21CA0508 Aurora Convention v Bd Equalization 09-22-2022

COLORADO COURT OF APPEALS

Court of Appeals No. 21CA0508
Board of Assessment Appeals Case No. 78792

Aurora Convention Center Hotel LLC,

Petitioner-Appellant,

v.

Adams County Board of Equalization,

Respondent-Appellee,

and

Board of Assessment Appeals,

Appellee.

ORDER AFFIRMED

Division VII
Opinion by JUDGE GOMEZ
Harris and Pawar, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced September 22, 2022

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¶ 1 In this property tax case, petitioner, Aurora Convention Center Hotel LLC, appeals an order by the Board of Assessment Appeals (BAA) concerning the valuation of the Gaylord of the Rockies Hotel Resort and Convention Center (Gaylord). We affirm.

I. Background

¶ 2 Petitioner owns the Gaylord, a full-service hotel resort and convention center located on over eighty acres in Aurora near the Denver International Airport. The Gaylord's facilities include 1,501 hotel rooms, more than 500,000 square feet of convention and meeting room space, five restaurants, a coffee kiosk, a snack bar, a grab-n-go marketplace, a full-service spa, a gift shop, a fitness center, a business center, and various recreational facilities, including tennis courts, indoor and outdoor swimming pools, a lazy river, hot tubs, gas firepits, and private cabanas.

¶ 3 The Gaylord opened in late 2018. Like the other four Gaylord properties across the country, about eighty percent of its business comes from conventions and group meetings. Marriott manages the entire property for a management fee that includes both a base fee and an incentive fee based on profitability.

¶ 4 For the Gaylord's first real property tax year, 2019, the Adams County Assessor valued it at $676,459,415. Petitioner filed an unsuccessful protest with the assessor, followed by an unsuccessful appeal to the Adams County Board of Equalization (BOE). Petitioner then appealed to the BAA. The BAA conducted a hearing, after which it denied the petition.

¶ 5 In this appeal, petitioner contends that the BAA erroneously approved a valuation method that didn't exclude intangible property from the value of the real property, as required by Colorado law. Petitioner also raises several other issues regarding the BAA's review of the competing valuations. We first set out the legal framework and then address each of these issues in turn.

II. Legal Framework

¶ 6 Under the Colorado Constitution, valuations for assessment of real and personal property taxes are based on the "actual value" of property. Colo. Const. art. X, § 3(1)(a); *see also Bd. of Assessment Appeals v. Sampson*, 105 P.3d 198, 203 (Colo. 2005).

¶ 7 Real property and personal property are valued and taxed separately, although intangible personal property (unlike tangible personal property) is not subject to any property tax. §§ 39-1-105,

39-3-118, C.R.S. 2021. Real property is an interest in land and structures erected on or affixed to the land. § 39-1-102(6.3), (14), C.R.S. 2021.

¶ 8 The county assessor determines the actual value of real and personal property by appropriate consideration of the cost approach, the market approach, and the income approach. § 39-1-103(5)(a), C.R.S. 2021. The most common approach for valuing commercial property is the income approach, which "generally involves calculating the income stream (rent) the property is capable of generating, capitalized to value at a rate typical within the relevant market." *Lodge Props., Inc. v. Eagle Cnty. Bd. of Equalization*, 2022 CO 9, ¶ 32 (quoting *Bd. of Assessment Appeals v. E.E. Sonnenberg & Sons, Inc.*, 797 P.2d 27, 30 n.8 (Colo. 1990)).[1] Alternatively, the cost approach involves estimating the cost of replacing the improvements to the property, less accrued depreciation, and the market approach involves analyzing sales of comparable properties in the market. *E.E. Sonnenberg & Sons*, 797

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[1] "Capitalization is simply a process of converting future monetary benefits of owning property into a value of present worth." *Microsemi Corp. of Colo. v. Broomfield Cnty. Bd. of Equalization*, 200 P.3d 1123, 1125 (Colo. App. 2008).

P.2d at 30 n.9, 31 n.12. Sometimes an approach may not apply to a particular property but still may be useful as a check against the value reached by using the applicable approach. *Id.* at 35; *501 S. Cherry Joint Venture v. Arapahoe Cnty. Bd. of Equalization*, 817 P.2d 583, 587 (Colo. App. 1991).

