

<b>BOARD OF ASSESSMENT APPEALS, STATE OF COLORADO</b> 1313 Sherman Street, Room 315 Denver, Colorado 80203	<b>Docket No.: 78895</b>
Petitioner:  <b>HERKERT &amp; MEISEL TRUNK COMPANY,</b>  v.  Respondent:  <b>GUNNISON COUNTY BOARD OF EQUALIZATION.</b>	
<b>FINAL AGENCY ORDER</b>	

**THIS MATTER** was heard by the Board of Assessment Appeals (“Board”) on November 16, 2020, Samuel Forsyth and John DeRungs presiding. Attorney Charles F. (Skip) Dufour appeared on behalf of Petitioner. Respondent was represented by David Baumgarten, Esq. Petitioner protests the actual value of the subject property for tax year 2019.

**EXHIBITS**

The Board admitted into evidence Petitioner’s Exhibits I - IV and Respondent’s Exhibit A.

**DESCRIPTION OF THE SUBJECT PROPERTY**

16 Sixth Street, Crested Butte, CO 81224  
County Parcel #3255-022-26-005

The subject property is a 15,625 SF site situated on Gothic Street at the north edge of the Town of Crested Butte. That gives it a secondary location off Elk Street in the central downtown area on the main road to the ski resort. It was improved with a 4,728 SF two story building in 2000 that mainly consists of a single 2,908 SF main level commercial unit (most recently used as a restaurant). A 1,820-SF single unit apartment that is found on the upper level is restricted to residents who have lived in Crested Butte for one year or more and must sign at least a six-month lease, and has only been rented with the main level.

The appealed subject property value assigned by the County Board of Equalization (“CBOE”) below, the value requested by Petitioner, and the value determined by the Board of Assessment Appeals for tax year 2019, follow:

CBOE's Assigned Value:	\$1,294,960
Petitioner's Requested Value:	\$1,000,000
BAA's Value:	\$1,000,000

### **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 valuation 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 board of equalization (CBOE) proceeding may be presented to this Board for a new and separate determination. *Id.* However, in this appeal, the Board may not impose a valuation on the property in excess of that set by the CBOE. § 39-8-108(5)(a), C.R.S. (2020).

### **APPLICABLE LAW**

For property taxation purposes, the value of residential properties must be determined solely by the market approach to appraisal. *See* Colo. Const. art. X, § 20(8)(c); § 39-1-103(5)(a), C.R.S. 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.

If an improvement used as a residential dwelling is also used for any other purpose, the actual value and valuation for assessment of such improvements shall be determined by valuing each portion of the improvement by application of the appropriate approaches to value – cost approach, income approach, and market approach. § 39-1-103(9)(a), C.R.S. The actual value of the land containing such an improvement shall also be determined by application of the appropriate

approaches to appraisal. *Id.*

The land containing such an improvement shall be allocated to the appropriate classes based upon the proportion that the actual value of each of the classes to which the improvement is allocated bears to the total actual value of the improvement. The appropriate valuation for assessment ratio shall then be applied to the actual value of each portion of the land and of the improvement.

*Id.* As reiterated by the Assessors' Reference Library ("ARL"),

The valuation of mixed-use properties, which include an improvement used as a residential dwelling unit, is outlined in §39-1-103(9)(a) and (b), C.R.S. The actual value of the residential portion of the improvement must be determined using only the market approach to value, §39-1-103(5)(a), C.R.S. Assessors may assign value to the residential portion of the improvement using market values per square foot of living areas found in residential properties most similar to the residential use. Consideration of the appropriate approaches to value must be applied to the non-residential portion. Land classification is allocated in proportion to the allocation of the improvement value.

3 Div. of Prop. Taxation, Dep't of Local Affairs, Assessors' Reference Library Ch. 1, at 1.9 (rev. Jan. 2021).

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 approach is a common method for calculating the value of commercial properties, especially apartment buildings, office buildings and shopping centers. *Sonnenberg*, 797 P.2d at 31. 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.*

### **FINDINGS AND CONCLUSIONS**

The Board finds that the subject property is a mixed use property, and should be valued according to the direction given in statute at § 39-1-103(9)(a), C.R.S. The residential portion of the subject (the improvement and the land) should be valued by application of the sales comparison approach, and the commercial portion (the improvement and the land) should be valued by consideration of all three approaches to value – sales comparison, income and cost.

Petitioner presented the testimony of Mr. Wallace McNeill, owner of Herkert & Meisel Trunk Company. The Petitioner maintained that the actual value of the commercial portion of the subject should be value based on capitalizing contract net income by developing an Income

Approach. He supplied an excerpt of the lease, several years of actual operating income and expense data and a vacancy report. In summary, a prolonged (over ten years) period of vacancy occurred before the current tenant signed a lease for the entire building in 2015. A lower rent of \$13.20 PSF was re-negotiated within a year but the tenant maintained their lease rate was above market levels. Finally, an understanding of how a capitalization rate is selected using a range of these rates reported for national credit tenants appeared to support his estimate of value. Petitioner also objected to relying on available comparable sales at superior downtown locations along Elk Avenue that he asserted overvalued the property using a Sales Comparison approach.

