IN THE COURT OF APPEALS IN THE STATE OF NEW MEXICO

2727 SAN PEDRO LLC, a limited liability company,

Petitioner-Petitioner,

v.

No. 34,869
Bernalillo County
D-202-CV-2014-06777

BERNALILLO COUNTY ASSESSOR,

Respondent-Appellee.

APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT, DIVISION XVIII, COUNTY OF BERNALILLO, STATE OF NEW MEXICO, THE HON. DENISE BARELA SHEPHERD PRESIDING

ORAL ARGUMENT IS REQUESTED

BERNALILLO COUNTY ASSESSOR'S ANSWER BRIEF

ROBLES, RAEL & ANAYA P.C.

Vanessa R. Chavez
Marcus J. Rael, Jr.
500 Marquette Ave., NW Suite 700
Albuquerque, NM 87120
(505) 242-2228 (Telephone)
(505) 242-1106 (Facsimile)

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

NEW MEXICO CASES

TENTH CIRCUIT CASES

STATUTES

SUMMARY OF PROCEEDINGS

The Bernalillo County Assessor (hereinafter "Assessor") disputes Petitioner's Summary of the Proceedings to the extent it mischaracterizes and omits facts, confuses legal arguments with factual testimony, and alleges information not in the record. The Assessor therefore supplements and corrects Petitioner's Summary of Proceedings as follows:

A. Nature of the Case

This matter comes before the Court on petition for writ of certiorari and arises out of an administrative decision by the Bernalillo County Valuation Protest Board ("Protest Board") in establishing the tax value of the property owned by Petitioner, UPC no. 101805925437420602 (hereinafter "Subject Property") for tax year 2014. Pursuant to state law, the Protest Board is charged with hearing and deciding protests of determinations made by county assessors and protested under NMSA 1978, § 7-38-24 (2003). Petitioner disagreed with the value established by the Assessor and filed a protest before the Protest Board. Primarily at issue in this case was the appraisal technique used by the Assessor. Petitioner claims the Protest Board erred in rejecting his proposed method of valuation, and both adopting the Assessor's valuation and the valuation method used by the Assessor's Office.

In his Petition for Writ of Certiorari, Petitioner identifies two (2) issues to be considered by the Court. Accordingly, the issues before this Court on certiorari are as follows:

1. Whether substantial evidence supported the decision of the Board that the method used by the Assessor met the statutory requirements as a generally accepted appraisal technique?

2. Whether the District Court's affirmation of the Board's decision was also supported by substantial evidence?

The Court granted certiorari on both these issues. However, in the Brief in Chief, Petitioner bootstraps into his brief several arguments which were neither argued below nor identified in the petition for writ of certiorari.

B. Course of Proceedings and Disposition Below

Petitioner filed a notice of protest challenging Assessor's valuation of the Subject Property. The matter was heard by the Protest Board, and the Protest Board found in favor of the Assessor. Petitioner appealed the decision of the Protest Board to the District Court, where the District Court found that the decision was proper and supported by substantial evidence. Petitioner then petitioned this Court for review, and certiorari was granted on the issues identified herein.

C. Summary of Facts Relevant to the Issues Presented for Review

The Subject Property is a commercial property located within Bernalillo County, New Mexico. NMSA 1978, § 7-36-15(B) provides that "the value of property for property taxation purposes shall be its market value as determined by application of the sales of comparable property, income or cost methods of valuation or any combination of these methods." The Assessor generated the available market comparables, but the parties agreed that the values were not entirely representative and were merely included because that was the only information available. *Valuation Protest Hearing Track 3* at 43:59. As a result, the comparables were not used in the valuation, and instead, the Assessor utilized the generally accepted income method of valuation to generate a pro forma in establishing the value of the Subject Property. *Valuation Protest Hearing Track 3* at 54:09; RP 33.

The Subject Property was initially valued by the Assessor at $1,113,300.00. See RP at 10. However, Petitioner filed a notice of protest and requested an informal protest with the Assessor. RP at 11. As part of the informal protest, the Assessor conducted a subsequent review of the Subject Property and updated the pro-forma to include management fees and reserves for replacement, thereby resulting in a value for the Subject Property of $900,200.00. Compare RP at 21 with RP at 29; *Valuation Protest Hearing Track* 1 at 00:33 and 02:35. The value of $900,200.00 was adopted by the Assessor and presented to the Protest Board at the outset of the

hearing. See generally RP. Although the parties agreed that this value was entitled to the presumption of correctness (*Valuation Protest Hearing Track* 1 at 03:19), Petitioner nonetheless disputed the Assessor's value of $900,200.00 and instead claimed the value should be $753,690.00. RP at 11. During the protest hearing, Petitioner challenged both the valuation method used by the Assessor and the expense limit granted to the Subject Property. See generally RP.

As part of the income method of valuation, the Assessor was required to determine the proper expense limit for the Subject Properties. Upon researching the relevant market data, the Assessor determined that the expense limit should be set at forty-five percent (45%). RP at 33. In support of this position, Arlene Jaramillo of the Assessor's office testified as follows:

> In doing the pro forma, I used the $12.50 [price per unit] cause that's pretty much the average of what [Petitioner] is getting as of January 1. [] As of January 1, he was 41% vacant, and his expenses were at 87% for 2013. From what we have seen as far as what people are bringing in, what we've researched from Business Weekly and Co-Star, right now the max vacancy is at 15% and the max expenses is at 45%, so that's what we allowed. His expenses were at 87% which is really high for what the market is doing. I also used his leasable area as opposed to our actual measurements of the building which is 18,108 because [] as mass appraisal, we do exterior measurements only. I did give him a 3% management fee and a 4% reserves, and that is basically the standard of what we are giving now based on, again, the research that we have done. And the 10 [%] cap [rate] is what I used in that area.

