the reported capitalization rates of sales in the HVS data base across the country; reported capitalization rates of hotel sales in the more proximate Rocky Mountain Region; and capitalization rates reported from investor surveys. Petitioner "loaded" the tax rate of 6.5% by the effective tax rate of 1.38% to arrive to an overall rate of 7.88%. The effective tax rate is a blended rate applying the residential assessment rate of the residentially classed Employee Housing Unit and the commercial assessment rate of the commercially classed hotel. The witness identified two sales in the Vail Valley for the sales comparison approach but concluded that the properties were too different from the subject to derive a credible value conclusion. The cost approach was considered but not developed largely because of the built-out nature of the Vail Valley.

Respondent called Gilles Cote, employed by Timbers. Mr. Cote testified to the identity of the parties in FVV, the owner of the hotel, and FVOC, the operations manager of the hotel. Mr. Cote testified that the ownership members of the two entities are related parties. The witness stated that the entity that he is employed by, Timbers, is independent from the hotel owner and hotel manager.

Respondent called Peter Korpacz, MAI, CRE, FRICS, President of Korpacz Realty Advisors, Inc. Mr. Korpacz provided testimony for the study he produced, titled *Resort-Hotel Valuation Methodology Study including Separately-Owned Hotel Rooms and Condos*. In preparing the report, Mr. Korpacz interviewed lodging properties' advisors, investors, brokers, buyers and sellers. Based on the input of the market participants interviewed, Mr. Korpacz concluded that net income derived from condominium and fractional interest rental pools (RAI) is considered to be a real estate ownership benefit that is factored into acquisition pricing. According to Mr. Korpacz, it is not considered a business income nor an intangible asset.

Respondent called Mark R. Linne, MAI, SRA, AI-GRS, a commercial and residential real estate appraiser. Mr. Linne testified that along with Peter Korpacz, he co-authored the International Association of Assessing Officers (IAAO) guide titled *Understanding Intangible Assets and Real Estate*. Mr. Linne testified that the RAI revenue is a tangible asset and provides a determinable amount of benefit to the hotel "...because it has a direct definable income stream..." The witness stated that the guide's goal was to established methodologies for eliminating valuation of intangibles

from an operational asset, once a component is identified as intangible. Because the witness identified the RAI as a tangible asset, the witness concluded that applying any aspect of the guidelines, that focuses on intangible, rather than tangible assets, is a misapplication of the guidelines.

Respondent called Ryan T. Kane, a Certified General Appraiser, employed by the Eagle County Assessors' Office. The witness testified to his appraisal report of the 11 real property accounts comprising the subject property. Mr. Kane considered the cost approach but did not develop a conclusion of value for this approach. Mr. Kane relied most on the income approach. In addition, Mr. Kane relied on the Audited Financial Statement of FVOC report for 2015 and 2016. Mr. Kane relied on the financial statement for the calendar year 2015. Mr. Kane did not trend the data to the June 30, 2016 appraisal date because, according to Mr. Kane, the actual performance of the subject showed no trend. Mr. Kane included the RAI revenue, concluding that market participants believe this income is a tangible asset by parties engaged in buying and selling hotels. The income and expenses used by Mr. Kane are the same as the 2015 financial statement except for 3 line items: 1) the income derived from the EHU is subtracted from the revenue; 2) the property tax line expense is not included because this expense is handled by the addition of the effective tax rate to the overall capitalization rate; 3) the management fee is adjusted to 3.2% which aligns with the typical fee that buyers and sellers expect in the market. There is no additional line item expense for reserve and replacement based on Mr. Kane's review of the Association dues that resulted in a 7.7% allotment of total revenue. Mr. Kane concluded to a 6.48% capitalization rate, composed of a 5% overall capitalization rate, based on the nature and character of the local Vail market with support by the reported capitalization rates from the 5 local sales in the subject market, plus a 1.48% effective tax rate. The sales comparison approach was considered but a value conclusion was not developed. Mr. Kane relied on the sales as support for the concluded value per room and capitalization rates.

