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2727 SAN PEDRO LLC, a limited liability company,

Petitioner/ Appellant,

Ct. App No. 34,869
Appeal from the Second Judicial District Court
Bernalillo County
Judge Denise Barela Shepherd
No. D-202-CV-2014-06777

v.

BERNALILLO COUNTY ASSESSOR,

Respondent/Appellee.

APPELLANT'S BRIEF IN CHIEF

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Audio Recording of Hearing: Citations to testimony given at the Protest Hearing are based on the audio recording (two CDs) provided with the Record Proper (RP 0013A).

TABLE OF AUTHORITIES

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SUMMARY OF PROCEEDINGS

Nature of the Case

This is an appeal on certiorari to the Court of Appeals from the Amended Memorandum Opinion and Order of the Second Judicial District Court (the Honorable Denise Barela Shepherd) affirming a Decision and Order by the Bernalillo County Valuation Protests Board setting the value of Appellant's [1]property for the 2014 tax year.

Course of Proceedings

On April 11, 2014, the Bernalillo County Tax Assessor ("Assessor") issued a notice of value of an office property located at 2727 San Pedro NE, Albuquerque, New Mexico (UPC # 1-018-059-254374-254374-2-06-02) (the "Property") setting the value at $1,113,300.00. RP 00028.

Appellant 2727San Pedro, LLC is the owner of the property. On May 22, 2014, the Appellant timely filed a protest petition to the Bernalillo County Valuation Protests Board ("Board"), declaring that the correct value of the Property was $753,690.00.[2] RP 00024. On June 25, 2014, the Assessor notified the Appellant that she had revalued the Property and that the new "Final Value"

[1] The value asserted by the Appellant was the value assigned the Property in 2009, 2010, 2011 and 2012.

was $1,031,480.00. RP 0033-0034 (Protestant's Exhibit 3).

A hearing was held before the Board on July 8, 2014. RP 0002- 0026. At the hearing, the Assessor[3] announced that she was reducing the valuation to $900,200.00, a value disclosed to the Appellant immediately prior to the hearing. Testimony of Appellant, Audio transcript ("AT") at Track 1, 2.44 - 2.59 min.

The Appellant introduced a set of exhibits without objection, including the decision on his protest of the valuation of the same Property in 2010. AT, Track 2 at 2:00 min. RP0037-0039 (hearing exhibit 4). Mr. Pongetti testified that he disagreed with the Assessor's rule arbitrarily capping management fees at 3% with no allowance for necessary expenses. AT Track 3 at 2-3:00. He submitted three APOD (Annual Property Operating Data) forms for the Property demonstrating an average net operating income ("NOI") of $12, 412.00. Track 3 at 3:40-4:30; Appellant's Exhibit 2, RP 0030-32. He disagreed with the Assessor's refusal to consider the cost of tenant improvements, management fees, Realtor commissions or reserves for replacement costs. AT at 3:00-3:25.

He introduced his projected Annual Operating Data for 2014 (RP 0041,

[3] The Assessor testified through Arlene Jaramillo, Bernalillo County Commercial Manager, and the Appellant testified through J. Victor Pongetti, Managing Member of 2727 San Pedro, LLC. Throughout this brief, the Assessor is sometimes referred to as "she" and the Appellant as "he," reflecting the gender of the testifying representatives of the parties.

Exhibit 6, Track 3 at 7-8:00) and testified that the Assessor's rule limiting operating expenses to 45% was in conflict with a 2010 decision of the Board regarding the same Property ruling that the Assessor's expense limit of 50% for the Property was " not a generally accepted appraisal technique." RP 0038 at ¶12; AT Track 3 at 8:00-8:45, referencing Protestant's Exhibit 4. He testified that there had been no material change in the value of office properties since that decision (Track 3 at 9:30), and that the Assessor's application of a 45% cap on expenses was arbitrary and ignored many of his actual operating expenses. Track 3 at 14:20-16:00.

The Appellant called real estate broker David Wesley to testify regarding the factors real estate professionals consider in determining the fair market value of a property. The Board accepted him as an expert real estate professional. Track 3 at 21:21. Introducing Wesley, the Appellant explained that he was not a real estate appraiser and "doesn't do that technique stuff" (Track 3 at 21:27), but that he had long experience helping the Appellant and others identify the fair market value of properties. Wesley testified that he had over 40 years experience in the field and explained the factors he considered in arriving at the value of a property, including location, zoning, market conditions, income, cash flow, management and maintenance of the property. Track 3 at 22- 25.

Mr. Wesley testified regarding the factors considered by Realtors and the use of APODs in determining the NOI applicable to similar properties. Track 3 at 26-28. He explained that the 2014 climate was highly competitive, opining that the Appellant did an excellent job maintaining the property and otherwise attracting tenants. Track 3 at 25-30. He testified that the APOD is "the Bible" used to value properties, and always includes operating and recurring expenses, including management fees, cost of tenant improvements reserves for replacement and Realtor commissions. Track 3 at 29-31:20. There was no cross-examination.

The Assessor's presentation was brief. Track 3, 43-46. Ms. Jaramillo described the technique the Assessor used to reach the final assessed value of $900,200.00. See, Assessor's Exhibit 2 at RP 0046. She did not consider actual operating expenses or vacancies or the factors listed by David Wesley. Instead she testified that she based her valuation on research of Business Weekly and Co-Star, and had concluded that the maximum vacancy was 15% and the maximum expenses were 45%, and this was what she allowed. She opined that expenses of 87% are "very high for this market." Track 3 at 45-45:36. She allowed a 3% management fee and 4% reserves because this was the standard she was "applying to everyone." based on her research. Track 3 at 45:50. She produced no underlying data or research of any kind.