Valuation Protest Hearing Track 3 at 44:35-46:12.

Petitioner disputed the appraisal and asserted that the proper expense limit should be eighty-seven percent (87%), which reflected his actual expenses. See RP at 36.[1] In support of his position, Petitioner provided an extensive history of the Subject Property's prior assessments. See generally *Valuation Protest Hearing Track 2.* In addition, although Petitioner acknowledged that the valuation rules prohibit the use of income data after the valuation date of January 1, Petitioner nonetheless provided extensive information regarding the actual income generated from the Subject Property for the period of January 2, 2014 through June 2014. *Valuation Protest Hearing Track 3* at 5:25. Petitioner also provided testimony from David Wesley, a real estate broker. See *Valuation Protest Hearing Track 3* at 21:20-29:37. Petitioner acknowledged that Mr. Wesley was not an appraiser and disclaimed his ability to provide expert testimony on appraisal techniques. Id. Instead, Mr. Wesley's testimony was limited to his belief that the expenses claimed

[1] There is repeated confusion throughout the documents in this matter regarding the expense limit which was requested by Petitioner. The Assessor concluded that the expenses requested were at 87% (*Valuation Protest Hearing Track 3* at 44:35), while the Protest Board concluded the request was for 83% (RP at 36), and Petitioner maintains throughout his pleadings that his expenses were actually 62.3% (Amended Statement of Appellate Issues at 17). The Assessor's calculation of 87% was reached by adding the 2013 Ordinary Expenses and Total Other Expenses, subtracting Real Estate Property Taxes, and then dividing by the Gross Operating Income. Petitioner's calculation of 62.3% was reached by using the same formula, except that his 2014 Projected Income was used instead. It is presumed that the 83% alleged by the Protest Board is a typo and should instead read 87%.

by Petitioner were proper, reflected current market conditions, and should be included in the valuation determination. See id.

Petitioner also directed the Protest Board's attention to the 2010 Decision and Order issued by the Protest Board regarding his property ("2010 Protest Decision"). *Valuation Protest Hearing Track 3* at 7:56; see also RP at 24. According to the 2010 Protest Decision, at that time, the Assessor had a standard policy of not permitting expenses of greater than fifty percent (50%) of income when determining value based on a capitalized income method. RP at 25. As a result, in the 2010 Protest Decision, the Board stated that "[w]e agree that the income method is an appropriate approach to valuation of the subject property, but we find that the Assessor's expense limit is not a generally accepted appraisal technique." RP at 25. Petitioner relied on the 2010 Protest Decision as a means of rebutting the presumption of correctness of the Assessor's value.

In addition, Petitioner introduced his own appraisal technique. See RP at 28. However, Petitioner admitted that the approach resulted in an untraditional pro forma being generated, and further stated, "It's kind of like an [Annual Property Operating Data ("APOD")], but not really one, and I wanted to admit that going in but I don't know how else to approach it." *Valuation Protest Hearing Track 3* at 6:20-7:02; RP at 28. Furthermore, although Petitioner acknowledged that Mr. Wesley was not an expert appraiser, he introduced testimony from Mr. Wesley

regarding the appropriateness of Petitioner's proposed technique. *Valuation Protest Hearing Track 3* at 21:20 (stating Mr. Wesley "doesn't do that technique stuff."). As part of his testimony, Mr. Wesley argued that the APOD technique proposed by Petitioner was customary in determining a property's value, and that the expenses claimed by Petitioner should be used in establishing the value. *Valuation Protest Hearing Track 3* at 29:38.

Having considered the totality of the evidence presented to it, the Protest Board determined that the Assessor's approach to value was most reliable and therefore adopted the valuation of $900,200.00. On appeal, the District Court noted that the Protest Board failed to make a finding as to whether the presumption of correctness had been overcome. As a result, the District Court conducted their analysis assuming that the presumption of correctness had been overcome, but nonetheless finding that substantial evidence supported the decision reached by the Protest Board.

ARGUMENT

The decision of the Protest Board should stand because the Protest Board did not commit reversible error in reaching its decision. A determination of an administrative agency will only be reversed if it is fraudulent, arbitrary, or capricious, not supported by substantial evidence based on the whole record before

it, or otherwise not in accordance with the law.[2] Carter v. NM Human Services Dep't., 2009-NMCA-063, ¶ 8, 146 N.M. 422 (citing Rio Grande Chapter of Sierra Club v. N.M. Mining Comm'n, 2003-NMSC-005, ¶¶ 14 n. 7, 16-17, 133 N.M. 97). Administrative agency decisions are not reviewed de novo and the Court does not substitute its judgment for that of the agency. Id. Instead, the Court grants deference to an agency's interpretation of its own statutes, although it will reverse an agency determination in order to correct a misapplication of the law. Id. However, an administrative agency's factual determinations are accorded broad deference, especially if the factual issues concern matters in which the agency has specialized expertise. Montano v. N.M. Real Estate Appraiser's Bd., 2009-NMCA-009, ¶ 21, 145 N.M. 494.

