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<tr><td>BOARD OF ASSESSMENT APPEALS,
STATE OF COLORADO
1313 Sherman Street, Room 315
Denver, Colorado 80203</td><td rowspan="2">Docket No.: 76569</td></tr>
<tr><td>Petitioner:

OMNI INTERLOCKEN CO LLC,

v.

Respondent:

BROOMFIELD COUNTY BOARD OF EQUALIZATION.</td></tr>
<tr><td colspan="2" align="center">FINAL AGENCY ORDER</td></tr>
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THIS MATTER was heard by the Board of Assessment Appeals ("Board") on January 5, 2021, Louesa Maricle and Sondra W. Mercier presiding. Petitioner was represented by Mr. Thomas E. Downey, Jr, Esq. Respondent was represented by Mr. Karl Frundt, Esq. Petitioner appeals the actual value of the subject property for tax year 2019.

EXHIBITS AND EXPERT WITNESSES

The Board admitted into evidence Petitioner's Exhibit 1 and Rebuttal Exhibits 2 and 5. The Board also admitted Respondent's Exhibit A, and Rebuttal Exhibits B and C. In addition, the Board admitted Respondent's Rebuttal Exhibit D, indicating that it would not consider post base-year sales data. The Board admitted Mr. Jeff Lugosi, Colorado Certified General Real Estate Appraiser with CBRE Inc., and Mr. Mark R. Linné, Colorado Certified General Appraiser with Chrysalis Valuation Consultants LLC, as expert witnesses.

DESCRIPTION OF THE SUBJECT PROPERTY

Address: 500 Interlocken Boulevard, Broomfield
Broomfield County Schedule No.: 1575-331-10-001

The subject property was identified as the Omni Interlocken Resort, a 390-room full-service hotel and conference center that was constructed in 1999. The facility includes 21,000 square feet of meeting space, two restaurants, a lobby lounge area, outdoor pool with grill, fitness center, gift shop, and business center. The facility is situated on an 18.4-acre site, situated adjacent to a golf course that is not part of this appeal. (Exhibit 1, p. 1.)

The appealed value assigned by the County Board of Equalization ("CBOE") below, and the parties' assertions of the subject property's value are as follows:

Appealed CBOE Value:	$ 46,800,000
Petitioner's Requested Value:	$ 41,900,000
Respondent's Requested Value:	$ 46,800,000

BURDEN OF PROOF AND STANDARD OF REVIEW

In a proceeding before this Board, the taxpayer has the burden of proof to establish, by a preponderance of the evidence, that the assessor's or county board's valuation or classification is incorrect. *Bd. of Assessment Appeals v. Sampson*, 105 P.3d 198, 204 (Colo. 2005). Proof by a preponderance of the evidence means that the evidence of a circumstance or occurrence preponderates over, or outweighs, the evidence to the contrary. *Mile High Cab, Inc. v. Colorado Public Utilities Comm'n*, 302 P.3d 241, 246 (Colo. 2013). The evaluation of the credibility of the witnesses and the weight, probative value, and sufficiency of all of the evidence are matters solely within the fact-finding province of this Board, whose decisions in such matters may not be displaced on appeal by a reviewing court. *Gyurman v. Weld Cty. Bd. of Equalization*, 851 P.2d 307, 310 (Colo. App. 1993). The determination of the degree of comparability of land sales and the weight to be given to the various physical characteristics of the property are questions of fact for the Board to decide. *Golden Gate Dev. Co. v. Gilpin Cty. Bd. of Equalization*, 856 P.2d 72, 73 (Colo. App. 1993).

The Board reviews every case de novo. *See Bd. of Assessment Appeals v. Valley Country Club*, 792 P.2d 299, 301 (Colo. 1990). In general, the de novo proceeding before the Board "is commonly understood as a new trial of an entire controversy." *Sampson*, 105 P.3d at 203. Thus, any evidence that was presented or could have been presented in the county proceeding below may be presented to this Board for a new and separate determination. *Id*.