The Board issued its Decision and Order on October 7, 2014. RP 0047-50. It noted that the Assessor had reduced her valuation of the Property from $1,113,300.00 to $900,200.00 at the hearing. RP 0047 at ¶ 8. It found that the Appellant had provided actual income and expense data for the years 2011 through 2013 and projected data for 2014. RP0048 at ¶12, referencing Appellant's Exhibit 2 at RP 0030-0032. It found that the Assessor proposed an income approach valuation limiting vacancy to 15%, management fees to 3% and expenses to 45%. RP 0048, ¶ 13. It noted that the Assessor based these figures on her "market research" and "review of data from other properties." Id.

It found that David Wesley appeared to be "very knowledgeable about the local real estate market and commercial property operations." RP 0049 at ¶ 16. It noted, however, that "Mr. Wesley is not a licensed or certified appraiser, and the property owner specifically disclaimed an approach to value using generally accepted appraisal techniques. . . " Accordingly, it ignored Mr. Wesley's testimony in its entirety – even though Mr. Wesley had not given an opinion as to the value of the Property. RP 0049 at ¶ 16.

Because the Assessor had not introduced any of the underlying data on which she claimed to rely, the Board stated:

Again, the Board would prefer to see the Assessor's actual market

> studies to support the expense limits imposed That said, the Board does find the Assessor's testimony regarding market comparable expenses persuasive.

RP 0050 at ¶ 21. It concluded that "the best evidence in front of the Board supports the reduced valuation proposed by the Assessor." RP 0050 at ¶ 23. The Board acknowledged that the Appellant had introduced the 2010 order of the Board "in which it determined that an expense limit of 50% of gross income was not a generally accepted appraisal technique" with respect to the 2009 valuation of the Property (RP 0048 at ¶ 14), but made no further reference to that order and apparently gave it no consideration in reaching its decision. It also noted the testimony of real estate broker David Wesley and his knowledge of the local real estate market," RP 0049 at ¶ 19, but gave his testimony no weight. Id. It made no reference to the APODs relied on by the Appellant and Mr. Wesley, disregarding Wesley's testimony that Realtors and knowledgeable buyers and sellers use the APOD to determine the NOI of an income producing property. See, Protestant's Exhibit 6.

It ordered that the valuation records "for the 2009 tax year"[4] be changed to $900,200.00, the final figure proposed by the Assessor. RP 0050.

The Appellant timely appealed the decision to the Second Judicial District

Court and filed a brief. RP0053-0080. After he received a transcript of the hearing before the Board, he moved to amend his Statement of Appellate Issues. RP 0081-84. The Assessor responded RP0085-86. The District Court entered a Stipulated Order allowing the Appellant to amend his Statement of Appellate Issues but requiring the parties to cite only to the audio recording of the hearing. RP0093-94.

On December 10, 2015, the Appellant filed his Amended Statement of Appellate Issues. RP 0095-RP0121. He listed and argued eight issues. These issues have been combined and reorganized in this appeal.

In his argument, the Appellant pointed out that the Assessor had changed the valuation of the Property three times before the hearing, with no explanation as to the reason for the first two valuations or for the change. RP 0098. He argued that the unexplained 22% change in value from the initial valuation to the final value overcame the presumption of correctness given the Assessor's valuation, particularly where the Assessor identified no written policy on which her changing valuations were based and presented no evidence that her valuation policy and technique are generally accepted. RP 0099-0103, citing NMSA 1978 § 7-38-6. See, also, RP 0106-0107.

[4] The tax year at issue in the hearing was 2014. No party challenged this error.

He argued that the APOD, such as the ones he used to calculate net operating income ("NOI"), is a generally accepted appraisal technique and that the Assessor presented no argument or evidence that it is not. RP 0104; 10108-0109. He disagreed with the Board's finding that he had "specifically disclaimed an approach using generally accepted appraisal techniques . . " (RP 0049), arguing that his statement had been taken out of context. RP 0104-0106, quoting his testimony

The Appellant argued that the Board had expressly found that the Assessor's expense limit (50%) was not a generally accepted appraisal technique as applied to the Property in 2009. RP 0112, referencing Appellant's hearing exhibit 4 (RP 0038 at ¶12). Accordingly, the Board's finding no. 21 that the Assessor's evidence was the most persuasive was not supported. RP 0113, referencing RP 0050.

He argued that the Board could not properly apply its knowledge of the relevant market to accept the Assessor's determination of market rent in finding no. 18 (RP 0049) because there was no evidence in the record to which the Board could apply its knowledge and experience. RP 0074, citing NMAC 3.6.7.36(H)(1). RP 0114-0115.

He argued that he had not disclaimed an approach using generally accepted accounting principles in his testimony, and that the Board's finding no. 16 (RP

0049) was thus unsupported by substantial evidence. RP 0115. He contended that his evidence, including the testimony of a real estate professional with over 40 years of experience in determining the NOIs of properties, the APODs he admitted for the years 2011, 12 and 13 (Exhibit 2, RP 0029-0032) and his exhibit 6 (RP 0041), showing his projected NOI for 2014 constituted an approach to value based on generally accepted appraisal techniques. RP 0115-0120. This evidence demonstrated that his expenses were far less than the Assessor asserted. RP 0120.