Respondent presented expert testimony by Robert J. Blackett, a residential appraiser employed by the Gunnison County Assessor's Office. Mr. Blackett testified that he agreed with the statutory method for valuing mixed use properties. He identified that within the subject's 4,728 square foot improvement, 2,908 square feet (62%) was being put to commercial (restaurant) use, and 1,820 square feet (38%) was classified as residential use. Using the Income Approach, he concluded to a rental rate of \$21.50 per square foot to calculate potential income for the subject property's commercial area only. Using the 2,908 rentable square feet and an overall capitalization rate of 7.77%, he estimated a \$730,779 value for the commercial portion of the subject. Mr. Blackett then correctly identified that a value for the residential portion of the subject property would need to be added to this estimate of the commercial portion of the property to arrive at a total value. However, the Board finds Mr. Blackett's methodology in valuing the residential portion of the property was flawed.

Within his Market Approach, Mr. Blackett selected six sales (three residential/commercial mixed use, three commercial). His Market Approach sought to value the entire 4,728 square feet of the subject property, rather than the 1,820 square feet of the residential portion. He applied an adjustment for "difference in use." He arrived at a value of \$320 per square foot, multiplied that by 4,728 square feet, and concluded to a Market Approach value of \$1,512,960 for the entire subject property. He then arrived at the residential value of the subject by calculating that 38.5% (the percentage of the subject devoted to residential use) of \$1,512,960 is \$582,490. (Exhibit A, p. 17.) Next, he combined the income approach value for the commercial portion of the property (\$730,779) with the Market Approach value for the residential portion (\$582,490) to arrive at a stated combined "Income Approach" value of \$1,313,269 for the entire subject property. (Exhibit A, p. 17.) He then also conducted a final reconciliation of his \$1,313,269 Income Approach Value and his \$1,512,960 Market Approach value to arrive at a final opinion of value for the subject of \$1,500,000. (Exhibit A, p. 27.)

The Board finds that Mr. Blackett's Market Approach would have been more compliant with statutory direction, and more persuasive, had he assigned value to the residential portion of the subject improvement "using market values per square foot of living areas found in residential properties most similar to the residential use," as suggested by the ARL. Instead, his comparables included mixed use sales, and attempted "difference in use" adjustments. In addition, in valuing the residential portion of the improvement, the better methodology would have been to value the residential portion of the improvement using residential sales comparable in size, rather than arriving at the residential portion's value by application of the *percentage* of residential use to the value of the entire mixed use subject property. In addition, it is unclear why Mr. Blackett used his "Market Approach" value for the residential portion of the subject to arrive at what he termed an

“Income Approach” value of \$1,313,269 for the entirety of the subject, in combination with the income approach he performed for the commercial portion of the subject. In light of the \$1,313,269 conclusion, which already included the Market Approach residential component, it is also unclear how he reconciled the Income Approach Value and Market Approach Value (for the subject as a whole) to arrive at a value of \$1,500,000.

In addition, in developing an Income Approach, Mr. Blackett identified his Property 2 at \$21.46 PSF as the subject property in his rental survey. It was the only rent comparable included with an “off of Elk Avenue” location. Indeed, he went on to conclude a market rent for the commercial portion of the property at only a slightly higher rate. However, he used only the square footage of the subject’s main (commercial) floor at 2,908 SF to calculate this rental rate when, with the apartment unit, the subject’s actual rental rate for the entire 4,728 SF was only \$13.20 PSF. Short of surveying apartment unit rents to quantify that contribution, it suggests an “off of Elk Avenue” rental rate falls short of what was concluded. Finally, the Board believes that using a capitalization rate of 5.75% that is more often found in national credit tenant leased properties rather than in a small town in Colorado, resulted in a value estimate using the Income Approach that is not credible.

Mr. Blackett also testified in relevant part that of six comparable sales analyzed in his appraisal, Sale 2 and 5 had a comparable location on Sixth Street and one (Sale 4) adjoined the subject property. Remaining sales were adjusted downward for their Elk Street location at 15%. Practically speaking however, where Sale 2 and 5 are located in downtown at the east end of Elk Avenue, they should be adjusted. Based on rental rate comparisons made in the Income Approach, at least double that adjustment rate of 15% is called for. It makes a majority of these sale indications more representative of the subject property’s value under the market approach and more closely supports Petitioner’s value.

By providing evidence of the subject’s checkered operating history and actual lease information that reflects its secondary location at the edge of town and then selecting a capitalization rate that better reflects a likely tenant, we find therefore that the Petitioner has met its burden of proving that the assigned value for tax year 2019 is incorrect. The Board finds based on the valuation evidence presented that Petitioner’s asserted value of \$1,000,000 is the correct value for tax year 2019.

### **ORDER**

The petition is **GRANTED**. The Gunnison County Assessor is ordered to update its records accordingly.

### **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.

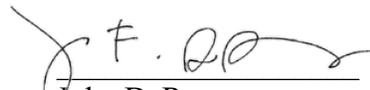
*See* § 39-8-108(2), C.R.S. (rights to appeal a tax protest petition); *see also* § 39-10-114.5(2), C.R.S. (rights to appeal on an abatement petition).

**DATED and MAILED** this 15<sup>th</sup> day of April, 2021.

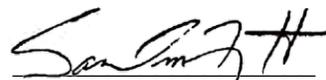
**BOARD OF ASSESSMENT APPEALS:**

Drafting Board Member:

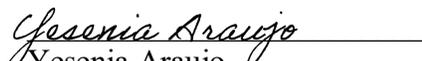


  
John DeRungs

Concurring Board Member:

  
Samuel Forsyth  
*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.

  
Yesenia Araujo