THE BOARD'S FINDINGS AND CONCLUSIONS

Petitioner presented insufficient probative evidence and testimony to prove that the subject property was incorrectly valued for tax year 2017.

Petitioner's appraisal refers to the date of value as January 1, 2017 and specifies the opinion of value is subject to a jurisdictional exception: *"The retrospective 'as is' market value is subject to a jurisdictional exception. The Colorado Revised Statutes Title 39 indicate that a property is valued as it existed on January 1, 2017; however, the data used to establish property value is to be from the 18-month period ending June 30, 2016. As such, market, financial, and comparable sales data that is available from July 1, 2016, through the date of value were not considered in developing our opinion of value. Standards rule 1-4 states that an appraiser must collect, verify, and analyze all information necessary for credible assignment results. This statute precludes compliance with the USPAP standard."* However, the Board finds that is not consistent with Colorado statute. The date of appraisal is June 30 of the year preceding the year of general reappraisal. All applicable approaches to appraisal must be trended or adjusted to this date. Colorado statute § 39-1-105, C.R.S., provides that the date of assessment is to be January 1 each year and that all property is to be listed as it exists in the county where it is located on the assessment date. To distinguish between the two dates, the assessment date refers to the date upon which property situs (location), taxable status, and

the property's physical characteristics are established for that assessment year, while the appraisal date refers to the date upon which the valuation of the property is based or otherwise adjusted or trended. Accordingly, the effective date of value at issue in this case is June 30, 2016, not January 1, 2017.

The Board finds the parties' appraisers relied solely on, or gave most weight to, the income approach to value. Petitioner's appraiser, Mr. Russell, presented a reconstructed operating statement for the property for the trailing 12-month period ending June 30, 2016. Further, Mr. Russell's reconstructed historical operating performance for the property has been adjusted (1) to exclude the Condominium Rental Pool Program revenue and his estimate of the associated expenses, and (2) to reflect his estimate of a market typical reserve for replacements. The Board concludes that Mr. Russell's reconstructed operating history for the property is too processed and summarized for the Board to be able to extract all the pertinent revenue and expense elements needed to rely on that information. Although Mr. Russell presented what are identified as "source documents" for the 12-month period he used as an exhibit to his report, the Board finds they are also reconstructed statements in summary format, not the actual detailed operating statements. Because of the complex accounting for the subject hotel and the condominium association, and the necessity to see the detailed allocations and reimbursements between those entities, the Board concludes the trailing 12-month operating history presented by Mr. Russell is inadequate.

Respondent's appraiser, Mr. Kane, relied most on the audited financial report for the subject property showing calendar years 2015 and 2016. Mr. Kane analyzed the 2015 history. The audited financial report is in summary format, so Mr. Kane also used the 2016 detailed operating statement provided by Petitioner which also shows the 2015 history. After reviewing both appraisals, the Board concluded that the 2015 operating history used by Mr. Kane was more reliable because it was supported by an actual detailed operating statement.

Treatment of Rental Agency Fee Income:

The Colorado Constitution requires property to be taxed at its actual value. Colorado Constitution Article 10, Sec. 3(1). "Actual value" is synonymous with market value. All income streams attributable to the real estate are relevant to market value; a willing buyer would expect each income stream to be included in value if it is transferrable with the land. *Bd. of Assessment Appeals of State of Colo. v. Colorado Arlberg Club*, 762 P.2d 146, 152 ("In the market, the current value of a property...is based on what market participants perceive to be the future benefits of acquisition.") Similarly, a willing seller would want to include all streams of income in a valuation to maximize the value of the property at the time of transfer. *Id.*

Respondent claims hotel income derived from renting separately owned condominiums as auxiliary hotel rooms is not intangible personal property. Respondent argues an assessor must consider all relevant revenue streams attributable to the property, which would include revenue from renting separately owned condominiums. Because a revenue source rental of the separately owned condominiums is inextricably intertwined with the hotel real estate, it would be transferrable with the sale of a hotel to the new owner. Therefore, it is attributable to the real estate, and contributes to the actual, market value of a property.