¶ 9 If a taxpayer disagrees with the county assessor's valuation, it may protest the valuation, may petition to the county BOE if its protest is denied, and may appeal the BOE's decision to the BAA or to the district court in that county. *Sampson*, 105 P.3d at 202; *see also* §§ 39-5-122, 39-8-106, 39-8-108(1), C.R.S. 2021.

¶ 10 The BAA (or the district court) reviews BOE decisions de novo, and a hearing operates as a "new trial of an entire controversy." *Sampson*, 105 P.3d at 203 (quoting *Gilpin Cnty. Bd. of Equalization v. Russell*, 941 P.2d 257, 263 (Colo. 1997)). The taxpayer bears the burden of proof and, to prevail, must show by a preponderance of the evidence that the assessment is incorrect. *Id.* at 204.

¶ 11 We review BAA orders under the Administrative Procedure Act. *Id.* at 208; §§ 24-4-106(11), 39-8-108(2), C.R.S. 2021. In doing so, we review questions of law, including interpretation of applicable constitutional and statutory provisions, de novo. *Ziegler v. Park*

Cnty. Bd. of Cnty. Comm'rs, 2020 CO 13, ¶ 11. But "[i]t is the BAA's function, and not that of a reviewing court, to weigh the evidence and to resolve conflicts therein." *Lodge Props.*, ¶ 26. Thus, we defer to the BAA's factual findings and will set aside its order only if we conclude that it abused its discretion or that its order is arbitrary and capricious, based upon clearly erroneous factual findings, unsupported by substantial evidence in the record, or otherwise contrary to law. *Ziegler*, ¶ 11; *Hinsdale Cnty. Bd. of Equalization v. HDH P'ship*, 2019 CO 22, ¶ 19; § 24-4-106(7).

III. Valuation Method

¶ 12 Petitioner first contends that the BAA erred by approving a valuation method that failed to exclude intangible property from the value of the real property, resulting in an overvaluation of the realty "with immense non-realty income," contrary to Colorado's statutory scheme. We are not persuaded.

A. Additional Background

1. Competing Valuation Methods

¶ 13 At the hearing before the BAA, the parties agreed that the income approach was the most relevant in valuing the property. But they disagreed on how that approach should be applied,

resulting in a variance of over $400 million in their valuations. Most of that variance came from disagreements on how to value the intangible assets that the appraisers deducted from the Gaylord's total value to arrive at the value of the real property.

¶ 14 The BOE's appraisal expert, Patrick Hallman, applied the management fee method, also known as the Rushmore approach (named after its creator, Stephen Rushmore). Under this income-based approach, the value of a hotel property overseen by a management company is determined by calculating the hotel's total value and then subtracting the management and franchise fees (which are assumed to account for all the intangible assets) and the value of the tangible personal property, referred to as furniture, fixtures, and equipment (FF&E), to obtain a value for just the realty. Int'l Ass'n of Assessing Officers, *Understanding Intangible Assets and Real Estate: A Guide for Real Property Valuation Professionals* 11-12 (2016), https://perma.cc/3KG8-HLS2 (IAAO Guide); Appraisal Inst., *The Appraisal of Real Estate* 676-77 (15th ed. 2020). Although it has been subject to criticism, the Rushmore approach has been widely accepted by courts and assessment jurisdictions. *See* IAAO Guide at 12-14, 38-39 (citing cases).

¶ 15 Petitioner's appraisal expert, David Lennhoff, used a competing method he is credited with creating, called the income residual technique or the business enterprise approach. This method is similar to the Rushmore approach but assumes that additional deductions — such as start-up costs and return on FF&E — are needed to remove all the intangible value from the realty. *Id.* at 22-23. Although courts and assessment jurisdictions have accepted this method in some cases, they have rejected it in many others. *See id.* (citing cases).

2. Treatment of Profit Centers

¶ 16 As part of their contrasting approaches to valuing the hotel's intangible assets, the appraisers differed in their treatment of what they referred to as the "profit centers" — the food and beverage services, the spa, and the gift shop.

¶ 17 Lennhoff theorized that any net income generated by the profit centers represented income derived from business activities — not from real estate. He therefore removed that income from his valuation of the realty, including instead hypothetical rents for the areas of the property where the profit centers operated. He

acknowledged, however, that he wasn't aware of any hotels comparable to the Gaylord that rented out such areas.