In addition, the evidence is viewed in a light most favorable to the decision reached by the agency. Montano, 2009-NMCA-009, ¶ 22. While a whole record standard of review is utilized in reviewing an agency's findings of fact, the decision of the agency must still be affirmed if it is supported by substantial evidence. Fitzhugh v. N.M. Dep't of Labor, 1996-NMSC-44, ¶ 24, 122 N.M. 173. "Substantial evidence on the record as a whole is evidence demonstrating the

[2] It should be noted that the standard of review asserted by Petitioner is based on a 1987 Court of Appeals case that cites to an older version of § 7-38-28, which is now outdated and no longer applicable. See Cibola Energy Corp. v. Roselli, 1987-NMCA-055, ¶ 7, 105 N.M. 744; cf. NMSA 1978, § 7-38-28(A) (2015).

reasonableness of an agency's decision, and [the reviewing court] neither reweigh[s] the evidence nor replace[s] the fact finder's conclusions with [its] own." DeWitt v. Rent-A-Center, Inc., 2009-NMSC-32, ¶ 12, 146 N.M. 453 (citation omitted). Thus, the task is to "evaluate whether the record supports the result reached, not whether a different result could have been reached." Montano, 2009-NMCA-009, ¶ 21 (internal citation omitted).

I. THE PROTEST BOARD'S DECISION WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Petitioner argues that the Protest Board's 2014 decision was not supported by substantial evidence for two (2) primary reasons. First, Petitioner claims that the only evidence to support the Protest Board's findings and conclusions regarding the subject property was the inadmissible hearsay proffered by Ms. Jaramillo at the protest hearing, thus violating the legal residuum rule. *Brief in Chief* at 27-28. Second, Petitioner claims that the Assessor failed to explain to the Board the basis for her valuation of the subject property, thus making the Board's decision to uphold the Assessor's valuation arbitrary and capricious. Id. at 28-30.

In support of his position, Petitioner also argues that at the protest hearing he produced "abundant evidence tending to dispute the factual correctness of the Assessor's valuation," and thus rebutted the presumption of correctness and shifted the burden of proof onto the Assessor to prove that her valuation was the product of a generally accepted appraisal technique. *Brief in Chief* at 25. Petitioner further

argues that the Assessor failed to meet that burden. Id. To that end, Petitioner argues that there was insufficient evidence to support the Assessor's value, and that "the Board simply accepted the Assessor's testimony without question, entirely ignoring the Petitioner's evidence ... that his expenses were actually far lower." Id. at 23.

a. The Protest Board's Decision Must Be Upheld Because Petitioner Failed to Overcome the Presumption of Correctness.

NMSA 1978, § 7-38-6 provides that "*[v]alues* of property for property taxation purposes determined by [] the county assessor are presumed to be correct." (emphasis added). In addition, "[d]eterminations of ... the computation and determination of property taxes made by the officer or agency responsible therefor under the Property Tax Code are presumed to be correct." Id. The Assessor's valuation is sufficient evidence where it is uncontradicted. Bakel v. Bernalillo Cnty. Assessor, 1980-NMCA-173, ¶ 3, 95 N.M. 723, 723-24.

Nevertheless, when contradicted, "[t]his presumption is rebuttable and is best characterized as a prima facie inference in that it shifts the burden of going forward with the evidence to the taxpayer to prove the contrary." San Pedro S. Grp. v. Bernalillo Cnty. Valuation Protest Bd., 1976-NMCA-116, ¶ 9, 89 N.M. 784, 785 (citing Petition of Kinscherff, 1976-NMCA-097, ¶ 7, 89 N.M. 669, 673). "Taxpayers challenging their assessments have the burden of rebutting this presumption by showing that the assessor *did not follow the statutory provisions of the Act* or by presenting evidence *tending to dispute the factual correctness* of the

valuation." Hannahs v. Anderson, 1998-NMCA-152, ¶ 22, 126 N.M. 1 (internal quotations omitted and emphasis added); see also 3.6.7.13(A) NMAC; La Jara Land Developers, Inc. v. Bernalillo County Assessor, 1982-NMCA-006, ¶ 11, 97 N.M. 318. If a taxpayer overcomes the presumption of correctness, only then does the burden shift to the assessor to show that "the valuation method used to assess the property was based upon generally accepted appraisal techniques." Hannahs, 1998-NMCA-152, ¶ 22.

Petitioner claims that the presumption of correctness was overcome because (1) the Assessor reduced its original valuation from $1,113,300.00 to $900,200.00, thereby resulting in prima facie evidence that the valuation was improper; (2) he produced evidence tending to dispute the factual correctness of the Assessor's valuation; and (3) he provided an alternate method of valuation which should have been adopted by the Protest Board.

First, Petitioner contends that because the Assessor reduced the property value from its initial assessment, the presumption of correctness was overcome because if the Subject Property had previously been overvalued by 22%, then there was a continuing likelihood that additional errors were made in valuing the Subject Property. This argument is contrary to state law and is not supported by any legal authority.

NMSA 1978, § 7-38-6 clearly provides that "*[v]alues* of property for property taxation purposes determined by [] the county assessor are presumed to be correct." (emphasis added). Notably, the language of the statute does not limit the presumption to the initial assessment, but rather includes all values of property for property taxation purposes determined by the county assessor. Id. As a result, the fact that the Assessor changed the value of the Subject Property at the outset of the hearing is irrelevant—the $900,200.00 value was entitled to the presumption of correctness just the same as the initial $1,113,300.00 assessment. Furthermore, at the outset of the protest hearing, the parties agreed that this $900,200.00 value was entitled to the presumption of correctness. *Valuation Protest Hearing Track* 1 at 03:19. Petitioner would have needed to raise this challenge at that time in order to preserve this argument for appeal.