The Board was persuaded by testimony from multiple witnesses and other evidence presented that the separately owned condominiums (wholly owned and fractional interests) are inextricably intertwined with the hotel real estate through common use of the hotel improvements, as well as shared management and maintenance administered through the condominium association (VPCA). The size and variety of the common area facilities and the level of staffing are required to meet not just the needs of guests for the 84 hotel owned rooms, but also the owners, guests, and renters of the 38 separately owned residential condominiums. The Board is also convinced the VPCA is controlled by the owner (FVV) and the owner's wholly controlled hotel operating company (FVOC). The hotel has 54.2085% of the pro rata interest (including the EHU) allocated among the members of the VPCA.

Petitioner's claim that the RAI revenue must be excluded from the hotel's net income relied on the Intangible Personal Property - Exemption statute, C.R.S. Section 39-3-118, which states: "Intangible personal property shall be exempt from the levy and collection of property tax. For purposes of this section, 'intangible personal property' shall include, but is not limited to, computer software." Petitioner also relied on an article produced by the IAAO Special Committee on Intangibles, titled *Understanding Intangible Assets and Real Estate*: *A Guide for Real Property Valuation Professionals* (the Guide).

Petitioner cited a recent BAA decision in Docket 70454, *Lodge Properties, Inc. v. Eagle County Board of Equalization*, in which Petitioner also claimed the RAI revenue at that hotel was an intangible asset derived from condominium units it rents but does not own, and that it must be deducted from the net income used to calculate market value. The Board in that case agreed with Petitioner. In both cases, Petitioners declared the RAI revenue is an intangible asset, relying on the IAAO Guide that addresses intangible assets. However, two of the Guide authors, Mr. Korpacz and Mr. Linne testified at the Ferruco hearing that Petitioner had misinterpreted and misapplied information provided in the Guide. Mr. Linne testified Petitioner's application of the four tests addressed in the Guide is a misapplication; they are not tests to determine if an asset is intangible. Mr. Linne further testified that if a property has a definable income stream, it is tangible rather than intangible which does not have a definable value element. By definition, a definable income stream is tangible, so it cannot be an intangible. Both witnesses testified the RAI income stream is identifiable, measurable cash, and a continual source of income to the hotel, so it cannot be intangible. Mr. Linne testified the Guide addresses only intangible assets, not tangible assets. Both Mr. Korpacz and Mr. Linne testified that sellers, buyers, (equity) investors, and lenders include the revenue stream from the third party-owned condominium rentals in their analysis of sale prices for condominium hotels, so it does have a direct impact on market value and the prices paid for those properties. In fact, that revenue is desirable to investors because it allows developers and owners to capitalize on rentals for the larger condominium hotel property without owning all of it. Mr. Linne was not presented as a witness in the *Lodge Properties* case.

The Board takes notice of Mr. Korpacz's statement in his *Resort-Hotel Valuation Methodology Study Including Separately-Owned Hotel Rooms and Condos*:

> Consistent with the market behavior of buyers and sellers of hotels and other industry sources, net income derived from condominium and fractional interest (timeshares) rental pools is considered a real estate ownership benefit (in the case of hotels – a fee simple estate) that is factored into acquisition pricing. It is not considered a business income nor an intangible asset. Characterization of such income as business income or intangible assets is an unfounded theory that has no basis in the hotel transaction market (market behavior).

The Board was not persuaded by Petitioner's claim that the separate ownership of the RAI units disqualifies the inclusion of the rental pool revenue in the hotel value. The Board is also not persuaded by the claim the RAI revenue is too unreliable because condominium owners are not required to rent unused weeks through the hotel. On-line rental services and outside agents can also be used. Petitioner provided witness testimony estimating approximately 85 to 90 percent of the unused condominium weeks are rented through the hotel, although management does not have an accurate method of tracking it. The Board agrees this revenue stream can go up or down over time, depending on many factors, and the value of the hotel will be impacted by potential changes in this revenue. However, that is also true for the hotel's room revenues, so the Board concludes that characteristic is not disqualifying.