¶ 18 Disagreeing with Lennhoff's method, Hallman opined that the Gaylord's hotel and convention business was "intertwined" and "interdependen[t]" with the profit centers and, therefore, that the income derived from those areas could appropriately be considered as income from the realty. In support of this opinion, he said that "[t]he property was built to sell the entire package," not just the hotel and convention space, to users; the Gaylord gained efficiencies by combining its operations; he wasn't aware of any hotel of a comparable size that leased its food and beverage spaces; and the Gaylord's food and beverage revenues per occupied room were higher than at comparable hotels.[2] Therefore, he included the income from the profit centers in his realty valuation.

3. Final Valuation Opinions

¶ 19 Applying his methodology, Hallman concluded that the value of the Gaylord's real property was $690.5 million, which supported

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[2] Even Lennhoff acknowledged that the Gaylord's food and beverage revenues "far exceed what would be found at a typical convention hotel," due in part to the "[e]verything in one place" concept encouraging guests to stay onsite for the duration of their stay.

the lower appraised value of approximately $676.5 million. He also made valuations using the cost and market approaches, which he didn't rely on separately but used to test the reasonableness of his valuation under the income approach.

¶ 20 Applying his contrasting methodology, Lennhoff concluded that the real property was worth only $270 million. He didn't perform a cost or market approach valuation, concluding that neither would be useful because the property wasn't economically feasible and because any other hotel sales would include a sale of not just realty but also intangible assets.

4. The BAA's Order

¶ 21 In a detailed order, the BAA determined that petitioner hadn't established by a preponderance of the evidence that the BOE's property valuation was incorrect. It also determined that Hallman's appraisal supported the assessed value.

¶ 22 The BAA found that the income approach provided the "most reliable indication of value" for the property. But it also gave some weight to Hallman's valuations under the other two approaches to the extent that they provided "a test of reasonableness" of the value determined under the income approach. It further found that

Hallman's valuation under the cost approach provided "a credible 'check' of the intangible value that should be excluded from the [property's] taxable value."

¶ 23 The BAA rejected Lennhoff's valuation, reasoning that his methodology "lacks qualitative factual data typically related to real estate transactions" and that his adjustments were not "based on evidence from actual real estate transactions."

¶ 24 The BAA also rejected petitioner's argument that Hallman's valuation failed to account for the value of the intangible assets. Instead, it found Hallman's use of the Rushmore approach "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." It noted that this approach is widely used in the appraisal industry, that it's taught in courses for assessors given by the Colorado Division of Property Taxation (DPT), and that its application has been upheld by courts across the country.

¶ 25 Finally, the BAA rejected Lennhoff's treatment of the profit centers, citing four primary concerns:

- Lennhoff "lacked a sufficient quantity of meaningful arms' length leases to hotel operators" to support a market rate for the rents. Thus, for instance, for the food and beverage rent, he based his assumed rate solely on a survey of typical rent rates for stand-alone restaurant facilities, which are "incomparable to the subject."
- The profit center spaces "are not rented" and were expected to "generate significant income to the [Gaylord]." For example, under the budgeted projections, the food and beverage category "would derive income well in excess of the attributed rent."
- "[T]he subject property had significant space contributing to a strong food and beverage operation, which, unlike a typical freestanding restaurant, is operated within multiple spaces, bar area, room service, and extensive interior and exterior conference spaces." Yet, under Lennhoff's method, no revenue was directly attributed to the over 500,000 square feet of convention space.
- Marriott, as the management company, was "paid based on total revenue to all departments and therefore

> requires control of the operation of all revenue generating departments." Thus, Lennhoff's method was inconsistent with actual operation.

Instead, the BAA agreed with Hallman's opinion that the profit centers are not intangibles but "streams of income attributable to the Gaylord property," which Hallman "properly accounted for."

¶ 26 The BAA ultimately concluded that, "[w]hile [p]etitioner's methodology is one of several techniques that may be considered by appraisers, the [BAA] was not convinced that it represented the most compelling or reliable approach to removal of intangible business value for the subject property." Instead, it concluded that Hallman's methodology "most closely aligns with what occurs in the actual market for hotels" and "resulted in a credible valuation of the subject [property]."

B. Analysis

¶ 27 Petitioner challenges two aspects of the BAA's approval of Hallman's valuation method: (1) the use of the Rushmore approach generally and (2) the treatment of the profit centers. We address each in turn.