More importantly, to overcome the presumption of correctness for the $900,200.00 valuation, the taxpayer must show that the Assessor "*did not follow the statutory provisions of the Act* or by presenting evidence *tending to dispute the factual correctness* of the valuation." Hannahs, 1998-NMCA-152, ¶ 22 (emphasis added). A mere reduction in value prior to the outset of the protest hearing does not demonstrate that the Assessor did not follow the statutory provisions of the Act in reaching the value of $900,200.00. Id. Similarly, the fact that a reduction from $1,113,300.00 has occurred is not evidence tending to dispute the factual

correctness of the $900,200.00 valuation. At most, this would be evidence that the original valuation of $1,113,300.00 was incorrect, but that matter was irrelevant and undisputed with respect to the $900,200.00 valuation at issue during the protest hearing. As a result, the fact that the Assessor adjusted the value of the Subject Property is irrelevant to a consideration of whether the presumption of correctness has been overcome.

Furthermore, allowing the presumption of correctness to be overcome merely because the Assessor has voluntarily modified a property value during review as part of an informal protest would discourage both offers of settlement and corrections. If only the initial value is afforded the presumption of correctness, assessors would be discouraged from attempting to resolve even factual inaccuracies, as the burden would automatically shift to the assessor at any subsequent protest hearing. Assessors and landowners alike would be disadvantaged by a process which discourages correcting values. Accordingly, this Court should hold that the presumption of correctness cannot be overcome just by showing that the Assessor agreed to a reduction in value prior to a protest hearing.

Next, Petitioner did not provide any evidence demonstrating that the valuation of $900,200.00 did not follow the statutory provisions of the Act, or that the valuation was factually inaccurate. See generally RP. Although Petitioner claims that he disputed the factual correctness of the Assessor's method of valuation with

"abundant evidence tending to dispute the factual correctness of the valuation," this evidence was limited to three (3) APODs regarding the Property's actual expenses in 2011, 2012 and 2013, as well as testimony from real estate professional David Wesley stating that the APOD technique Petitioner proposed was customary in determining a property's value, and that the expenses claimed by Petitioner should be used in establishing the value. *Brief in Chief* at 25.

However, Petitioner failed to present any evidence actually disputing Ms. Jaramillo's testimony regarding the Assessor's market research which indicated that ordinary and necessary expenses are typically 45% of gross income. Similarly, no arguments were made that the Assessor's factual data was incorrect, such as an improper classification or errors in raw data from the valuation date. In addition, there is simply no evidence in the record disputing the Board's finding that the Assessor's use of market data to determine the expense ratio is a generally accepted technique. See generally id. There is also no legal authority supporting Petitioner's assertion that the Assessor is required to use the Property's actual expenses for valuation purposes. In fact, this Court has specifically approved similar mass appraisals and noted that "there is nothing in the statute mandating an independent fee appraisal on each parcel of land in New Mexico." Cobb v. Otero County Assessor, 1991-NMCA-122, ¶ 8, 113 N.M. 251 (internal quotation omitted).

Furthermore, despite Mr. Wesley's testimony that APODs were an accepted technique, Petitioner nonetheless agreed that Mr. Wesley was not an expert appraiser. *Valuation Protest Hearing Track 3* at 21:20. Thus, Petitioner was unable to dispute the Assessor's valuation with competent evidence in the form of expert testimony. See First Nat'l Bank v. Bernalillo County Valuation Protest Bd., 1977-NMAC-005, ¶ 23, 90 N.M. 110 (stating that, if necessary, the protesting taxpayer has a duty to dispute this fact by expert testimony).

Petitioner also did not argue that the income valuation method used by the Assessor was not generally accepted. Instead, Petitioner argued that the result of the income valuation method used was unjust, and sought adoption of a new, unconventional method of valuation which Petitioner felt created a more just result. However, the law is clear that the Assessor's valuation must be based on generally accepted appraisal techniques, not new and unconventional valuation methods. As such, the presumption of correctness was not overcome as neither of the standards for overcoming a presumption of correctness was met. As a result, the Assessor's valuation of $900,200.00 was presumed correct, and Petitioner failed to overcome this presumption by presenting evidence disputing the factual correctness of the Assessor's method of valuation or that the Assessor did not follow the statutory provisions of the Act.

b. Even if Petitioner Overcame the Presumption of Correctness, the Assessor Proved that Her Valuation Method Was a Generally Accepted Appraisal Technique.

Even assuming that the presumption of correctness was overcome by Petitioner, the Protest Board's decision must nonetheless stand as the property value was determined in accordance with law. State law provides that "[a]ll property subject to valuation for property taxation purposes shall be valued as of January 1 of each tax year." NMSA 1978, § 7-38-7. "[T]the value of property for property taxation purposes shall be its market value as determined by application of the sales of comparable property, income or cost methods of valuation or any combination of these methods." Id. at § 7-36-15. "In using any of the methods of valuation authorized by this subsection, the valuation authority [] shall apply generally accepted appraisal techniques." Id. However, "what the fair market value of a tract may have been in the past or speculation as to what it might be in the future cannot serve as the basis for valuation." Bakel, 1980-NMCA-173, ¶ 10, 95 N.M. 723, 725.