APPLICABLE LAW

"'Taxable property' means all property, real and personal, not expressly exempted from taxation by law." § 39-1-102(16), C.R.S. This appeal is concerned with the assessed value of real property.

As relevant to this appeal, there are three methods of valuing real property: the market approach, the cost approach, and the income capitalization approach.

The market approach relies on comparable sales, as required under section 39-1-103(8)(a)(I), C.R.S., which states:

> Use of the market approach shall require a representative body of sales, including sales by a lender or government, sufficient to set a pattern, and appraisals shall reflect due consideration of the degree of comparability of sales, including the extent of similarities and dissimilarities among properties that are compared for assessment purposes.

The cost approach involves estimating the cost of replacing the improvements to the property, less accrued depreciation. *Bd. of Assessment Appeals v. E.E. Sonnenberg & Sons, Inc.,* 797 P.2d 27 (Colo. 1990). Colorado law mandates that depreciation in the valuation of a taxpayer's personal business property be allowed annually from the base year to the date of assessment. *BQP Industries v. State Bd. of Equalization*, 694 P.2d 337 (Colo. App. 1984).

The income capitalization approach is a common method for calculating the value of commercial properties. *Sonnenberg*, 797 P.2d at 31 (fn.8). It generally involves calculating the income stream (rent) the property is capable of generating, capitalized to value at a rate typical within the relevant market. *Id.* Within an income approach to calculate real property value, it is necessary to remove all components of net operating income not attributable to the real estate and deduct them from the value.

It is also necessary to exclude all tangible and intangible personal property items from the valuation of real property for taxation. Tangible personal property is taxed through a separate procedure, and intangible personal property is exempt from taxation. § 39-3-118, C.R.S. ("Intangible personal property shall be exempt from the levy and collection of property tax."); *see also* § 39-22-611, C.R.S.

"Intangible property" is defined as, "Nonphysical assets, including but not limited to franchises, trademarks, patents, copyrights, goodwill, equities, securities, and contracts as distinguished from physical assets such as facilities and equipment." Appraisal Institute, *The Dictionary of Real Estate Appraisal* (6th ed. 2015), p. 119.

The standard appraisal methods for allocating value to intangible assets are presented in *The Appraisal of Real Estate, Chapter 37 - Valuation of Real Property with Related Non-Realty Items*. As this reference book explains,

> The appropriate method of valuing or allocating intangible assets has been highly controversial among real property appraisers. It is important for all involved in this form of valuation work to understand the history and intensity of the debate and to understand the various alternative methodologies regarding how intangible assets should be accounted for in the valuation process. Given the complexity of the issues and intensity of the controversy, generalizations can be dangerous.

Appraisal Institute, *The Appraisal of Real Estate*, (15th ed. 2020), p. 670.

The International Association of Assessing Officers ("IAAO") also issues technical standards and other reference publications that are generally accepted in the appraisal community. The Assessors' Reference Library ("ARL") provides binding guidance for county assessors and cites IAAO publications extensively. *See, e.g.*, ARL V.3 at 2.31, 8.8, 8.14, 8.15 and ARL V.5 at 3.13, 3.19, and 3.27 (citing IAAO, *Property Appraisal and Assessment Administration*, (1990)); ARL V.3 at 4.21 (citing IAAO for the practice of time trending); ARL V.5 at 3.4 (citing IAAO, *Property Assessment Valuation*, (2010); ARL V.2 at 8.16 and ARL V.5 at 3.4 (citing numerous technical standards published by IAAO). As relevant to this case, the IAAO Special Committee on Intangibles has published a guide titled *Understanding Intangible Assets and Real Estate: A*

Guide for Real Property Valuation Professionals, which discusses various methods for allocating value to intangible assets. This article explains that the appraisal community recognizes the two approaches discussed above to removing intangible value for the purposes of the *ad valorem* appraisal of real estate: the management fee method (Rushmore approach) and the income residual technique (business enterprise approach).