1. The Rushmore Approach

¶ 28 Petitioner argues that the BAA "erred in adopting Rushmore's method for all Colorado hotel valuations, particularly the Gaylord hotel." But the BAA's decision is not so broad. Although some of the language in its order is broad, the order doesn't adopt the Rushmore approach for all hotel valuations in the state. Instead, it simply approves Hallman's application of that method in this case. We conclude that it didn't err by doing so.

¶ 29 Petitioner argues that the sources the BAA cited in its order — including case law from other jurisdictions, DPT course materials, and the IAAO Guide — don't support its approval of the Rushmore approach. As to the case law, petitioner acknowledges that the BAA cited as examples eight cases approving the use of the Rushmore approach in valuing hotel properties and, in some cases, rejecting Lennhoff's conflicting method. *See Switz. Cnty. Assessor v. Belterra Resort Ind., LLC*, 101 N.E.3d 895 (Ind. T.C. 2018); *CHH Cap. Hotel Partners, LP, v. District of Columbia*, 152 A.3d 591 (D.C. 2017); *Grand Haven Inv., LLC v. Spring Lake Twp.*, No. 364917, 2012 WL 10441874 (Mich. Tax Trib. Oct. 31, 2012); *Chesapeake Hotel LP v. Saddle Brook Twp.*, 22 N.J. Tax 525 (2005); *Wolfchase Galleria Ltd.*

P'ship v. Shelby County (Tenn. Bd. of Equalization Mar. 16, 2005); *Marriott Corp. v. Bd. of Cnty. Comm'rs*, 972 P.2d 793 (Kan. Ct. App. 1999); *In re J.F.K. Acquisitions Grp.*, 166 B.R. 207 (Bankr. E.D.N.Y. 1994); *Glenpointe Assocs. v. Twp. of Teaneck*, 12 N.J. Tax 118 (Super. Ct. App. Div. 1990).

¶ 30 Petitioner tries to distinguish these cases and cites two other cases that rejected the Rushmore approach.

¶ 31 In the first case, a Florida appeals court affirmed that portion of a trial court's order in which it set aside the property tax assessment of a Disney hotel. *Singh v. Walt Disney Parks & Resorts US, Inc.*, 325 So. 3d 124, 130-31 (Fla. Dist. Ct. App. 2020). In its de novo review of the assessment, the trial court found that the assessor's valuation applying the Rushmore approach hadn't adequately removed the value of the intangible assets. *Id.* at 129.[3] Specifically, it "found that the testimony demonstrated that the restaurants and retail spaces operated independently from the room rentals" and, thus, that the valuation should've imputed rent to

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[3] In Florida, a taxpayer may challenge an assessment by filing a de novo proceeding in a trial court. *See* Fla. Stat. § 194.036 (2021); *Crapo v. Acad. for Five Element Acupuncture, Inc.*, 278 So. 3d 113, 121-22 (Fla. Dist. Ct. App. 2019).

those spaces rather than including the income generated in them. *Id.* The appellate court agreed with the trial court's finding, adding that the appraiser's contrary testimony was "unconvincing." *Id.* at 131. Neither court held broadly that the Rushmore approach could not be used to value hotel property — only that the evidence in that case (which is not detailed in the opinion) convinced them that the Rushmore approach didn't adequately remove the value of business operations that were independent of room rentals.

¶ 32 In the second case, a California appeals court, reviewing de novo its state board of assessment appeals' approval of a hotel property tax assessment, rejected the assessor's application of the Rushmore approach. *SHC Half Moon Bay, LLC v. County of San Mateo*, 171 Cal. Rptr. 3d 893, 908-11 (Cal. Ct. App. 2014). The court concluded that the assessment hadn't excluded income attributable to certain intangible assets: the hotel's workforce, its leasehold interest in a parking lot, and its agreement allowing its guests privileges at a golf course. *Id.* at 908. Significantly, the state assessors' handbook — the equivalent of Colorado's Assessors' Reference Library (ARL) — rejects the Rushmore approach as a method of valuing hotel properties, *see id.* at 897, 904, and the

assessor's expert had conceded that the assessor's approach "did not remove all intangible assets and rights," *id.* at 908.

