OF THE STATE OF NEW MEXICO

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 REPLY BRIEF

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APPELLANT REPLY BRIEF

Appellant, through counsel, submits the following reply to the Assessor's Answer Brief. As argued below and in the Appellant's Brief in Chief, the decision of the District Court must be reversed.

1. For Purposes of this Appeal, the Appellant Rebutted the Presumption that the Assessor's Valuation was Correct

As the Assessor acknowledges, the District Court assumed that the presumption of correctness generally accorded the Assessor's valuation had been rebutted and based its decision on that assumption. See, Answer Brief at p. 7. The Assessor did not cross-appeal and thus does not challenge the Court's finding that the Appellant rebutted the presumption that the Assessor's valuation was correct. It is now the law of the case.

On this appeal, the Appellant's rebuttal of the presumption of correctness is binding on this Court. See, e.g., *Shed Indus., Inc. v. King*, 1980 NMSC 86, 95 N.M. 62, 62-63, 618 P.2d 1226, 1226-27 (It is clearly established by case law that findings that are not challenged are binding upon this Court on appeal) (citations omitted); *Rendleman v. Heinley*, 2007 NMCA 009, 140 N.M. 912, 914, 149 P.3d 1009, 1011 (same).

The Assessor's argument that the Appellant failed to rebut the presumption that its valuation was correct is entitled to no weight and should be disregarded by this Court. The burden of proof now rests with the Assessor to prove that it used a generally accepted appraisal technique in its valuation of the Subject Property

2. The Assessor's Changing Valuations Demonstrate that None are Supported By a Generally Accepted Appraisal Technique

As the Assessor notes, it dropped its initial valuation by over $213,000.00 immediately prior to the hearing on the Appellant's protest and with no notice to the Appellant or to the Board.ıthis footnote needs to be raised Although this is not part of the record below, the Assessor now states that the reason for the significant change in value was that it decided to include management fees and reserves for replacements not considered in the initial valuation,[1] See, Answer Brief at p. 3. The only explanation of record was at the opening of the Board hearing Ms, Jaramillo said "There's been a change within the Assessor's office to $900,200." AT at Track 1, 2.44-2.59 min. In addition, the Assessor had made an interim valuation of $1,031,480. See Brief in Chief, pgs 1,2.

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[1] "The right to a fair hearing presupposes that the taxpayer has been informed, prior to the hearing, of the method of valuation used by county assessor. Otherwise, he cannot be expected the intelligently protest an assessment made." *First Nat. Bank v. Bernalillo Cty. Valuation Protest Bd.,* 1977 NMCA005, 90 N.M. 110, 113, 560, P.2 174, 177

This dramatic change in value raises the obvious question: which of the three valuations – if any– does the Assessor contend is supported by a generally accepted appraisal technique? It is difficult to conceive of a valid appraisal technique that could generate a 22% disparity in value.

Moreover, the statute on which the Assessor relies does not give it the authority to change valuations mid-stream. The statute is silent on this issue. See, Answer Brief at p. 10, asserting that the statute permits such a change because it does not provide that a change in valuation is not permissible. This argument is not valid for at least several reasons.

First, the statutory requirement that "[t]he same or similar methods of valuation shall be used for valuation of the same or similar kinds of property for property taxation purposes" would preclude such arbitrary revisions of value. See, NMSA 1978 § 7-36-15. See, also, *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"). A valuation technique that is fair, generally accepted and uniformly applied cannot plausibly generate a 22% change in value after the original valuation is sent to the owner, the taxpayer has protested and the issue being protested has been defined .

Second, the Assessor's cannot legitimately argue that the statute's silence on whether the Assessor can change a valuation at will grants the Assessor the power to do so. This "violates our long-established rule of construction prohibiting courts from reading language into a statute which is not there." *Faber v. King*, 2015©NMSC©015, 348 P.3d 173, 178. The courts cannot read such language into NMSA 1978 § 7-36-15, particularly where to allow such a change conflicts with the statutory requirement of uniformity. *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).