The Board is convinced the RAI revenue stream is identifiable, measurable cash, and a continual source of income to the hotel that arises out of the core business of the subject property. The hotel's portion of the RAI flows to the hotel's net income; it is not paid out to the third party management company. The RAI revenue is a benefit to the property directly as a result of the hotel real estate including common areas, food and beverage facilities, recreational amenities, meeting facilities, and the services provided. Indeed, the condominium hotel design of the subject property included hotel facilities and amenities to serve not just the 100 hotel rooms originally constructed (now 84), but also the individually owned condominium owners, their guests, and renters who have pre-existing rights of use of the hotel facilities and all normal services provided by the hotel. The RAI unit rents directly benefit from the hotel facilities. The Board finds the testimony of multiple witnesses and evidence credible that a primary benefit of the condominium hotel design concept is that it allows the hotel owner to operate a significantly larger "hotel" than the 84 hotel rooms owned, by also having the ability to rent unused weeks for the individually owned and fractional interest condominiums that participate in the Rental Pool Program. The hotel owner substantially increases room revenue using the condominiums it does not own or maintain. Also, the RAI revenue transfers to a new owner upon sale. FVV and FVOC do not retain the right to rent the "club units" in the event of a sale.

The Board finds no support in statute or the ARL for Petitioner's claim that the RAI is *"intangible personal property"*. Neither statute nor the ARL identify this type of revenue, or cash of any type, as an intangible asset. On the contrary, intangible assets are defined in Black's Law Dictionary, in part, as property that has no intrinsic and marketable value. *See, e.g.*, Black's Law Dictionary, 6th Ed. ("As used in the law of taxation, the term intangible property means that such property has no intrinsic and marketable value but is merely the representing evidence of value such as certificates of stock, bonds, promissory notes, copyrights, and franchises. . ."). The Board concludes the testimony of Mr. Korpacz and Mr. Linne is most credible regarding this type of

revenue as a tangible asset, that it is desirable revenue to hotel investors, and that it contributes directly to condominium hotel sale prices and market values. The Board concludes the RAI revenue is a *tangible* asset that should be included in the market value analysis for the subject property.

Petitioner claims that including the RAI revenue stream in the hotel value results in double taxation. The Board disagrees. Only the portion of the revenue retained by the hotel as its fee flows to its NOI and thus to value; the portion of the rent paid to the "club unit" owners is shown as an expense on the operating statements, so is not included in the NOI. The individually owned condominiums are assessed by Eagle County as residential property using only the market approach, so any rental income the owners might receive is not considered in the value. Therefore, the Board concludes that including the hotel's portion of the rental pool revenue in the NOI used for the hotel valuation does not result in double taxation.

Management Fee:

Respondent claims the three components of the third party Timbers management fee agreement for the subject property result in a combined above market fee. The combined fees paid to Timbers were equivalent to 4.2% of the 2015 total revenue including the RAI revenue. Respondent claims a more typical management fee of 3.2% based on hotel industry market reports is appropriate. However, the Board finds it is not clear if the industry surveys reflect the added components of managing the condominium association and the condominium rentals. The Board finds that in addition to the combined fees paid to Timbers, the hotel operator (FVOC) keeps 50% of the management fee charged to VPCA for the management of the condominium association. In 2015, that reimbursement from VPCA to the hotel was $188,493. That is in effect, revenue or profit to the hotel; the owner's hotel operator company (FVOC) is paying itself. That revenue reduces the actual management fee expense paid to Timbers on the hotel's operating statement. Respondent's application of a flat fee percentage to the 2015 income should also have included adjustments to the various management fee charges and reimbursements involving the hotel and the condominium association to reflect that, which did not occur. The Board concludes that although the management fee structure involving both the third party management company (Timbers) and the owner's operating company (FVOC) is complex, it falls within a lower reasonable range after considering the portion of the VPCA management fee kept by FVOC as "profit", or effectively a reduction of the third party management fee expense.