¶ 33 Neither of these cases suggests that the Rushmore approach is an improper method for valuing hotel property in Colorado or is an inappropriate method for valuing this specific property. The cases suggest only that, on de novo review of assessment decisions comparable to the BAA's de novo review of the assessment decision in this case, two courts agreed that the evidence presented in those cases didn't support the application of the Rushmore approach. And, in *SHC Half Moon Bay*, the court was persuaded in part by the California assessors' handbook's rejection of the Rushmore approach. *Id.* at 904, 909. Here, however, the evidence supports the BAA's approval of the Rushmore approach, and the ARL doesn't reject it.[4]

¶ 34 The expert appraisers and the BAA all agreed that the income approach was the most relevant approach to determining the value of the property. The only question was how that approach should be applied and, more specifically, what method should be used to

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[4] We defer to, but are not bound by, the ARL. *See Bachelor Gulch Operating Co. v. Bd. of Cnty. Comm'rs*, 2013 COA 46, ¶ 31.

value the intangible assets. As the BAA indicated, there may have been "several techniques" appraisers could've considered in that valuation. And the BAA received competing expert testimony and other evidence to help it choose among two such techniques.

¶ 35 Ultimately, it was the BAA's role — not ours — to "weigh the evidence, make credibility determinations, and resolve any factual conflicts," including determining which technique was the most compelling and reliable for valuing the property. *Rare Air Ltd., LLC v. Prop. Tax Adm'r*, 2019 COA 134, ¶ 14; *see also CTS Invs., LLC v. Garfield Cnty. Bd. of Equalization*, 2013 COA 30, ¶ 59 ("If conflicting evidence is presented at the hearing, the credibility of the witnesses and the weight to be given to their testimony are committed to the fact-finding discretion of the BAA."). Our role is limited to determining whether petitioner has shown that the BAA abused its discretion or that its order is arbitrary and capricious, based upon clearly erroneous factual findings, unsupported by substantial evidence in the record, or otherwise contrary to law. *See Ziegler*, ¶ 11; *Hinsdale Cnty.*, ¶ 19.

¶ 36 We conclude that petitioner has not made such a showing. The Rushmore approach is generally consistent with the income

approach to real property valuation, insofar as it seeks to ascertain the value of realty separate from tangible personal property and intangibles and is not prohibited by any case law or statute (or the ARL). *See Microsemi Corp. of Colo. v. Broomfield Cnty. Bd. of Equalization*, 200 P.3d 1123, 1125 (Colo. App. 2008) (the BAA didn't err by using a particular methodology where no case law or statute prohibited it and it was consistent with the income approach). And the BAA's approval of Hallman's application of that method to this case is amply supported by the record. *See Home Depot USA, Inc. v. Pueblo Cnty. Bd. of Comm'rs*, 50 P.3d 916, 918-20 (Colo. App. 2002) (where the parties presented competing valuations applying different approaches, the BAA's factual findings favoring one of those valuations were supported by substantial evidence); *Colo. Interstate Gas Co. v. Prop. Tax Adm'r Huddleston*, 28 P.3d 958, 962 (Colo. App. 2000) (where the parties presented conflicting evidence on whether financing costs should be included in determining the costs of capital in a valuation, the BAA's resolution of that issue was supported by substantial evidence).

¶ 37 Finally, petitioner complains that the order alludes to the Rushmore approach as "the approach Colorado assessors are

required to use" and cites the IAAO Guide in several places. Petitioner argues that the DPT does not *require* assessors to use the Rushmore approach, as assessors are required to follow recommendations in the ARL, not in course materials, and the approach is mentioned only in the latter. *See Ziegler*, ¶ 7 n.2 (assessors must follow the ARL). Petitioner also argues that the IAAO Guide includes a disclaimer that it is a "guide" provided "for informational purposes only" and not as "a policy position of" the organization. Regardless of how authoritative these sources may be, the BAA did not err by relying on them — along with the case law, other sources, and its own reasoning — in approving Hallman's application of the Rushmore approach in this case.[5]

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[5] Petitioner also argues that the BAA improperly retrieved the DPT course materials and the IAAO Guide after the hearing, without giving petitioner notice and an opportunity to be heard. *See* § 24-4-105(8), (14)(a), C.R.S. 2021. While these sources weren't offered as evidence at the hearing, Hallman referenced the course materials in his hearing testimony and one of the articles petitioner submitted as an exhibit is a direct response to the IAAO Guide. Under these circumstances, we discern no error in the BAA's review of and reference to these sources. At any rate, because the BAA also cited case law, other sources, and its own reasoning in support of its decision, we conclude that any error in relying on these sources was harmless. *See EchoStar Satellite, L.L.C. v. Arapahoe Cnty. Bd. of Equalization*, 171 P.3d 633, 637 (Colo. App. 2007).