Moreover, as the courts of other jurisdictions have repeatedly held, to allow tax assessors to change a property value after delivering a notice of value to the tax payer would be contrary to public policy. See, e.g., *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) (holding that if assessors may change property values at will and "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"). New Mexico's statutory silence on the issue

of change does not indicate that this is not similarly our public policy. To the contrary, our statutory and constitutional requirement of uniformity reflects this policy.

The Assessor may still offer an informal resolution of the protest, and the parties may engage in negotiations without violating this principle. Appellant is not advocating that hearings be excessively formal. The Appellant argues only that the Assessor must follow procedures authorized by the Legislature and enabling regulations in the conduct of informal hearings and settlement negotiations. To do fosters public confidence in the procedures and in the Assessor, and to fail to do so erodes taxpayer confidence that property valuations are fair and uniformly applied.

The District Court's decision to uphold a change in valuation not authorized by the statute was reversible error. 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, stating that "[r]ulings by an administrative agency not in accord with the basic requirements of the statutes relating to the agency will render its decision void."

In short, the District Court's holding that the Assessor may change the valuation at will is simply wrong, as is its reasoning that to allow such changes is

acceptable because it encourages negotiation. See, also Answer Brief at p. 13 (repeating this argument). It is one thing to offer a reduced valuation as a compromise in the context of settlement negotiations and quite another to change a valuation by 22% and then defend it in a protest hearing by arguing that it – or the original valuation – is the product of a generally accepted appraisal technique. The decision of the district court must be reversed.

3. Ms. Jaramillo's Testimony Was Not Competent Evidence

The Assessor argues that Ms. Jaramillo's testimony was "competent evidence" and was not hearsay because it was based on her "personal recollection" of her review of business periodicals and unspecified comments by undisclosed persons. See, Track 3 at 54:40-54:56 (testifying that she based the value on her "pro forma 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").

The information purportedly contained in articles in Co-Star and Business Weekly and in conversations with "anybody that has brought us any information" was offered for the truth of the matters contained therein ("market vacancies reserves and such") and is hearsay. It remained hearsay when Ms. Jaramillo

embedded it in her testimony. See, N.M. R. Evid. 11-801 C: hearsay "[m]eans a statement that (1) the declarant does not make while testifying at the current trial or hearing, and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." Neither the articles in the periodicals nor the comments by the undisclosed persons were contained in the testimony at the trial and both were offered to prove the truth of the matters allegedly asserted therein.

The fact that Ms. Jaramillo referred to these statements in her testimony does not make them non-hearsay: they remain "statements, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," and her testimony was hearsay. *State v. Montes*, 2007 NMCA 083, 142 N.M. 221, 225, 164 P.3d 102, 106 (concluding that statements made by "out-of-court declarants, which were embedded in the prosecutor's questions, were hearsay "where they "were offered for the purpose of establishing that Defendant had indeed distributed drugs on previous occasions").

The "research" on which Jaramillo based her testimony as to the valuation of the subject property was information acquired from others who did not testify at trial and who were not available for cross examination. It was pure hearsay. See,*State v. Davis*, 1979 NMCA 015, 92 N.M. 563, 570, 591 P.2d 1160, 1167 ("hearsay information acquired from others" was inadmissible and testimony based

on that information was hearsay). The fact that Ms. Jaramillo testified in her capacity as an employee of the Assessor's office (Answer Brief at p.20) does not make her testimony non-hearsay.

Ms. Jaramillo's testimony in this regard was not based on her personal knowledge but on information acquired from others– including unidentified persons -- and was offered to prove the basis for her valuation of the Property. It should have been excluded, leaving the Board and the District Court without a residuum of legally competent evidence on which to base a decision. *Chavez v. City of Albuquerque*, 1997 NMCA 111, 124 N.M. 239, 241, 947 P.2d 1059, 1061 ("[T]he legal residuum rule requires that the agency's decision be supported by some evidence that would be admissible under the rules").