Reserve for Replacements:

The subject property is 12 years old and approximately $13,500,000 was spent on renovations in 2010. The parties agree the property is in good condition. Petitioner claims Respondent's net income analysis expenses are too low because a reserve for replacements for the hotel rooms furniture, fixtures, and equipment (FF&E) has been excluded. The hotel's allocated portion of common reserves billed through the condominium association does not include the hotel room FF&E. The condo association budget, including the budget for reserves is based on the hotel's budget figures presented to VPCA. Respondent claims Petitioner's $410,000 additional reserve deduction from net operating income for the FF&E for 84 hotel rooms is excessive. Respondent further contends the common reserve amount charged to the hotel through the condominium

association is sufficient to include the hotel room FF&E.

The parties agree that a "typical" reserve of approximately 4.0% of total revenue for hotels is quoted by industry surveys. However, the Board is not convinced that percentage is reasonable for a condominium hotel designed property because the hotel only pays an allocated portion of the reserves needed to maintain the common elements of the larger property as a whole. In this scenario, the hotel's overall reserve burden is reduced. The Board also finds that the Host Almanac and Smith Travel Research surveys presented show reserve percentages for full service hotels ranging from approximately 1.6% to 2.3% depending on location, quality, and whether they are independent or franchise hotels. The Board further finds that the rates for hotels in the geographic region that includes Colorado are often toward the lower end of the range. Most of the reserve dollars per available room quoted by the surveys are approximately $1,500 or less. These ranges are for building plus FF&E reserves. The portion of the total common reserve billed to the hotel is equivalent to 1% of the 2015 revenue excluding the rental management fees and the EHU, but it is $1,595 per hotel room. The hotel in turn is reimbursed for the reserve charges to the non-hotel association "units".

The Board finds that Petitioner's $410,000 estimate of replacement reserves for hotel room FF&E is equivalent to an annual amount of $4,881, which is not supported by the industry surveys provided. Further, using Petitioner's own tax loaded capitalization rate, that expense is equivalent to a $5,203,046 (21%) reduction in value, which the Board finds is not credible.

The Board concludes that although the hotel's portion of the common reserve is only 1% of the adjusted hotel revenue, it is reasonable that this percentage be lower than for typical hotels that do not share the reserve burden with separately owned condominiums within the project. Also, the hotel's reserve expense is above average per available room. Even though the reserve expense that passes through the condominium association budget and dues is for common elements, the Board concludes it appears to be adequate to include FF&E for the 84 hotel rooms as well, based on the hotel industry survey statistics provided.

Capitalization Rate:

Petitioner's appraiser, Mr. Russell, concluded to a base capitalization rate of 6.50% and a tax loaded rate of 7.88% that included a blended effective tax rate to factor in the impact of the EHU's lower residential assessment rate. Mr. Russell relied on capitalization rates from national hotel sales, regional sales in Colorado, Arizona and Utah, and rates quoted in investor surveys. The rate chosen by the appraiser considered location, quality and condition of the property, and his opinion of the higher risks associated with not being a branded (national franchise) hotel, and with seasonality of the Vail market and annual snowfall variations. Respondent's appraiser, Mr. Kane, concluded to a 5.0% base capitalization rate and a tax loaded rate of 6.48% using the 29% assessment ratio for the hotel property. Mr. Kane considered rates reported in the PwC Real Estate Investor Survey (formerly the Korpacz Investor Survey) for luxury/upper-upscale hotels. He gave most weight to the capitalization rates produced by Colorado resort sales including two sales in Vail and a third sale of a small four-room property in Minturn during the base period. The capitalization rates for the two Vail sales were 4.86% and 5.98%. Mr. Kane contends that Vail hotel properties command low

capitalization rates because of barriers to entry for new development and a longer economic life, which leads to a greater window to achieve a return on investment.