2. Treatment of Profit Centers

¶ 38 Petitioner also argues that the BAA erred by approving Hallman's inclusion of income derived from the profit centers in his valuation. Petitioner argues that any net income derived from the profit centers is business income, not realty income, and therefore that only imputed rent attributable to the profit center areas should be included in the property valuation. We disagree, for largely the same reasons already articulated.

¶ 39 The BAA heard competing expert evidence from both sides and determined that Hallman's approach to the profit centers was more persuasive than Lennhoff's. The BAA gave detailed reasons explaining why it disagreed with Lennhoff's approach, including his lack of relevant market data to support the amount of the assumed rent, his failure to directly attribute any revenue to the extensive conference spaces that would contribute to the food and beverage income, the inconsistency between his method and the hotel's actual operation, and the fact that the profit center spaces are not rented and generate significant income to the Gaylord.

¶ 40 Ultimately, this issue was much like that regarding the Rushmore approach generally, insofar as the BAA heard conflicting

evidence about which technique was the most compelling and reliable for valuing the property. The BAA weighed that evidence and resolved the conflict, determining that income from the profit centers could be attributed to the realty. Our role is not to reweigh the evidence but simply to consider whether petitioner has shown that BAA abused its discretion or that its order is arbitrary and capricious, based upon clearly erroneous factual findings, unsupported by substantial evidence in the record, or otherwise contrary to law. *See Rare Air Ltd.*, ¶ 14; *Ziegler*, ¶ 11; *Hinsdale Cnty.*, ¶ 19. It has not done so.

¶ 41 And this issue was particularly fact-laden. The BAA heard extensive evidence about the profit centers and how interconnected they were with the Gaylord's hotel and convention business. Petitioner tries to re-argue those facts, contending that the profit center areas are "separate functions" that cannot be treated as part of the same enterprise. But we will not second-guess the BAA's factual determinations on this issue, which are amply supported by the record. *See Rare Air Ltd.*, ¶ 14; *see also Steamboat Ski & Resort Corp. v. Routt Cnty. Bd. of Equalization*, 23 P.3d 1258, 1260 (Colo. App. 2001) (rejecting arguments "as going to the weight to be given

to the valuation evidence admitted at the hearing," and noting that "we may not substitute our judgment for that of the BAA").

¶ 42 We are not persuaded by petitioner's citation to *Singh*. As we've indicated, that case involved a trial court's de novo review of an assessment, much like the BAA's de novo review of the assessment in this case. 325 So. 3d at 129-30. In its review, the trial court found that the testimony presented in that case showed that the restaurant and retail areas "operated independently from the room rentals." *Id.* at 129. The appellate court, reviewing the same testimony, agreed. *Id.* at 130-31. The case doesn't suggest that profit centers in a hotel must always be treated separate from the realty. Nor does it suggest that under the evidence presented in this case, the same approach must necessarily apply. *See also Bloomington Hotel Inv'rs, LLC v. County of Hennepin*, No. 27-CV-19-6973, 2022 WL 2347868, at *24-26 (Minn. T.C. June 27, 2022) (rejecting a "proxy rent" approach similar to Lennhoff's in a hotel valuation).

¶ 43 Nor are we persuaded by petitioner's reliance on eminent domain cases. Those cases hold that when valuing land taken by eminent domain, an owner is entitled to compensation for the value

of the land and improvements but not for the value of a business conducted on the land, as the business can be relocated and its "profits are more a function of the entrepreneurial skills of management than of the value of the land." *Denver Urb. Renewal Auth. v. Berglund-Cherne Co.*, 193 Colo. 562, 567, 568 P.2d 478, 481 (1977); *see also Denver Urb. Renewal Auth. v. Cook*, 186 Colo. 182, 184, 526 P.2d 652, 653 (1974). Even if eminent domain principles could apply in this context, the holding in these cases doesn't further petitioner's argument. Petitioner agrees that profits derived from renting hotel rooms are profit from the realty and therefore are properly included in a property valuation under the income approach. So the question would still remain whether the profit centers were integrally related to the room-rental operations, such that their profits could similarly be treated as part of the realty. And the BAA's resolution of that question in this case is supported by the record. *See Home Depot*, 50 P.3d at 918-20; *Colo. Interstate Gas*, 28 P.3d at 962.