In addition, the Taxation and Revenue Department has issued regulations regarding the proper application of the income method of valuation. 3.6.5.22(A)(1)-(6) NMAC provides in part that the income method of valuation is used when market value cannot be used due to lack of data on sales of comparable properties, and is predicated on estimated future income which could be realized from the legally

permitted highest and best use or uses of the property.[3] In reaching its decision on the amount of expenses to allow, the Protest Board relied on the testimony of Ms. Jaramillo, in addition to its own expertise in determining independently whether the Assessor's approach was reliable and in compliance with Taxation and Revenue Department regulations.

---

[3] *The income method of valuation is a method used to value property by capitalizing its income when the market value method cannot be used due to lack of data on sales of comparable properties*....The value of the property under the income method of valuation is determined by dividing the annual income by the applicable capitalization rate. *Income is predicated on estimated future income which could be realized from the legally permitted highest and best use or uses of the property.* Where sufficient evidence of the rental value of the property being valued is available, the income is based upon the fair rent which can be imputed to the property being valued based upon rent actually received for the property by the owner and upon typical rentals received in the area for similar property in similar use, provided that use is the legally permitted highest and best use. When the property being valued is actually encumbered by a lease, the cash rent or its equivalent considered in determining the fair rent of the property is the amount for which the property would be expected to rent at its legally permitted highest and best use were the rental payment to be renegotiated in the light of conditions as they exist at the time the property is being valued. Where sufficient evidence as to rental value of the property being valued is not available, the income used is based upon the fair rent which the property being valued reasonably can be expected to yield under prudent management. *The imputed fair rent is developed from market information which reflects the probable rental value of the property being valued in the open market at its legally permitted highest and best use.* Income means the net income or the difference between annual revenue or receipts, actual or imputed, from rental of the property and the annual expenses relating to the property. Expenses means the outlay or average annual allocation of money or money's worth that can fairly be charged against the revenue or receipts from the property. Expenses are limited to those which are ordinary and necessary in the production of the revenue and receipts from the property and do not include debt retirement, interest on funds invested in the property or income taxes. 3.6.5.22(A)(1)-(6) NMAC (emphasis added).

It is clear from Ms. Jaramillo's testimony that the Assessor's valuation was based on these principles. Ms. Jaramillo presented the available market comparables, but the parties agreed that the values were not entirely representative and were merely used because that was the only information available. *Valuation Protest Hearing Track 3* at 43:59. As a result, Ms. Jaramillo testified that the comparables were not used in the valuation, and instead the income method was the basis of the valuation. *Valuation Protest Hearing Track 3* at 54:09. Ms. Jaramillo's testimony also sets out with specificity the method that was used in reaching the Property's valuation. This included that Petitioner's property was 41% vacant as of January 1, and his expenses were at 87% for 2013. *Valuation Protest Hearing Track 3* at 44:35. In addition, the Assessor also took into consideration that under the NMTRD regulation, the imputed fair rent is developed from market information which reflects the probable rental value of the property being valued in the open market at its legally permitted highest and best use. 3.6.5.22(A) NMAC. As a result, to properly compute this information, the Assessor evaluated other similar businesses and researched reputable sources such as Business Weekly and Co-Star. *Valuation Protest Hearing Track 3* at 44:35. The Assessor allowed a max vacancy of 15% and max expenses of 45% because that is what her research indicated the then-current market was allowing. Id. The Assessor further concluded that at 87%, Petitioner's expenses were really high for the market at the time. Id. The Assessor

further stated that Petitioner was provided with a 3% management fee and a 4% reserves because that was the standard based on their extensive research into the market. Id. The Assessor's evaluation was therefore in compliance with the requirements of state law and the NMTRD regulation.

Furthermore, although the Petitioner provided extensive documentation on the prior valuation of the property as well as income generated after January 1, 2014, as the Court has noted, "the value of a tract in the past or speculation as to what it might be in the future cannot serve as the basis for valuation." See Bakel, 1980-NMCA-173, ¶ 10, 95 N.M. at 725. Instead, the Assessor was obligated to look at the value on January 1 of the tax year. NMSA 1978, § 7-38-7. The Assessor repeatedly noted that her valuation was based on these principles and limited the valuation to the property as of January 1, 2014. *Valuation Protest Hearing Track 3* at 44:35. As a result, additional information could not, and was not taken into consideration by the Assessor. Because the valuation was reached in accordance with state law, the NMTRD regulations, and was based on standards developed in compliance with extensive research into market, the Assessor's determination was made in accordance with law and the Protest Board acted properly in adopting that valuation.

Petitioner further claims that the Assessor did not overcome her burden because she relied on hearsay testimony from Ms. Jaramillo at the hearing. However, Ms. Jaramillo's testimony was properly before the Protest Board. Hearsay

is a statement, other than one made by a declarant while testifying at trial or a hearing, that is offered into evidence for the truth of the matter asserted. Rule 11-801(C) NMRA. Although Petitioner repeatedly refers to Ms. Jaramillo's testimony to the Board as "hearsay," this characterization is in error as Ms. Jaramillo was competently testifying at the protest hearing in her capacity as an employee of the Assessor's office.