The Assessor responded. (RP 0122-0134). It contended that the Appellant did not overcome the presumption of correctness given its third valuation for 2014. RP 0126-0128. It argued that the reduction of the initial valuation did not rebut the presumption of correctness because the Appellant had not shown that the revised valuation did not follow statutory provisions or that it was factually incorrect. RP 0127. Moreover, the 2010 decision of the Board was insufficient to rebut the presumption because the Assessor had relied on her market research to limit expenses to 45% rather than following a standard policy of limiting them to 50%. RP 0127-0128.

The Assessor argued that the Board's decision was correct because "the property value was determined in accordance with the law." RP 0128-0130. She conceded that the comparables the Assessor admitted at the hearing were not

actually used in the valuation of the Property. RP 0130. Instead, the Assessor used the income method, relying on her evaluation of similar businesses and her research based on Business Weekly and Co-Star, which indicated that maximum vacancies were at 15% and maximum expenses were 45%. RP 0130. Accordingly, 87% expenses "were really high for the market at the time." Id. The management fee of 3% and reserves of 4% she applied were based on her research.[5] Id.

The Assessor argued that prior valuations of the Property and income generated after January 1, 2014 could not serve as a basis for the valuation. RP 0131. The APOD submitted by the Appellant was "untraditional" and David Wesley was not an expert appraiser. Id. The Board properly utilized its own judgment. Id.

Finally, the Assessor argued that the Board's decision was supported by substantial evidence (RP-1032-0133), that she had relied on "extensive research" in support of her decision, and that David Wesley's testimony was not relevant because the Appellant had not overcome the presumption that the valuation was correct. Id. Moreover, the Board properly weighed the evidence in reaching its decision. RP 0133.

The Appellant submitted a reply (RP 0135-0144), arguing that actual

[5] The Assessor did not submit the research or any underlying data.

expenses should have been used in determining the value of the Property under NMAC 3.6.5.22(A)(1-6), rather than the Assessor's policy of limiting expenses to 45%. (RP 1036; 0137). He did not rely solely on the Board's 2010 decision regarding the Property and he had not disclaimed the use of generally accepted appraisal techniques. RP 0136; 0140. He pointed out that the Assessor had not submitted substantial evidence to support the appraisal (RP 0137) and argued that due process and his right to a fair hearing on his protest required that the Board's decision be based on evidence in the record. RP 0143.

The Appellant argued that the Board failed to make critical findings. It failed to enter a finding as to whether he had overcome the presumption of correctness, failed to find that either party had applied generally accepted appraisal techniques and failed to reconcile its concern that the Assessor had not produced the market studies on which she claimed she relied with its finding that "the best evidence" supported its conclusion that her valuation was correct. RP 0138, referencing RP 0050. The Board had made no finding as to whether limiting operating expenses to 45% was a generally accepted appraisal technique. RP 0140.

The Appellant argued that the Board may not apply its expertise or base its decision on facts outside the record. RP 0138. It should not have entered a finding

regarding comparables where the Assessor specifically disclaimed using comparables in her valuation. RP 0139. He disputed the Assessor's argument that he had relied solely on the 2010 Board decision to rebut the presumption of correctness, arguing that the Assessor's 22% reduction of the initial valuation was an admission that the initial valuation was incorrect. RP 0139.

The Appellant challenged the Board's refusal to give weight to David Wesley's testimony, pointing out that Wesley did not assert the value of the Property, but opined that an APOD is generally and regularly used to determine the NOI of properties and is "the Bible" used by knowledgeable buyers and sellers of commercial properties to determine NOI. RP 0139-0140.

The District Court entered a Memorandum Opinion and Order affirming the Board's decision (RP 0149- 0157) and an Amended Opinion and Order on June 25, 2015. RP 0158-0167.

It found that the fact that the Assessor had revised the valuation twice did not overcome the presumption of correctness. RP 0161. It found that the Board should have made a finding as to whether the presumption of correctness had been overcome, but this failure was not grounds for reversal. RP 0161-162. For purposes of the appeal, the Court would presume that the presumption had been overcome (RP 0162), and that the evidence that the Appellant's actual expenses

were higher than 45% tended to "dispute the factual correctness of the Assessor's market-based limitation on operation expenses." RP 0162. However, substantial evidence supported the Assessor's conclusion that expenses should be capped at 45% based on her market research. RP 0163.

The Court deferred to the Board's decision to rely on the Assessor's testimony regarding comparable market expenses, even in the absence of the data on which the Assessor claimed reliance. It found that the Board properly relied on its own expertise, even in the absence of evidence in the record. RP 0164. It ruled that the Assessor was not required to use actual expense data to value properties. RP 0165.

It found that the Board did not err in not considering its 2010 decision in this appeal as that valuation was not at issue in 2014. RP 0165. It concluded that substantial evidence supported the Assessor's use of market data to determine expenses for tax valuation purchase and that it was it was not arbitrary or capricious for the Board to find that she met her burden. RP 0155.

Finally, it found that even if the APOD is a generally accepted appraisal technique, evidence to support a different result did not require reversal. RP 0156. It concluded that the Board's decision was supported by substantial evidence and was not arbitrary or capricious, and affirmed. RP 0166.