IV. Additional Arguments

¶ 44 Petitioner raises four additional arguments relating to the BAA's review of the competing valuations. We address each in turn.

A. Brand Work

¶ 45 Petitioner contends that Hallman erred in his application of the Rushmore approach by failing to recognize some expenses that should've been deducted along with the management and franchise fees. Petitioner argues that its management relationship is unique in that it doesn't cede the entire management to Marriott but uses its own asset management team to work with Marriott in promoting the Gaylord brand. Therefore, it argues, Hallman should've treated its asset management team costs as intangible "brand work" that should be excluded from the valuation along with the management and franchise fees.

¶ 46 We decline to consider this argument, as we conclude that petitioner didn't preserve it. *See CTS Invs.*, ¶ 14 ("A party generally must first raise an objection in the administrative proceeding to preserve a contention for appeal.").

¶ 47 Petitioner cites various places in the record in which it claims it raised this argument. But, while petitioner presented testimony about its branding work and strategies, nowhere did it argue that under the Rushmore approach its asset management team costs needed to be excluded as additional intangible brand work. Nor did

it present any evidence of what those costs were. Accordingly, the argument is unpreserved.

B. Obsolescence and Tax Incentives

¶ 48 Next, petitioner contends that Hallman erred in his valuation under the cost approach, which he used to test the reasonableness of his valuation under the income approach, by failing to adjust for the Gaylord's obsolescence and assuming any obsolescence was offset by tax incentives. We are not persuaded.

¶ 49 The parties agree that the property was obsolete, insofar as the costs of construction exceeded the anticipated return on investment and the property would not have been built were it not for the promise of about $310 million in local government tax incentives. *See Appraisal of Real Estate* 539, 591 (explaining that external obsolescence, which may cause depreciation, is "a loss in value caused by . . . factors outside a property" and "may result from adverse market conditions").

¶ 50 The parties also agree that any valuation using the cost approach, which factors in depreciation, should consider that obsolescence. *See id.* at 526 ("[E]xternal obsolescence is estimated in the cost approach."); *cf.* § 39-1-104(12.3)(a)(II), C.R.S. 2021

(providing, as to personal property, that "[p]hysical, functional, and economic obsolescence shall be considered in determining actual value"); *Cnty. Bd. of Equalization v. Bd. of Assessment Appeals*, 743 P.2d 444, 446 (Colo. App. 1987) (stating, in a personal property tax case, that "economic obsolescence is a proper factor to be considered in reaching assessed valuation").

¶ 51 Where the parties differ is on whether Hallman erred by offsetting the obsolescence with the tax incentives. Hallman concluded that the tax incentives, while not themselves taxable as part of the real estate, "bridge[d] that feasibility gap." Accordingly, in his cost approach valuation, he concluded that the tax incentives offset any obsolescence. Petitioner contends that this was error, as the right to a tax incentive is intangible and, by statute, intangible personal property is exempt from property tax. *See* § 39-3-118.

¶ 52 Even assuming that tax incentives are intangible property — an issue we needn't decide in this case — various courts have recognized that considering "value-affecting intangible factors" like tax incentives in a real property valuation "does not constitute a tax" on intangibles but merely "provides a full and accurate picture of the property's worth." *Spring Hill, L.P. v. Tenn. State Bd. of*

Equalization, No. M2001-02683-COA-R3-CV, 2003 WL 23099679, at *13, 15 (Tenn. Ct. App. Dec. 31, 2003) (unpublished opinion) (citing cases); *accord Huron Ridge LP v. Ypsilanti Twp.*, 737 N.W.2d 187, 198-99 (Mich. Ct. App. 2007); *Pine Pointe Hous., L.P. v. Lowndes Cnty. Bd. of Tax Assessors*, 561 S.E.2d 860, 863-65 (Ga. Ct. App. 2002); *Pedcor Invs.-1990-XIII, L.P. v. State Bd. of Tax Comm'rs*, 715 N.E.2d 432, 437-39 (Ind. T.C. 1999); *see also Town Square Ltd. P'ship v. Clay Cnty. Bd. of Equalization*, 704 N.W.2d 896, 902 n.4 (S.D. 2005) ("Even if . . . tax credits could be designated as intangible property, a distinction can be made between taxing intangible property and considering such credits as a value increasing feature.").