The Rushmore approach is a method of valuing the real property portion of hotels and other lodging properties by excluding the value of intangible assets from the hotel's overall value. It does so by calculating the property's net operating income after deducting the hotel's management and franchise fees – fees that, under the Rushmore approach, account for the value of intangible assets. Following the deduction of the management and franchise fees from the income of the business, the remaining income is capitalized to reach the subject property's value. The Rushmore approach has never been addressed in a published opinion by Colorado courts, but its application has been extensively upheld by courts in other jurisdictions. *See, e.g.*, *Glenpointe Assoc. v. Teaneck Township*, 12 N.J. Tax 118 (N.J. Super. Ct. App. Div. 1990); *In re J.F.K. Acquisitions Group*, 166 B.R. 207, 209 (Bankr.E.D.N.Y.1994); *Marriott Corp. v. Bd. of Johnson Cnty. Comm'rs*, 972 P.2d 793 (Kan. Ct. App. 1999); *Chesapeake Hotel LP v. Saddle Brook Township*, 22 N.J. Tax 525 (2005); *Wolfchase Galleria Ltd. Partnership v. Tenn. Bd. Of Eq*. (Shelby Cty. TN, 2005); *Grand Haven Investment, LLC v. Spring Lake Township* MTT Docket No. 364917 (MI Tax Tribunal 2012); *CHH Capital Hotel Partners, LP, v. District of Columbia*, 152 A.3d 591 (D.C. 2017); *Switzerland Cnty Assessor v. Belterra Resort Indiana, LLC*, *101 N.E.3d 895* (Ind. Tax Ct. 2018). "[T]he Rushmore approach has been widely accepted by the courts, has been embraced by most assessment jurisdictions, and reflects observable and verifiable market behavior in the transaction market. For lodging properties and casinos, the Rushmore approach is the recommended method for excluding intangible value from real property valuations." IAAO Special Committee on Intangibles, *Understanding Intangible Assets and Real Estate: A Guide for Real Property Valuation Professionals*, (Nov. 12, 2016), pp. 38-39.

The business enterprise approach deducts not only the management fee, but also business start-up costs and the return on any furniture, fixtures and equipment. This approach is often used to value shopping centers and office buildings.

"Business Enterprise Value" is defined as, "The value contribution of the total intangible assets of a continuing business enterprise such as marketing and management skill, an assembled workforce, working capital, trade names, franchises, patents, trademarks, contracts, leases, customer base, and operating agreements." Appraisal Institute, *The Dictionary of Real Estate Appraisal* (6th ed. 2015), p. 28. Going concern value can be thought of as the market value of the real estate plus the Business Enterprise Value. "Going concern value" is more expansively defined as: "An outdated label for the market value of all the tangible and intangible assets of an established and operating business with an indefinite life, as if sold in aggregate; more accurately termed the *market value of the going concern* or *market value of the total assets of the business*." Appraisal Institute, *The Dictionary of Real Estate Appraisal*, (6th ed. 2015), p. 102.

The market value of the going concern is defined as: "The market value of an established and operating business including the real property, personal property, financial assets, and the

intangible assets of the business." Appraisal Institute, *The Dictionary of Real Estate Appraisal*, (6th ed. 2015), p. 143.

> Other methodologies have been used for market and ad valorem valuation, but it is our opinion that the Rushmore Method is the most reliable; this opinion is supported by market appraisers, case law, published appraisal articles, and the IAAO. By failing to deduct these expenses from the hotel's income stream, an appraiser would be valuing the subject based on income attributable to the realty and non-realty elements.

State of Colorado, Division of Property Taxation, Appraisal Standards, *APR 215: Hotel/Motel Valuation Workshop (2019), Course Materials,* p. 31.

ISSUES BEFORE THE BOARD

Petitioner contended that the subject was overvalued based on an insufficient deduction for intangible value as a component of the going concern value. In this case, the Board must evaluate how the value associated with intangible assets has been removed to produce a reliable indication of the value of the real property for tax purposes.