The Appellant timely filed a Petition for Writ of Certiorari in this Court (RP 0168) and subsequently filed an Amended Petition. He argued that although the District Court ruled that he had overcome the presumption of correctness for purposes of the appeal, it then returned the burden of proof to the Appellant. RP 0185. The Appellant argued that the Court erred in disregarding a prior decision regarding the same Property in which the Board held that the use of market data to determine the expense ratio was not a generally accepted appraisal technique. RP 0186. The Assessor failed to disclose the underlying data she used to reach her conclusion or a written policy on which her valuation was based, and the Board did not find that her approach was a generally accepted appraisal technique as required by NMSA 1978 § 7-36-16 (B)(1). RP 0187-188. The Order was impermissibly based on facts outside the record, was unsupported by substantial evidence and violated the Appellant's right to due process of law. RP 0189-194.

This Court granted the Appellant's Petition for Writ of Certiorari and assigned this case to the general calendar on August 26, 2015. RP 0205-0207. [6]

ARGUMENT

[6] The Response to the Petition for Writ of Certiorari was not included in the Record Proper.

I. THE DECISION OF THE BOARD WAS ARBITRARY AND CAPRICIOUS, NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND NOT IN ACCORDANCE WITH THE LAW

A. Applicable Standard of Review

Under NMSA 1978 § 7–38–28(D), the decision of a Valuation Protest Board must be set aside if it is: (1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record taken as a whole; or (3) otherwise not in accordance with law. *Cibola Energy Corp. v. Roselli*, 1987 NMCA 055, 105 N.M. 774, 776, 737 P.2d 555, 557 (citation omitted). In reviewing the decision of an administrative agency, this Court applies the same statutorily defined standard of review as the district court. *Lantz v. Santa Fe Extraterritorial Zoning Auth.*, 2004 NMCA©090, 136 N.M. 74, 76, 94 P.3d 817 citing *Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm'n*, 819 2003–NMSC–005, ¶ 17, 133 N.M. 97, 61 P.3d 806 and NMSA § 39–3–1.1(D).

The Court of Appeals does not reweigh the evidence nor substitute its judgment for that of the Board provided that its findings are supported by substantial evidence on the record as a whole. "Whole record review requires us to consider all evidence in support of one party's contentions and also to consider evidence which is contrary to the Board's findings." The Court must "decide

whether, on balance, the agency's decision was supported by substantial evidence." *Hannahs v. Anderson*, 1998 NMCA©152, 126 N.M. 1, 4, 966 P.2d 168, 171, quoting *Cibola Energy Corp. v. Roselli,* 105 N.M. at 776, 737 P.2d at 557 and citing *Gallegos v. New Mexico State Corrections Dep't*, 1992 -NMCA- 013, 115 N.M. 797, 800, 858 P.2d 1276, 1279.

"Substantial evidence in an administrative agency review requires whole record review, not a review limited to those findings most favorable to the agency order." *Cibola Energy*, 105 N.M. at 776, 737 P.2d at 557, quoting *Trujillo v. Employment Sec. Dep't,* 1987 -NMCA- 008, 105 N.M. 467, 470, 734 P.2d 245, 248 and *Groendyke Transport, Inc. v. New Mexico State Corp. Comm'n,*1984 NMSC 067, 101 N.M. 470, 477, 684 P.2d 1135, 1142.

The Appellant preserved this argument in the protest hearing before the Board and in his appeal to the Second Judicial District Court as described in more detail in the Summary of Proceedings, above.

B. The Appellant Overcame the Presumption that the Valuation Was Correct

In New Mexico, "[v]alues of property for property taxation purposes determined by the division or the county assessor are presumed to be correct." NM SA 1978 § 7-38-6. "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*, 126 N.M. at, 7, 966 P.2d at 174, quoting *First Nat'l Bank v. Bernalillo County Valuation Protest Bd.*, 1977 NMCA 005, 90 N.M. 110, 114, 560 P.2d 174, 178 and citing *La Jara Land Developers, Inc. v. Bernalillo County Assessor*, 1982 -NMCA- 006, 97 N.M. 318, 320, 639 P.2d 605, 607. The Appellant overcame the presumption as set forth below.

1. The Assessor Impermissibly Changed the Valuation of the Property

The Assessor changed the valuation of the Property by 22% from the first notice of value in the amount of $1,113,300,00 to the value of $900, 200.00 she attempted to defend at the protest hearing. She gave no explanation whatsoever for this substantial change in value.

These changes alone rebut the presumption that any of the three valuations are correct and demonstrate that the Assessor did not apply a generally accepted appraisal technique to the valuations. A valuation that is arbitrarily changed by 22% simply can not be considered accurate, and it is difficult to imagine how the Assessor can assure uniformity of assessments when it is able to change valuations

at will. See, NMSA 1978 § 7-36-15 (" The same or similar methods of valuation shall be used for valuation of the same or similar kinds of property for property taxation purposes"); *Peterson Properties, Del Rio Plaza Shopping Ctr. v. Valencia Cnty. Valuation Protests Bd.*, 1976 NMCA043, 89 N.M. 239, 244, 549 P.2d 1074, 1079 (Art. III, §§ 1 and 2 of the New Mexico Constitution requires "uniformity in the assessment of property for taxation").

Moreover, the Assessor's valuation is not entitled to a presumption of correctness where it did not have the authority to make changes to the initial valuation once it was mailed to the Appellant. Although the Appellant has located no New Mexico case law discussing whether the Assessor can change the valuation of a property under these circumstances, the courts of other jurisdictions have repeatedly held that property tax assessors lack the authority to make changes that are more than clerical corrections and that require discretion or judgment after delivering the initial valuation of a property. The reasons for this rule are applicable here and demonstrate that the Board's decision to uphold a value that had been changed twice was arbitrary and capricious.