¶ 53 We agree with these cases and conclude that the BAA didn't err by approving a valuation that considered tax incentives as an offset to obsolescence. And whether such an offset was appropriate in this case, and the amount of any such offset, were factual issues appropriately resolved by the BAA. *See Home Depot*, 50 P.3d at 918-20; *Colo. Interstate Gas*, 28 P.3d at 962.

¶ 54 In any event, the tax incentives were considered only in one of the alternative valuations — not in the income approach valuation

the BAA approved. *See EchoStar Satellite, L.L.C. v. Arapahoe Cnty. Bd. of Equalization*, 171 P.3d 633, 637 (Colo. App. 2007) (concluding that any error by the BAA was harmless).

C. Date of Valuation

¶ 55 Next, petitioner contends that Hallman's valuations were erroneous because he used the wrong appraisal date. We disagree.

¶ 56 There is no dispute that the correct appraisal date for the property was June 30, 2018. *See* § 39-1-104(10.2)(d). But in his report, Hallman labeled the date of appraisal as January 1, 2019. At the hearing before the BAA, Hallman repeatedly testified that his valuations would have been the same had he listed and considered the correct date.

¶ 57 The BAA acknowledged the issue in the section of its order addressing Hallman's market approach valuation. There, the BAA noted the discrepancy and reported that "Hallman testified that in his opinion there would [be] no difference in his . . . sales comparison approach conclusions of value for the subject property between June 30, 2018 and January 1, 2019." It then said, "Regardless, the [BAA] finds the sales comparison approach to have little value when applied to the subject property."

¶ 58 Petitioner interprets this language to indicate that the BAA rejected Hallman's market approach valuation due in part to his reliance on the wrong date. And because the BAA didn't return to the date discrepancy when it considered Hallman's valuation under the income approach, petitioner argues that the BAA failed to make a determination whether that valuation should likewise be rejected due to Hallman's reliance on the wrong date.

¶ 59 But by accepting Hallman's income approach valuation, the BAA implicitly found that the valuation was credible despite the discrepancy with the date. *See E.R. Southtech, Ltd. v. Arapahoe Cnty. Bd. of Equalization*, 972 P.2d 1057, 1060 (Colo. App. 1998) (perceiving no error in an implicit determination by the BAA); *Snyder Fam. Tr. v. Adams Cnty. Bd. of Equalization*, 835 P.2d 579, 581 (Colo. App. 1992) (perceiving no error in an implicit credibility determination by the BAA). And it was up to the BAA to determine the credibility of Hallman's valuations, as well as his testimony that the date discrepancy didn't make a difference in those valuations. *See Rare Air Ltd.*, ¶ 14; *CTS Invs.*, ¶ 59.

D. Business Valuation Expert

¶ 60 Finally, petitioner contends that the BAA rejected the opinion of its business valuation expert, Mary O'Connor, on an erroneous basis. We conclude that any error was harmless.

¶ 61 O'Connor offered valuations of Gaylord's total business enterprise and its intangible assets, including the value of its flag (use of the Gaylord name) and management, food and beverage operations, recreation operations, and business startup costs. Her general approach to valuing the intangible assets and her final conclusions of value were comparable to Lennhoff's.

¶ 62 The BAA rejected O'Connor's valuations for several reasons: (1) they were based on conditions arising outside the base period, contrary to Colorado law; (2) they ignored the contribution of the taxable real estate toward value, much like Lennhoff's treatment of the profit centers did; and (3) to the extent that they were based in part on Lennhoff's appraisal, the same problems the BAA had noted with his appraisal applied.

¶ 63 Petitioner takes issue with the first of those reasons, asserting that O'Connor's valuations were not based on conditions that arose after the base period but, instead, were based on projections

founded on conditions that existed during the base period. *Cf. Padre Resort, Inc. v. Jefferson Cnty. Bd. of Equalization*, 30 P.3d 813, 815-16 (Colo. App. 2001).

¶ 64 We needn't resolve this issue. Regardless of whether this particular critique of O'Connor's valuations was accurate, it didn't affect the outcome of the BAA's decision. The BAA gave many reasons why it rejected Lennhoff's and O'Connor's approach — and agreed with Hallman's approach — to the valuation of the Gaylord's intangible assets. Thus, any error in relying on this additional basis was harmless. *See EchoStar Satellite*, 171 P.3d at 637.

V. Conclusion

¶ 65 The order is affirmed.

JUDGE HARRIS and JUDGE PAWAR concur.