As is clear from the record, Ms. Jaramillo's testimony regarding the valuation of the Property was based entirely on facts she learned through her personal experience as Commercial Manager at the Assessor's office. Ms. Jaramillo does not speculate or merely give an opinion as to what she believes was the method used in reaching the Property's valuation, nor does she speculate as to the basis for the decision to use that particular method. See Pedigo v. Valley Mobile Homes, Inc., 97 N.M. 795, 798, 643 P.2d 1247, 1250 (Ct. App. 1982) (A witness's statement as to "possible" cause of fire was self-serving speculation, factually unsupported opinion testimony, and made without personal knowledge); see also Sehll Rocky Mountain Prod., LLC v. Ultra Res., Inc., 415 F.3d 1158, 1169 n.6 (10th Cir. 2005) (A witness's statements based on information and belief are inadmissible.). Rather, Ms. Jaramillo set forth specific assertions of fact as to the exact method that was used and the reasons for using that method, based on her personal recollection. As her assertions are based on personal knowledge, they constitute competent evidence

that would be admissible at trial through Ms. Jaramillo's witness testimony. Thus, the facts asserted by Ms. Jaramillo at the protest hearing through her legally admissible testimony provided a sufficient basis to support the Board's decision to adopt the Assessor's valuation.

Furthermore, the Protest Board utilized its specialized knowledge and expertise in determining that the Assessor's method of valuation for the Property was reliable. RP at 36. After hearing Ms. Jaramillo's testimony, the Board concluded, upon independent review, that the Assessor's method of valuation was reliable without needing to review the underlying market studies. RP at 37. This determination was entirely within the Board's discretion, as it "may use [its] knowledge and experience to evaluate evidence admitted" at protest hearings. 3.6.7.36(H)(1) NMAC. Moreover, decisions by the Board are given deference with regard to factual issues pertaining to matters in which the Board has specialized expertise. See Montano, 2009-NMCA-009, ¶ 21 (internal citation omitted). Finally, Petitioner was present at the hearing and had the opportunity to request the underlying market data supporting Ms. Jaramillo's testimony, yet he failed to request any such information. Accordingly, Ms. Jaramillo's testimony to the Board was competent, admissible evidence, and the Board's decision to adopt the Assessor's valuation based on that testimony and its own expertise was in accordance with the law and supported by substantial evidence.

Finally, the Protest Board could not adopt the APOD proffered by Petitioner as the Petitioner admitted that the approach resulted in an untraditional pro forma being generated, and further stated, "It's kind of like an [Annual Property Operating Data ("APOD")], but not really one, and I wanted to admit that going in but I don't know how else to approach it." *Valuation Protest Hearing Track 3* at 6:20-7:02; RP at 28. Furthermore, despite Mr. Wesley's testimony that APODs were an accepted technique, Petitioner nonetheless agreed that Mr. Wesley was not an expert appraiser and even stated that he "doesn't do that technique stuff." *Valuation Protest Hearing Track 3* at 21:20. In addition, to the extent that the Board utilized its own judgment in reaching its decision, the Protest Board is specifically authorized to do so by law.

The Protest Board's decision should therefore be upheld.

II. THE DECISION OF THE DISTRICT COURT AFFIRMING THE BOARD'S DECISION WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

On appeal, the District Court found that there was substantial evidence to support the Protest Board's decision to adopt the Assessor's valuation of the Property. *Memorandum Opinion and Order ("Opinion")* at 8 (June 23, 2015). As with the Protest Board's decision, Petitioner argues that the District Court decision was not supported by substantial evidence. However, substantial evidence is relevant evidence supporting an agency's decision such that a reasonable mind would find adequate to support the decision, viewed in the light most favorable to

the decision. Paule v. Santa Fe County Bd. Of County Comm'rs, 2005-NMSC-021, ¶ 32, 138 N.M. 82.

Here, the District Court found that Ms. Jaramillo's sworn testimony alone was "competent evidence" that the policy of capping expenses at 45% existed, and that the Assessor "was not required to produce a policy in writing" to support that testimony. *Opinion* at 6. The District Court also affirmed the Protest Board's determination that Ms. Jaramillo's testimony was both reliable and persuasive, even without the presentation of the underlying market data to support her testimony. Id. at 7. In doing so, the District Court deferred to the Board's expertise in evaluating the weight of the testimony in accordance with 3.6.7.36(H)(I) NMAC.

The District Court also considered the evidence in the record offered by Petitioner at the protest hearing, but failed to find any evidence to dispute the Board's conclusion that using market data in determining the expense ratio was a generally accepted technique. Id. at 6. The District Court also found that the 2010 Protest Decision regarding the Property was not binding and irrelevant to the issue at hand. See id. at 8 (". . . the correctness of the earlier determination is not at issue."). With regard to whether the Board should have used Petitioner's proposed APOD valuation, the District Court found that the "Board's decision is not subject to reversal merely because there is evidence to support a different result," and that "[m]erely because Petitioner's APOD may be a generally accepted appraisal

technique does not mean the Assessor's technique is not generally accepted." *Opinion* at 9. Thus, the District Court considered the whole record before it and determined that the Board's decision was based on evidence such that a reasonable mind would find adequate to support the decision when viewed in the light most favorable to the decision. See Paule, 2005-NMSC-021, ¶ 32.

Petitioner also argues that the District Court erred in failing to shift the burden to the Assessor to prove her valuation method was a generally accepted technique after the Petitioner had overcome the presumption of correctness. *Brief in Chief* at 32. However, the District Court explicitly assumed that the presumption had been overcome and conducted a detailed analysis regarding whether the Assessor met her burden of proof by demonstrating that the appraisal technique was generally accepted. *Opinion* at 5-8. The District Court even considered whether substantial evidence existed to support the Assessor's use of "market data to cap expenses at 45% [as] a generally accepted appraisal technique." *Opinion* at 5.