Furthermore, Ms. Jaramillo's very short testimony and reliance on periodicals and unspecified information from persons she did not identify was simply inadequate evidence to support her valuation regardless of whether it was hearsay and despite her knowledge and experience. "[E]xperts must satisfactorily explain the steps 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; *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 v. Bernalillo County Property Tax Protest Board,* 1979 NMCA 141, 94 N.M. 709, 616 P.2d 422 *(* "We recognize that an expert, even in an administrative hearing, must explain the steps followed to reach a conclusion").

Indeed, the Board itself noted that it "would prefer to see the Assessor's actual market studies to support the expense limits imposed." RP 0037 (Finding No 21) (thereby acknowledging that the Assessor should have introduced those studies into evidence).

In addition, the Board made no finding that the Assessor's hearsay evidence of "market comparable expenses" was a generally accepted appraisal technique, but somehow found her hearsay testimony "persuasive." It should have then concluded that the Assessor 's Valuation of $900,200 did not follow the statutory requirements for valuing the Property.

The Assessor's argument that Ms. Jaramillo's testimony provided substantial evidence to support her valuation is based on its erroneous claim that her testimony was not hearsay and was competent and admissible. Answer Brief at p. 25. It was not. It was based almost entirely on hearsay and contained an entirely inadequate explanation of how she reached her conclusion.

The Board's decision and the District Court's Order upholding that decision were not supported by "relevant evidence that a reasonable mind would accept as adequate to support a conclusion." *San Pedro Neighborhood Assn. v. SF Cty. BCC*, 2009 NMCA045, 146 N.M. 106, 111, 206 P.3d 1011, 1016 (defining "substantial evidence"); Albert E Utton, "The Use Of the Substantial Evidence Rule to review Administrative Findings Of Fact in New Mexico", 10 *New Mexico Law Review* 103. Reversal is required.

4. The 45% Cap on Expenses was Arbitrary and Capricious and Not a Generally Accepted Appraisal Technique

Again, the Assessor's testimony justifying her decision to place a flat cap of 45% on expenses was supported only by hearsay. Therefore, the Board's acceptance of its appraisal technique and the District Court's Order upholding that acceptance were not supported by substantial evidence.

Moreover, the reliance on the flat cap conflicts with an express ruling of the Board regarding the very same property only a few years prior. Both the Assessor and the Appellant were parties to that protest, and the Board squarely ruled that the application of a 50% cap on expenses was not a generally accepted appraisal technique. The Assessor attempts to negate the effect of this prior ruling by arguing that collateral estoppel was not argued below, that all of the elements were

not present, and that a value set one year applies only to that year. Answer Brief at pp. 28-31.

The Assessor intentionally misstates the Appellant's argument.

Acknowledging that collateral estoppel was not raised below, the Appellant did not argue that the doctrine should be applied by this Court, nor did he argue that the Assessor should be estopped from changing the ***value*** of the Property. Compare, *Protest of Plaza Del Sol Ltd. P'ship v. Assessor for Bernalillo Cty.*, 1986 NMCA 022, 104 N.M. 154, 158, 717 P.2d 1123, 1127 (" A stipulation fixing property tax values for a specific year is not binding for any following year").

Rather, Appellant proposed that the Board's 2010 conclusion that a 50% flat cap was not a generally accepted appraisal ***technique*** should be considered in this appeal for several reasons:

First, Appellant argues that the Board's acceptance of a flat cap on expenses in the 2014 protest was arbitrary and capricious in view of its conclusion only a few years prior that such a cap is an impermissible appraisal ***technique***. Regardless of whether market conditions and a property's value have changed, a ***technique*** that is not generally accepted one year cannot reasonably to found to be generally accepted a few years later – particularly without explanation or evidence that it had somehow become generally accepted.