The Board was not convinced by Mr. Russell's opinion that a higher base capitalization rate is warranted because the subject property is not a branded hotel and because of the risk of seasonality and varying snowfall amounts. The Board finds that Mr. Russell's use of a blended tax load rate to include the lower assessment ratio for the EHU gives too much weight to the residential assessment ratio relative to the commercial rate for the hotel. However, the Board notes that Mr. Russell's methodology does not favor Petitioner. Further, the Board questions whether a buyer of the subject property would make that capitalization rate distinction at all when buying the hotel and EHU as a combined property. The Board found Mr. Kane's evidence more compelling that the internationally known Vail resort market commands high purchase prices and lower capitalization rates. The Board has relied on Respondent's 6.48% tax loaded capitalization rate.

Employee Housing Unit (EHU):

The hotel property includes an employee housing unit with 19 studio apartments that were described as similar to dorm rooms. The EHU is not part of this appeal. Eagle County has assigned a separate parcel number to the EHU and it is appraised as residential property and assessed at the lower residential rate. The rents and expenses associated with the EHU appear on the hotel's operating statements. The parties agree the EHU must be removed from the valuation analysis for the hotel. Respondent's appraiser deducted the EHU rent from his analysis but did not adjust the operating expenses for the EHU because Petitioner does not separately track that information. Petitioner contends that approach inadequately adjusts for the EHU's impact on the hotel's NOI. In the same way Petitioner's appraiser made a deduction from value for personal property, a lump sum deduction of $1,970,000 was made for the value assigned to the EHU by Eagle County for the 2017 assessment. The Board agrees that Respondent made only part of the needed adjustments to NOI. The Board finds that Respondent also needed to remove the expenses directly associated with the EHU. Petitioner's witness, Ms. Polk, testified that the management company does not separately account for the EHU expenses and could only discuss a rough estimate. Based on Ms. Polk's testimony, the Board finds there is insufficient evidence to know how much of her rough estimate is included in the expense allocation made to the EHU through the condominium association budget, or if some or all of it is in addition to those expenses. Petitioner claims removal of the recorded rents and expenses from NOI does not adequately adjust for the full contributory value of the EHU to the hotel. The rents for this employee housing are purposely kept below market, so reflect only a portion of the value.

The Board finds Petitioner did not present any evidence or an estimate of the rent discounts that reportedly apply, and the only operating expenses associated with the EHU reported in the operating statements are those shown in the condominium association expense budget allocation. Statute requires the assessor to value residential property (the EHU) using only the market approach and no information was presented to the Board regarding what that value is based on. While the market approach is one indicator of value, it assumes the sale of the EHU as a separate residential property and it does not analyze rent or expenses. The market approach also does not address contributory value to the larger hotel property. The Board recognizes there is a value difference

between the value assigned by the assessor to the EHU and the capitalized value impact of removing the EHU rent and expenses and that the hotel operates the EHU at a loss. Petitioner claims that gap is the difference between the actual rents and market rents. The Board finds the EHU is a benefit to the condominium hotel property including the subject hotel and concludes it is likely to be operated as less expensive employee housing for the foreseeable future. In considering the contributory value of the EHU to the larger property, the Board considers the following Uniform Standards of Professional Appraisal Practice requirements:

> When analyzing the assemblage of the various estates or component parts of a property, an appraiser must analyze the effect on value, if any, of the assemblage. An appraiser must refrain from valuing the whole solely by adding together the individual values of the various estates or component parts.
>
> Comment: Although the value of the whole may be equal to the sum of the separate estates or parts, it also may be greater than or less than the sum of such estates or parts. Therefore, the value of the whole must be tested by reference to appropriate data and supported by an appropriate analysis of such data.
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> A similar procedure must be followed when the value of the whole has been established and the appraiser seeks to value a part. The value of any such part must be tested by reference to appropriate data and supported by an appropriate analysis of such data. *Uniform Standards of Professional Appraisal Practice, Standard 1, Standards Rule 1-4 (e).*

The Board concludes that although it is expedient to simply deduct the assigned value for the EHU from the hotel value, Petitioner has failed to demonstrate that it tested the assigned value of the EHU and that the value of that "part" of the hotel property is supported and is not over or under stated. The Board concludes the EHU rent and expenses shown on the condominium association allocated budget (the only expense information provided to the Board) should be removed from the NOI to remove the value of the EHU.