The District Court ultimately found that substantial evidence—in the form of Ms. Jaramillo's testimony and the Board's "independent review that the Assessor's approach was reliable"—supported the Board's conclusion that the Assessor had met her burden. *Opinion* at 7-8. Accordingly, the District Court properly shifted the burden of proof on the Assessor to show her appraisal technique was generally

accepted, and appropriately found that the Assessor met that burden based on substantial evidence.

Petitioner further claims that the District Court erred because "the Assessor produced no competent evidence to support her valuation." *Brief in Chief* at 33. Along the same lines, Petitioner argues the District Court erred when it found that the Board had properly relied on its own expertise in accordance with 3.67.36(H)(1) NMAC to evaluate the evidence because "[t]here simply was not substantial evidence admitted for the Board to evaluate." Id. However, as discussed above, these arguments fail because they operate on the erroneous assumption that Ms. Jaramillo's testimony was incompetent and inadmissible. As Ms. Jaramillo's testimony was based on personal knowledge, it was competent, admissible, and relevant evidence such that a reasonable mind would find adequate to support the Board's decision, viewed in the light most favorable to the decision. See Paule, 2005-NMSC-021, ¶ 32. Accordingly, the District Court's affirmation of the Board's decision was supported by substantial evidence.

III. THE COURT SHOULD NOT CONSIDER ISSUES RAISED IN PETITIONER'S BRIEF IN CHIEF THAT ARE OUTSIDE THE SCOPE OF THE QUESTIONS PRESENTED IN THE PETITION FOR WRIT OF CERTIORARI.

Petitioner improperly raises several issues in his Brief in Chief that are outside the scope of his Petition for Writ of Certiorari. Rule 12-505(D)(2)(b) plainly states that "the Court will consider only the questions [presented for review] set forth in

the petition." It is well settled that "[u]nder the appellate rules, it is improper for this Court to consider any questions except those set forth in the petition for certiorari." State v. Sewell, 2009-NMSC-33, ¶ 14, 146 N.M. 428, 211 P.3d 885 (quoting Fikes v. Furst, 2003-NMSC-33, ¶¶ 8-9, 134 N.M. 602, 81 P.3d 545). The reviewing court may only address a question not set forth in the petition for certiorari where there is "a foundational issue which is integral to a complete and thorough analysis of the specific question presented in the petition for writ of certiorari". State v. Javier M., 2001-NMSC-30, ¶ 10, 131 N.M. 1, 33 P.3d 1.

However, the extraneous issues raised in Petitioner's Petition simply are not the type of foundational issues that require this Court's review. In the Petition, Petitioner presents only two (2) specific questions for review:

> ISSUE 1. Was there substantial evidence to support the decision of the Board that the method used by the Assessor met the statutory requirement in N.M.S.A. 1978 Section 7_36 15 (B)(1 [sic] as a generally accepted appraisal technique?
>
> ISSUE 2. Was the decision of the District Court affirming the decision of the Board arbitrary because there was no substantial evidence to support the Board's decision that the Assessor's technique met the requirements of N.M.S.A. 1978 Section 7_36 15 (B)(1 [sic] as a generally accepted appraisal technique?

Petition at 12. In his Brief, however, Petitioner raises several issues that go well beyond the scope of the questions presented in his Petition.

a. Whether the assessor was authorized to change the property valuation after the notice of value was issued to the property owner is outside the scope of the questions presented in this matter.

Petitioner argues that the Assessor lacked the authority to change "the valuation of the Property by 22% from the first notice of value in the amount of $1,113,3000[.]00 to the value of $900,200.00 she attempted to defend at the protest hearing." *Brief in Chief* at 17. Petitioner then cites to various state court cases from other jurisdictions for the proposition that the Assessor lacks the lawful authority to make valuation changes amounting to more than clerical errors after the initial valuation has already been delivered. Id. at 18. Not only is this argument contrary to New Mexico law[4] and based exclusively on property tax statutes in other states that are not consistent with the law in New Mexico, but this issue was also not raised, either directly or indirectly, in the Petition.

Furthermore, this issue is clearly not a "foundational question integral to a complete and thorough analysis of the specific questions presented" in the Petition. Javier M., 2001-NMSC-30, ¶ 10. The Assessor's authority to change an initial valuation after notice has been sent to the taxpayer is immaterial to the issue of whether substantial evidence supports the Protest Board's 2014 decision or the District Court's affirmation of that decision. More importantly, there is simply no

[4] NMSA 1978, § 7-38-24 and 3.6.7.33(B) NMAC allow for an informal protest between the Assessor and the taxpayer for the purpose of resolving the protest, including anticipating that the Assessor may reduce the property value at that stage.

prohibition under New Mexico law regarding the Assessor's revision of an initial property tax valuation.[5] Accordingly, this issue is inconsequential to the two (2) questions actually presented for review, and this Court is not required to address it in order to thoroughly analyze whether substantial evidence supports either the Board's 2014 decision or the District Court's affirmation.

b. Whether the doctrine of collateral estoppel should apply to the Protest Board's decision is outside the scope of the questions presented in this matter.

Petitioner claims that because in the 2010 Protest Decision the Board found that a fifty percent (50%) cap on expenses was not a generally accepted appraisal technique, "[t]he Assessor's application of [a 45%] cap in 2014 was arbitrary and capricious." *Brief in Chief* at 20. However, Petitioner also argues for the first time that the doctrine of collateral estoppel "makes it clear that the Board's decision to allow the application of flat percentage cap on expenses was arbitrary and capricious."[6] Id. at 20-21. Although Petitioner briefly mentions the 2010 Protest Decision in his Petition, he does not argue that it makes the 2014 decision arbitrary under collateral estoppel principals. *Petition* at 9. Rather, Petitioner argues in the Petition that the District Court's affirmation of the Board's 2014 decision was

---

[5] Petitioner admits that he "has located no New Mexico case law discussing whether the Assessor can change the valuation of a property under the circumstances...". *Brief in Chief* at 18.