There was no disagreement between parties that it was necessary to exclude all tangible and intangible personal property items from the valuation of real property for taxation. Tangible personal property, such as furniture, fixtures, and equipment, is taxed through a separate procedure. Intangible personal property or nonphysical assets such as business value, franchises, trademarks, patents, copyrights, goodwill, equities, securities, and contracts are exempt from taxation. § 39-3-118, C.R.S. ("Intangible personal property shall be exempt from the levy and collection of property tax."); *see also* § 39-22-611, C.R.S.

While there are a number of techniques available to recognize and deduct intangible value, the appraisal community generally recognizes two approaches for removing intangible value for the purposes of the *ad valorem* appraisal of real estate: the management fee method (sometimes referred to as the Rushmore approach) and the income residual technique (sometimes referred to as the business enterprise approach).

"[T]he Rushmore approach has been widely accepted by the courts, has been embraced by most assessment jurisdictions, and reflects observable and verifiable market behavior in the transaction market. For lodging properties and casinos, the Rushmore approach is the recommended method for excluding intangible value from real property valuations." IAAO Special Committee on Intangibles, *Understanding Intangible Assets and Real Estate: A Guide for Real Property Valuation Professionals*, (Nov. 12, 2016), pp. 38-39.

The management fee approach is also favored by the State of Colorado Division of Property Taxation and taught as the preferred approach in the division's course – *APR 215: Hotel/Motel Valuation Workshop (2019), Course Materials,* p. 31, which notes: "Other methodologies have been used for market and ad valorem valuation, but it is our opinion that the

Rushmore Method is the most reliable; this opinion is supported by market appraisers, case law, published appraisal articles, and the IAAO."

The management fee methodology is succinctly described as follows:

> For a hotel property, proponents of this approach would deduct the management fee and franchise fee (if it is a branded hotel affiliated with a chain) along with other operating expenses. By removing management fees and franchise fees from the revenue, appraisers reason that the influence of intangible assets has been eliminated. This approach maintains that the offices, staff, salaries, and overhead associated with management of the hotel reside not with the owner of the real property but with the company that manages and operates the hotel for the owner of the real property. Advocates of this approach state that because the management fee compensates the management company for those expenses…the value of any intangible assets is removed, and any remaining net income is attributable to the real property.

Appraisal Institute, *The Appraisal of Real Estate*, (15th ed. 2020), p. 677.

FINDINGS AND CONCLUSIONS

Petitioner presented insufficient probative evidence to prove that the subject property was incorrectly valued for tax year 2019. Petitioner's witness, Mr. Lugosi, initially followed the steps outlined for the management fee method, but then made further deductions that are typically identified as part of the business enterprise approach. In this case, the Board's decision relates to Petitioner's secondary deductions for flag (brand) and franchise value, assembled workforce, and proxy rent value, which the Board finds to be duplications of deductions already made under the management fee method. Further, the secondary deductions lack support from market data.

Mr. Lugosi based his calculation of revenue, departmental expenses, operating expenses, and fixed expenses on an analysis of the subject's operating history, which was found reasonable based on comparison to the operating results for similar hotel properties. (Exhibit 1, Addenda Exhibits II and III.) Most relevant to his analysis was the subject's actual operating history for 2017, representing a full 12-month period prior to the end of the base period. Consistent with the process outlined as the management fee approach, Mr. Lugosi made deductions for franchise fees, management fee, and reserves for replacement. He identified the going concern value of the subject as $48,700,000, which included contributory value of real property, personal property, and in his opinion, residual intangible value. A deduction of $900,000 was made for personal property, based on information provided to Mr. Lugosi by Petitioner. Petitioner's initial management fee approach would support a market value of the real property at $47,800,000, which the Board notes is within 2% of Respondent's assigned value of $46,800,000 for tax year 2019. (Exhibit 1, p. 4.)