Uniformity:

Petitioner argues that Respondent's inclusion of rental agency income and expense in the subject's Net Operating Income (NOI) for purposes of the income approach is invalid because, as a result of Respondent's mid-cycle change in methodology, Respondent improperly applied different "means and methods" to value Petitioner's hotel and other similarly-situated hotels in violation of the uniformity clause of the Colorado Constitution.

Colorado Constitution, Article X, Section 3(1)(a), provides:

> Each property tax levy shall be uniform upon all real and personal property not exempt from taxation under this article located within the territorial limits of the authority levying the tax.

The uniformity requirement is met if the same "means and methods" are applied impartially to all the constituents of each class. *Salt River Project v. Board of Assessment Appeals*, 719 P.2d

368, 370 (Colo. App. 1986); *Citizens' Committee for Fair Property Taxation v. Warner*, 254 P.2d 1005 (Colo. 1953) (same).

The mode of making assessments is a legislative function. *Citizens' Committee*, 254 P.2d at 1010. Hence, the method or plan by which valuations for taxation purposes is to be formulated is not for determination by the courts. *Id*; *Board of County Commissioners v. Colorado Board of Assessment Appeals*, 628 P.2d 156, 159 (Colo. App. 1981) (the method by which valuation for taxation purposes is to be formulated is a legislative function and is not a proper subject for judicial determination); *Salt River Project*, 719 P.2d at 370 (same).

Accordingly, the "means and methods" for purposes of the uniformity requirement are those "means and methods" that are formulated by the legislature. In the case at hand, the Board is unaware of any rule or regulation formulated by the legislative authority that prohibits the inclusion of rental income from the separately owned condominiums in the hotel's NOI. Therefore, the Board does not find Petitioner's "means and methods" argument convincing. Similarly, the Board perceives no violation in Respondent's revision of its valuation methodology concerning the inclusion of the RAI mid-reassessment cycle.

The Board's Conclusion of Value

The Board has estimated a revised net operating income for the property starting with the 2015 audited financial statement report's $1,965,986 operating income which included the rental agency fee income and the EHU rent and was adjusted to remove the property taxes. The Board has then deducted the EHU rent and added back the EHU expenses shown on the condominium association allocated budget to remove the operating statement impact of the separately valued EHU. The adjusted initial operating income is $2,131,232 which results in a revised initial capitalized value for the subject property of $32,889,375. After deducting personal property value used by both parties, the Board concludes to a revised value for the subject property of $29,584,015 which is higher than the value recommended by Respondent in response to this appeal. Therefore, the Board concludes that Respondent's $28,508,399 value is supported by the evidence.

ORDER:

The Board orders that the 2017 valuation of the subject shall be reduced to Respondent's recommended value of $28,508,399.

The Eagle County Assessor is directed to update his/her records accordingly.

APPEAL:

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).

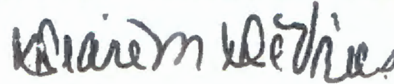
In addition, if the decision of the Board is against Respondent, Respondent may petition the Court of Appeals for judicial review of alleged procedural errors or errors of law within thirty days of such decision when Respondent alleges procedural errors or errors of law by the Board.

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.

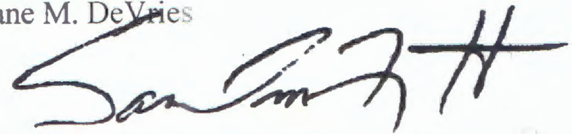
Section 39-8-108(2), C.R.S.

DATED and MAILED this 30th day of April, 2019.

BOARD OF ASSESSMENT APPEALS



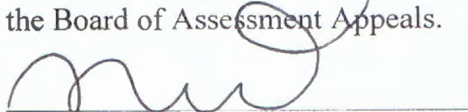
Diane M. DeVries



Samuel M. Forsyth

Louesa Maricle

I hereby certify that this is a true and correct copy of the decision of the Board of Assessment Appeals.



Milla Lishchuk