[6] Petitioner admits "this principal was not explicitly argued below." See Id. at 20.

improper because it failed to consider relevant evidence in the form of the 2010 Protest Decision. Id. However, the relevance or correctness of the Board's 2010 Protest Decision is not at issue here. Moreover, Petitioner clearly failed to raise any question in his Petition regarding the preclusive effect of the 2010 Protest Decision. Accordingly, the Court should not consider Petitioner's argument pertaining to the 2010 Protest Decision, as it is clearly outside the scope of the questions presented in his Petition, and inconsequential to the specific questions properly before this Court.

Furthermore, even assuming that Petitioner's question regarding collateral estoppel is properly before this Court, Petitioner's argument fails because the doctrine of collateral estoppel does not apply to this case. Before collateral estoppel is applied to preclude litigation of an issue, the moving party must demonstrate that: (1) the party to be estopped was a party to the prior proceeding; (2) the cause of action in the case before the court is different from the cause of action in the prior adjudication; (3) *the issue was actually litigated in the prior adjudication*; and (4) *the issue was necessarily determined in the prior litigation.* Silva v. State, 106 N.M. 472, 474-76, 745 P.2d 380, 382-84 (1987) (emphasis added). Under NMSA 1978, § 7-38-7 (1997), "[a]ll property subject to valuation for property taxation purposes shall be valued as of January 1 of *each* tax year ..." (emphasis added); see also Bakel, 1980-NMCA-173, ¶ 10, 95 N.M. 723, 625 P.2d 1240 (holding that it is improper to consider the value of a tract "in the past or speculation as to what it might be in the

future ... as a basis for valuation."). Thus, the issue in the 2010 Protest Decision was the valuation of the Subject Property for that tax year, which is a completely separate matter than the valuation of the Subject Property in 2014.

This Court has also recognized that because the Assessor has the authority to re-determine property tax valuation each year, a determination in one year will not bind any re-determinations in subsequent years. In Protest of Plaza Del Sol P'ship v. Assessor for Bernalillo, 1986-NMCA-022, ¶¶ 9-12, 104 N.M. 154, this Court stated that "[e]stoppel, as a general rule, does not apply against the state." Id. at 158. Importantly, this Court further determined that because "[b]y statute, all property subject to valuation for property taxation purposes is required to be valued each year ... [a] stipulation fixing property tax values for a specific year is not binding for any following tax year; *it is res judicata only for the year in question.*" (Internal citations omitted) (emphasis added).

In this case, the 2010 Protest Decision that a 50% cap on expenses is not a generally accepted appraisal technique was a decision regarding the Property for that tax year only—a year that is not at issue here. Thus, even assuming that the doctrine of collateral estoppel *could* apply to the Protest Board's decision, the elements of collateral estoppel are not met. Accordingly, the valuation in 2014 was not actually litigated or necessarily determined in the 2010 Protest Decision regarding the subject property. Furthermore, Petitioner acknowledges in his Petition that the 2010 Protest

Decision does not have a preclusive effect on the present matter before the Court. *Petition* at 5 ("While it may not be binding, it is certainly relevant evidence supporting its conclusion when presented to this same board if it is undisputed or distinguished.").

Even if the 2010 Protest Decision was introduced merely to demonstrate that the Board's 2014 decision was arbitrary, the argument must still fail not only because this issue is not properly before this Court, but also because such a proposition is not supported by law. There is no lawful authority supporting the argument that the Board is bound by previous findings as to what constitutes a reasonable expense ratio, nor for the assertion that a previous inconsistent finding is conclusive evidence that a subsequent finding is arbitrary. The Protest Board's decision is not "unfair and illogical and thus arbitrary and capricious" as Petitioner argues, merely because a different result had been reached in prior years. Accordingly, the Protest Board's decision should be affirmed.

REQUEST FOR RELIEF

WHEREFORE, the Assessor respectfully requests that this Court affirm the decision of the Bernalillo County Valuation Protest Board.

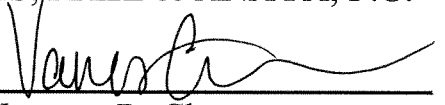
REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 12-214 NMRA, Oral Argument is requested in order to provide the Court with a thorough understanding of the issues and the policy

considerations relevant to this matter which are beyond the scope of this Answer Brief. Petitioner's position on many of the issues in this case have potentially harmful consequences for the overarching public policy, including undermining the Assessor's ability to engage in informal protests under the rules and laws of this state. The Assessor therefore respectfully requests oral argument in this matter.

Respectfully Submitted,

ROBLES, RAEL & ANAYA, P.C.

By: 

Vanessa R. Chavez
Marcus J. Rael
Attorneys for the Assessor
500 Marquette Ave., NW, Suite 700
Albuquerque, NM 87102
(505) 242-2228
(505) 242-1106 (facsimile)

I hereby certify that on this
14th day of December 2015,
the foregoing was mailed via
U.S. Mail to the following:

J. Victor Pongetti
Attorney for Petitioner
2727 San Pedro NE, Suite 115
Albuquerque, NM 87110
(505) 880-8228

/s/ Vanessa R. Chavez
Vanessa R. Chavez, Esq.