As one court said:

> [A]ssessors speak to the tax payers through their completed rolls. Those, and those only, register their judgments. What the property-owner there finds he has a right to rely upon as in truth the judgment

> and determination of the officers. If they may change it, with little or no notice, to correspond with some unregistered judgment and opinion known only to themselves, and so as not merely to correct a formal or non-substantial errors . . . , there will be little of safety to the tax payer, or of utility in the rights which the statute confers.

9281 Shore Rd. Owners Corp. v. Comm'r of Fin. of City of New York, 39 Misc. 3d 768, 961 N.Y.S.2d 756, 759 (Sup. Ct. 2013).

See, also, *Sheldon Rd. Assoc., L.L.C. v. Cuyahoga Cty. Bd. of Revision*, 2012©Ohio©581, ¶ 31, 131 Ohio St. 3d 201, 209, 963 N.E.2d 794, 801 (". . . .a purported correction might be considered illegal if it consisted of an outright reappraisal of the property rather than adding omitted property or fixing a computational error"); *The LLK Trust v. Town of Wolfeboro*, 159 N.H. 734, 736, 992 A.2d 666, 669 (2010) ("mistaken property tax valuations can be corrected only through legislatively authorized remedies"); *In re United Ag Servs., Inc.*, 37 Kan. App. 2d 902, 159 P.3d 1050 (2007) (where legislature has not provided a remedy for correcting valuation of real estate after notices have been sent out, assessor's correction is invalid); *In re Young*, 911 A.2d 605, 608 (Pa. Commw. Ct. 2006) (" It is generally acknowledged that, once a value has been established for a taxable property, that value cannot be changed absent [circumstances not present here]"); *Mount Auburn Hosp. v. Bd. of Assessors of Watertown*, 55 Mass. App. Ct. 611, 618©19, 773 N.E.2d 452, 459 (2002)(Assessor only had authority to correct an

unintentional error in assessment); *Am. Legion, Hanford Post 5 v. Cedar Rapids Bd. of Review*, 646 N.W.2d 433 (Iowa 2002) (property assessment in an amount intended by assessor is not a clerical error that may be corrected at any time) and many other cases.

2. The Board's Acceptance of a 45% Cap on Expenses was Arbitrary and Capricious in Light of its Prior Ruling that a Similar Cap was Not a Generally Accepted Appraisal Technique

The Appellant introduced a 2010 decision by the Board pertaining to the Property in which the Board expressly found that a cap of 50% on expenses was not a generally accepted appraisal technique. This finding was unchallenged and was not appealed, and the Assessor continued to use the valuation set by the Board in 2010 for the next three years . Although the value at which the Property was assessed several years prior does not control its value in 2014, the application of a set cap on expenses in 2014 was no more of a generally accepted appraisal technique than it was several years prior. The Assessor's application of this cap in 2014 was arbitrary and capricious and the Board's acceptance of the cap was likewise arbitrary and capricious.

Moreover-- although this principle was not explicitly argued below-- the policies underlying the doctrine of collateral estoppel make it clear that the Board's decision to allow the application of flat percentage cap on expenses was arbitrary

and capricious. As this Court has reasoned:

> The doctrine of collateral estoppel fosters judicial economy by preventing the relitigation of ultimate facts or issues actually and necessarily decided in a prior suit. Our Supreme Court has acknowledged that collateral estoppel applies to issues resolved in an administrative agency adjudicative decision to a later civil trial when rendered under conditions in which the parties have the opportunity to fully and fairly litigate the issue at the administrative hearing. For collateral estoppel to preclusively effect litigation, the moving party must show that (1) the party to be estopped was a party to the prior proceeding, (2) the cause of action in the case presently 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.

Mascarenas v. City of Albuquerque, 2012©NMCA©031, 274 P.3d 781, 789, quoting *Shovelin v. Cent. N.M. Elec. Coop., Inc.*, 8 IER Cases 654, 115 N.M. 293, 297-298, 850 P.2d 996, 1000-1001 (1993)(internal quotation marks and citation omitted).

Each of these elements is present here. The parties were entitled to rely on the Board's prior and recent finding that the application of a flat expense percentage cap was not a generally accepted appraisal technique as applied to the Property. Its refusal to do so in this proceeding was inconsistent with its prior determination, illogical and thus arbitrary and capricious. See, *Rosette, Inc. v. U.S. Dep't of the Interior*, 2007©NMCA©136, 142 N.M. 717, 726, 169 P.3d 704,

713 (holding that a federal court's prior determination that geothermal resources are a separate form of property from water was binding in subsequent water rights litigation)(citing *Three Rivers Land Co. v. Maddoux,* 1982 -NMSC- 111, 98 N.M. 690, 694, 652 P.2d 240, 244 (1982), overruled on other grounds by *Universal Life Church v. Coxon,*1986 NMSC 086, 105 N.M. 57, 59, 728 P.2d 467, 469. See, also, *State v. Arevalo*, 2002©NMCA©062, 132 N.M. 306, 310, 47 P.3d 866, 870 (acknowledging "concerns that inconsistent judgments are unfair and illogical") (internal citations omitted).

The Board's 2010 determination that the application of a flat percentage cap on expenses in 2010 was not a generally accepted appraisal technique is inconsistent with its determination in 2014 that such a cap could be applied to the same Property. The 2014 finding is unfair and illogical and thus arbitrary and capricious.