Although Mr. Lugosi's calculation already included deductions of both a management fee and franchise fee, he opines that there is additional economic benefit of approximately $6.00 in Revenue Per Available Room (RevPAR) compared to a competitive set. He believes that a portion is attributable to the intangible assets of the flag (brand) and franchise agreement. He determines

that additional revenue over an 18-month period of $448,473 can be attributed to the brand, reservation system and other benefits associated with the management agreement with Omni. Capitalized at the same rate as the going concern, this assumption resulted in a deduction of $3,700,000. (Exhibit 1, pp. 11-12.) However, net income is typically applied based on a 12-month time period and capitalized. Use of an 18-month period overstates the deduction. Also, the witness provided insufficient evidence to support that the high RevPAR was solely attributable to intangible assets (business operation), rather than real property (such as location, hotel amenities such as a pool, fitness room or restaurants). The Board finds this deduction of $3,700,000 to be a duplication of the deductions already made for management fee and franchise fee within the management fee approach.

Mr. Lugosi next makes a deduction of $400,000 for the value and expertise of the workforce operating the hotel. As a reminder, the management fee approach maintains that the offices, staff, salaries, and overhead associated with management of the hotel reside not with the owner of the real property but with the company that manages and operates the hotel for the owner of the real property. Consequently, the Board finds this deduction of $400,000 to also be a duplication of the deduction already made for management fee.

Finally, Mr. Lugosi makes a deduction of $1,800,000 based on the assumption that portions of the value of the food and beverage (F&B) operation should not be attributed to the real estate. He based this deduction on the assumption that the subject's restaurant and lounge areas were leased to an outside restaurant tenant/operator. As the subject's restaurant space and lounge areas are not leased, this analysis presents the equivalent of a hypothetical condition in the appraisal. Further, Petitioner provided no support for the supposition that a management company, which is paid a management fee based on total revenue to all departments, would give up control of any portion of the F&B operation.

To estimate rent, Petitioner relied on market rents from three restaurants and bars located within the Westminster area, and concluded to a proxy rental rate of $18.00 per square foot for the subject. (Exhibit 1, Addenda Exhibit VII.) At hearing, the Board questioned Mr. Lugosi as to the comparability of the three freestanding restaurants (not associated with a hotel). He testified that he had not personally inspected the comparable properties and was not familiar with the locations. The Board notes that Petitioner provided no market rent data for restaurants operating within a similar full-service resort hotel, or within any hotel in any location. The Board finds the data and analysis insufficient to support this additional adjustment.

Both parties applied the income approach to value the subject. Respondent's witness, Mr. Mark Linné, applied the management fee approach and concluded to a value of $66,000,000 for the real property based on the income approach. Mr. Linné also considered the sales comparison approach, and concluded to a value of $65,000,000, which is well in excess of the CBOE's assigned value. As Petitioner has the burden of proof to establish, by a preponderance of the evidence, that the assessor's or county board's valuation or classification is incorrect, Mr. Linné's report was weighted only as supportive to Respondent's value.

As an appraisal should be representative of the actions of the marketplace, the Board was convinced by both parties that participants in the hotel marketplace depend primarily on the

income-producing aspects of a property such as the subject when making purchase and sale decisions. The Board finds the income approach to be the most reliable indicator of value for the subject. The Board finds use of the management fee technique, the approach Colorado assessors are required to use, compelling as an appraisal methodology to eliminate intangible asset value and determine the taxable value of real estate for hotel properties in general, and for the subject property in particular. The Board was persuaded that the management fee method resulted in a credible valuation of the subject that supported the Broomfield County Assessor's assigned value.

Pursuant to the findings and conclusions reached above, the Board finds that Petitioner presented insufficient probative evidence to prove that the subject property was incorrectly valued for tax year 2019.

ORDER

The petition is **DENIED**.

APPEAL RIGHTS

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.

See § 39-8-108(2), C.R.S. (rights to appeal a tax protest petition); *see also* § 39-10-114.5(2), C.R.S. (rights to appeal on an abatement petition).

DATED and MAILED this 22nd day of June, 2021.

BOARD OF ASSESSMENT APPEALS:

Drafting Board Member:

Sondra W. Mercier

Concurring Board Member:

Louesa Maricle
Concurring without modification pursuant to § 39-2-127(2), C.R.S.

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

Casie Stokes