Second, Appellant argues that the policy reasons underlying collateral estoppel and res judicata must be considered such that the 2010 holding of the Board not be disregarded as completely irrelevant to this protest. See, *State v. Arevalo*, 2002 NMCA 062, 132 N.M. 306, 310, 47 P.3d 866, 870 (expressing "concerns that inconsistent judgments are unfair and illogical") (citing *Standefer v. United States*, 447 U.S. 10, 100 S.Ct. 1999, 64 L.Ed.2d 689 (1980) and *People v. Palmer*, 24 Cal.4th 856, 103 Cal.Rptr.2d 13, 15 P.3d 234 (2001)). Regardless of whether the 2010 decision is given preclusive effect, an arbitrary decision to rely on an appraisal technique rejected as not generally accepted only a few years before is inconsistent and illogical.

Finally, the refusal to allow the application of a flat cap on expenses on year and to rely on a similar cap a few years later is contrary to NMSA 1978 § 7-36-15, providing that "[t]he same or similar methods of valuation shall be used for valuation of the same or similar kinds of property for property taxation purposes." Likewise, Art. III, §§ 1 and 2 of the New Mexico Constitution requires "uniformity in the assessment of property for taxation."

In short, the Order of the Board and the District Court's Order affirming the Board were arbitrary and capricious and not in accordance with law.

5. The Appellant's Evidence Supports its Valuation

Although the Assessor's argument is mired in its attempt to show that its valuation is entitled to an unrebutted presumption of correctness – despite the District Court's un-appealed finding to the contrary – it appears to argue throughout the Answer that the Appellant produced no evidence to support the valuation it proposed. See, Answer Brief at pp. 13-15.

To the contrary, although David Wesley did not testify as an expert ***appraiser***, he did provide expert testimony regarding his very extensive experience with sales and net operating income of property in the area in which the Property was located. As the Board acknowledged, Wesley is "very knowledgeable about the local market." RP 49. Even without qualification as an expert appraiser, Mr. Wesley's testimony regarding the local market and his undisputed testimony that the APOD that subtracts all expenses for gross income is "the Bible" used to find the Net Operating Income of income properties and thus is a generally accepted appraisal technique was competent evidence in view of his considerable knowledge and experience. He did not testify that this technique was the only generally accepted appraisal technique and Appellant never claimed that the Assessor must use the APOD in appraising this property, as argued by the Assessor.

Instead, the Appellant admitted a set of APODs without objection, establishing that his actual expenses were far lower than the Board found. RP 30-32. Indeed, the Assessor's formula for valuing the Property makes actual expenses and gross income irrelevant because it assumes that the properties expenses are 45% of assumed gross income as though it was 85% occupied.,

There is considerable evidence on the record to support the Appellant's valuation of the Property.

CONCLUSION

The Assessor's contention that to hold that the Appellant was entitled to a fair hearing will discourage settlement and outlaw informal hearings is without merit. The law is clear that in its annual original valuation , the Assessor is required to use a generally accepted appraisal method even though that valuation carries a presumption of correctness. However, when an assessor admits that its original valuation was 22% too high, in a hearing fair to both parties, it does not seem unreasonable or overly burdensome that the assessor be required to show the taxpayer that revised valuation was obtained using a generally accepted appraisal technique, and if the technique is written and in general use it should not be overly burdensome to the assessor. However, when an Assessor originates its own appraisal technique, in a hearing that is fair to both parties, it not unreasonable to

require that the assessor be required to introduce substantial evidence that its technique meets the statutory requirement. does not appear to be unreasonable Appellant respectfully requests that the Court protect the taxpayer from the Assessor's arbitrary and capricious technique in valuing property and hold the Assessor to account for its actions by reversing the decisions of the Board and district court that affirmed the arbitrary and capricious actions.

Put simply, the taxpayer is entitled to a fair hearing on his protest following statutory mandates. The Assessor's valuation cannot simply be rubber stamped by the Board and the District Court.

The Assessor's arbitrary assessment did not comply with statutory requirements and the Appellant was not given a full and fair opportunity to challenge it, requiring reversal.

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I hereby certify a true and correct copy was hand-delivered to the following on this 30th day of December 2015:

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STATEMENT OF COMPLIANCE

I, J. Victor Pongetti, hereby certify that the Appellant's Reply Brief is proportionately spaced, 15 pages in length, and the number of words contained in the body of the brief is 3,312. 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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