The Appellant rebutted the presumption that the Assessor's valuation was correct by showing that it did not rely on a generally accepted appraisal technique when it applied a flat percentage cap to expenses, thus failing to comply with the statutory provisions of the Act. See, *La Jara Land Developers, Inc. v. Bernalillo Cnty. Assessor*, 1982 NMCA 006, 97 N.M. 318, 319,21, 639 P.2d 605, 607-08:

The statutory presumption of correctness of the value of property by

> the county assessor for tax purposes can be overcome by a taxpayer 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. Rulings by an administrative agency not in accord with the basic requirements of the statutes relating to the agency will render its decision void.

Id, internal citations omitted.

3. The Appellant Presented Evidence Disputing the Factual Correctness of the Valuation

The presumption that the Assessor's valuation is correct is overcome when the property owner presents evidence tending to dispute the factual correctness of the valuation. See, *e.g.*, *Hannahs v. Anderson*, 126 N.M. at 7, 966 P.2d at 174, quoting *First Nat'l Bank v. Bernalillo County Valuation Protest Bd.*, 90 N.M. at 114, 560 P.2d at 178.

The Board found that "[i]t is in the area of expenses that the primary discrepancy between the Assessor and property owner's values lie. At 83% of gross income, the property owner's expenses do seem excessively high . . ." Board's Decision and Order at ¶ 20 (RP 0049). In so finding, the Board simply accepted the Assessor's testimony without question, entirely ignoring the Appellant's evidence and testimony showing that his expenses were actually far lower. See, RP 0110-0114; Appellant's exhibit 6 (RP 0041, 0042).

In addition, the Appellant submitted three APODs for the Property for the years 2011, 2012 and 2013 (Track 3 at 3:40-4:30; Appellant's Exhibit 2, RP 0030-32) showing an average annual NOI of $12,412. At the 10% capitalization rate used by the Assessor (RP 0034), the value of the Property would be $124,000.00 – a clearly unreasonable value. Thus, the Appellant used the actual gross income paid or committed for 2014 and the average operating expenses for the prior years (Protestant's Exhibit 2, RP 0039-32), yielding a more accurate NOI in the amount of $67,28.00. See, Protestant's Exhibit 6, RP 0041. At the 10% capitalization rate used by the Assessor, the value of the Property would be $672,800.00 in 2014.[7]

The Board also discounted David Wesley's testimony based on his very extensive experience with sales and valuation of property in the area in which the Property was located. Acknowledging that Wesley was "very knowledgeable about the local market . . " it noted that he was not a licensed or certified appraiser, and declined to accept his testimony regarding the use of the APOD to determine NOI by Realtors, purchasers and sellers even though Wesley made no attempt to appraise the Property. RP 0049.

[7] The Appellant did not argue this value because he was limited to the value declared in his Protest Petition.

The Board simply ignored the APODs the Appellant admitted without objection, establishing that his actual expenses were far lower than the Board found (Exhibit 2 at RP 0030-32), and ignored Mr. Wesley's testimony that the APOD is "the Bible" used to value properties and thus a generally accepted appraisal technique.

Both the Appellant and Wesley disputed that the "comparables" propounded by the Assessor (her exhibit 1 at RP 0042-45) were truly comparable. As a result, she declared that she would not rely on them but would rely only on her review of two periodicals and undisclosed information brought to her office by undisclosed persons.

In short, the Appellant produced abundant "evidence tending to dispute the factual correctness of the valuation." He effectively rebutted the presumption of correctness, and the Board erred in failing even to make a finding as to whether the Appellant's evidence was adequate to shift the burden.

C. The Assessor Did Not Meet her Burden of Proof

Once a taxpayer overcomes the presumption of correctness, the burden shifts to the assessor to show that the valuation method used to assess the property was based upon generally accepted appraisal techniques. *First Nat. Bank*, 90 N.M. at 114, 560 P.2d at 178.

The Assessor attempted to do this with two exhibits and a few minutes of testimony. On cross examination, she implicitly withdrew one of her exhibits (Exhibit 1, pertaining to the purported comparable properties) and more than half of her brief testimony, explaining that she would not actually rely on her "comparables" because the properties were too dissimilar. AT, Track 3 at 54:20-30.

Instead she testified that she based the value on her "proforma using the market vacancies reserves and such that we have been giving everybody else based on the research we have done with Co-Star, Business Weekly and anybody that has brought us any information." Track 3 at 54:40-54:56. She did not describe her research further, did not produce the periodicals on which she claimed to be relying or the underlying data and did not identify either the people who had brought her information or the information itself. She did not produce any documents or other evidence showing "the market vacancies reserves and such" given "everybody else" or any documentation supporting her appraisal technique. She did not produce a policy or protocol regarding valuation.

In short, she relied on pure hearsay and nothing more. Nonetheless, despite its finding that it would have preferred to see the actual market studies supporting the expense limit the Assessor imposed (RP 0050, Finding No. 21), the Board

concluded that "the best evidence" supported the valuation the Assessor proposed. RP 0050, Finding No. 28.

D. The Board's Decision Was Not Supported by Substantial Evidence

The Assessor's evidence was entirely insufficient to support the Board's findings and conclusions. At best, it was a mere scintilla of evidence without support or substantiation and cannot support the Assessor's appraisal. "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *New Mexico Indus. Energy Consumers v. PRC*, 2007©NMSC©053, 142 N.M. 533, 542, 168 P.3d 105, 114, quoting *In re Comm'n's Investigation of the Rates for Gas Serv. of PNM's Gas Servs.*, 2000 NMSC 008,128 N.M. 747, 998 P.2d 1198 (quoting *Consol. Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229, 59 S.Ct. 206, 83 L.Ed. 126 (1938)).

E Hearsay Alone Cannot Support an Administrative Decision

It is blackletter law in New Mexico that:

> [a]lthough an administrative agency may consider evidence that would not be admissible under the rules of evidence, the legal residuum rule requires that the agency's decision be supported by some evidence that would be admissible under the rules. Otherwise the agency's decision is not considered to be supported by substantial evidence.

Chavez v. City of Albuquerque, 1997©NMCA©111, 124 N.M. 239, 241, 947 P.2d 1059, 1061, citing *Young v. Board of Pharmacy*, 1969 -NMSC- 168, 81 N.M. 5, 8-9, 462 P.2d 139, 142-43; *Anaya v. New Mexico State Personnel Bd.*, 1988 -NMCA- 077, 107 N.M. 622, 626, 762 P.2d 909, 913. See, also, *Duke City Lumber Co. v. New Mexico Envtl. Improvement Bd.*, 1984©NMSC©042, 101 N.M. 291, 295, 681 P.2d 717, 72, quoting NMSA 1978, § 12–8–11(A); *Young v. Board of Pharmacy*; *Trujillo v. Employment Security Commission,* ("[a]n administrative action [must] be supported by some evidence that would be admissible in a jury trial")[8].

The Board's ruling that there was sufficient evidence to support the Assessor's valuation violated the legal residuum rule, requiring reversal.

F. The Assessor did Not Explain the Basis for Her Valuation

The Board found that the Assessor's unsupported reference to two periodicals and unspecified information from persons she did not identify was adequate evidence to support her valuation. This finding and the conclusion that her valuation was correct were counter to well established law. "[T] the rule in this jurisdiction has long been that experts must satisfactorily explain the steps

[8] Where there was no evidence on the record to be evaluated, the Board could not properly apply its own expertise. See, NMAC 3.6.7.36(H)(1) (providing that "Board members

followed in reaching a conclusion and without such an explanation and basis in the record, the opinion is not competent evidence." *Protest of Plaza Del Sol Ltd. P'ship v. Assessor for Bernalillo Cnty.*, 1986 NMCA 022, 104 N.M. 154, 160, 717 P.2d 1123, 1129, quoting *Four Hills Country Club v. Bernalillo County Property Tax Protest Board,* 1979 NMCA 141, 94 N.M. 709, 616 P.2d 422 and citing *Galvan v. City of Albuquerque,* 1973 -NMCA- 049, 85 N.M. 42, 508 P.2d 1339 and Rule 703 NMRA and Rule 705 NMRA and noting that "[m]arket values cannot be established arbitrarily." See, also *KOB©TV, L.L.C. v. City of Albuquerque*, 2005©NMCA©049, 137 N.M. 388, 398, 111 P.3d 708, 718, citing *Four Hills Country Club (* "We recognize that an expert, even in an administrative hearing, must explain the steps followed to reach a conclusion").

Moreover, the Board's reliance on the Assessor's brief and unsubstantiated testimony deprived the Appellant of a fair hearing. See, *First Nat. Bank v. Bernalillo Cnty. Valuation Protest Bd.*, 1977 NMCA 005, 90 N.M. 110, 116©17, 560 P.2d 174, 180-81 (Hernandez, J., specially concurring):

> Protest Boards are quasi-judicial bodies and . . . are bound . . . . by the provisions of constitutional due process and by the fundamental rules of fairness. . . . .Due process requires that the Board base its decision

may use their knowledge and experience to evaluate evidence admitted").

> on evidence produced at the hearing by witnesses personally present or by authenticated documents, maps, etc., and that the evidence be incorporated in the record. . . . That is, the Board may not base its order on facts outside the record . . . . . Its orders must be supported by substantial evidence. . . . Unsubstantiated hearsay does not constitute substantial evidence . . . . [I]nformality must not be practiced to the point that a hearing becomes a summary proceeding, a mere formality preceding a predetermined result.

(Internal citations omitted).

Without a scintilla of competent evidence on the record on which the Board could legitimately uphold the Assessor's valuation, its decision was simply a rubber stamp. As such, it was arbitrary, capricious and not in accordance with law.

II. THE DISTRICT COURT'S ORDER AFFIRMING THE BOARD WAS ARBITRARY AND CAPRICIOUS, NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND NOT IN ACCORDANCE WITH LAW

A. Applicable Standard of Review

On appeal, this Court does not give deference to the ruling of the District Court. Rather, its review is based on the whole record, reviewing the agency decision "to determine if it is arbitrary, capricious, or an abuse of discretion; not supported by substantial evidence in the record or otherwise not in accordance with law." *Rio Grande Chapter of Sierra Club v. New Mexico Mining Comm'n*, 2003 NMSC 005, 133 N.M. 97, 104, 61 P.3d 806, 61. "A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis,

when viewed in light of the whole record." Id, citing *Snyder Ranches, Inc. v. Oil Conservation Comm'n,* 1990 NMSC 090,110 N.M. 637, 639, 798 P.2d 587, 589.

"The second-tier judicial review is not a means to insure that the district court has done its job in reviewing the decision of the administrative agency, but rather, on appeal, the role of this court is to canvass the whole record to determine if there is substantial evidence to support the decision." *Garcia v. Cnty. of Bernalillo*, 1992 NMCA 091, 114 N.M. 440, 441, 839 P.2d 650, 65, citing *Watson v. Town Council of Bernalillo,* 1991 NMCA 009, 111 N.M. 374, 805 P.2d 641 and *Tallman v. ABF (Arkansas Best Freight*), 1988 NMCA 091108 N.M. 124, 767 P.2d 363.

"Whole record review requires us to consider all evidence in support of one party's contentions and also to consider evidence which is contrary to the Board's findings." *Hannahs v. Anderson*, 1998 NMCA©152, 126 N.M. 1, 4, 966 P.2d 168, 171. The Court must "decide whether, on balance, the agency's decision was supported by substantial evidence." Id, quoting *Cibola Energy Corp. v. Roselli,* 105 N.M. at 776, 737 P.2d at 557 and citing *Gallegos v. New Mexico State Corrections Dep't*, 115 N.M. at 800, 858 P.2d at 1279.

On second tier review, the appellate court will "conduct the same review of an administrative order as the district court sitting in its appellate capacity, while at

the same time determining whether the district court erred in the first appeal." *CAVU Co. v. Martinez*, 2014©NMSC©029, 332 P.3d 287, 290©91, quoting *Rio Grande Chapter of Sierra Club.*

The Appellant preserved his arguments related to the District Court's Order in the protest hearing before the Board, in his appeal to the Second Judicial District Court and in his Petition for Writ of Certiorari to this Court as described in more detail in the Summary of Proceedings, above.

B. Under Whole Record Review, The District Court's Decision Must be Reversed

The Appellant's arguments that, under whole record review, the decision of the Board was arbitrary and capricious, unsupported by substantial evidence and otherwise not is accordance with law apply with equal force on second tier review by this Court and are incorporated by reference here. The District Court's Order upholding the Board's decision was in error for the reasons set forth in Part I, above.

In addition, the District Court committed reversible error when, although it stated that for purposes of the Appellant's appeal to that court the presumption of correctness was overcome (RP 0162), it failed to then shift the burden to the Assessor. Throughout the remainder of its decision, it continued to apply the

presumption of correctness to the Assessor. See, e.g., RP 0163-165 (accepting without question the Assessor's unsupported hearsay testimony based on her "market research," finding no issue with the Assessor's changing valuations of the same Property and refusing to consider the Board's prior ruling that a 50% expense cap was not a generally accepted appraisal technique). It ignored all of the evidence and testimony produced by the Appellant in its entirety and simply rubber-stamped the Board.

The Court also erred in its finding that the Appellant did not met his burden to show "that the use of market data to determine the expense ratio is not a generally accepted technique." RP 0163. As discussed in Section I, this was not the Appellant's argument. Instead, he argued that the Assessor produced no competent evidence to support her valuation. Ms. Jaramillo's testimony regarding her use of market data was based entirely on hearsay and was not supported by any data or other evidence. At best, there was only a scintilla of evidence to support the valuation-- far from the substantial evidence needed to sustain her burden.

The District Court additionally erred when it found that the Board had properly applied its "knowledge and experience and expertise to evaluate evidence admitted" as provided in § 3.67.36(H)(I) NMAC. There simply was not substantial evidence admitted for the Board to evaluate. § 3.67. 36(H)(I) NMAC is not

intended to be used as a justification for rubber-stamping an unsupported valuation.

CONCLUSION

Both the Protest Board and the District Court erred when they upheld the Assessor's valuation of the Appellant's Property. The Appellant overcame the presumption that the valuation was correct, and the Assessor did not meet her burden to support her valuation with substantial evidence.

The Assessor changed the valuation mailed to the Appellant twice before the hearing without explanation and without statutory authority. She arbitrarily set a 45% cap on expenses, although a recent prior ruling of the Board had found a 50% cap not to be a generally accepted appraisal technique. Policies and principles underlying the doctrine of collateral estoppel preclude ruling that a similar flat cap can be properly applied to the same property a few years later. The Appellant presented significant evidence to dispute the factual correctness of the valuation.

At the hearing, the Assessor disclaimed any reliance on the comparables on which she initially based the valuation because they were dissimilar to the Property at issue. Instead, she based the valuation entirely on trade periodicals and undisclosed information provided to her office by unspecified individuals. She produced no data or research whatsoever. She did not explain the steps by which she reached her conclusion and relied entirely on hearsay. There was not even a

scintilla of admissible evidence to support the valuation, and the rulings of the Board and the District Court were in derogation of the legal residuum rule.

The decision of the District Court must be reversed, and the valuation claimed by the Appellant and supported with admissible evidence should be accepted for the 2014 tax year.

Respectfully submitted by:

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I hereby certify that a true and correct copy of this brief was filed with the Court of Appeals and hand-delivered to Marcus C. Rael Jr. and Vanessa R. Chavez at 500 Marquette Avenue NW, Suite 700, Albuquerque, NM 87102, this 14th day of October, 2015.

J. Victor Pongetti

STATEMENT OF COMPLIANCE

I, J. Victor Pongetti, hereby certify that the Appellant's Brief in Chief is proportionately spaced, 35 pages in length, and the number of words contained in the body of the brief is 7,626. I relied on Microsoft Office Word 2010 to obtain the word count.

I further certify that the information set forth in this Certificate of Compliance is correct to the best of my knowledge and belief after reasonable inquiry.

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