



INTERIOR BOARD OF INDIAN APPEALS

Richard Gossett; Audrey Pentz; Judith Booth; Stewart Hutt; Richard Wells;
and Kenneth McDonald v. Portland Area Director, Bureau of Indian Affairs

28 IBIA 72 (06/19/1995)

Reconsideration denied:

34 IBIA 16

Judicial review of these cases:

Oral ruling for government, *Miller v. Bureau of Indian Affairs*, Case No. C98-330Z
(W.D. Wash. Mar. 24, 1999)

Related Board cases:

23 IBIA 114

28 IBIA 72

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United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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RICHARD GOSSETT, AUDREY PENTZ, JUDITH BOOTH,
STEWART HUTT, RICHARD WELLS, and KENNETH McDONALD
v.
PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 94-89-A through 94-94-A

Decided June 19, 1995

Appeals from rental rate adjustments for residential/recreational properties.

IBIA 94-89-A, 94-90-A, 94-92-A, and 94-94-A affirmed; IBIA 94-91-A and 94-93-A affirmed except as indicated herein, and remanded for further consideration.

1. Appraisals--Board of Indian Appeals: Generally--Indians: Lands:
Fair Rental Value--Indians: Leases and Permits: Rental Rates

The role of the Board of Indian Appeals in reviewing a Bureau of Indian Affairs determination of fair rental value is to determine whether the decision is reasonable; that is, whether it is supported by law and substantial evidence. An appellant who challenges a rental adjustment for a lease of Indian land bears the burden of proving that the adjustment is unreasonable.

2. Administrative Procedure: Standing--Indians: Leases and Permits:
Rental Rates

A lessee of Indian trust or restricted property lacks standing to raise an alleged violation of 25 CFR 162.8 as it relates to written concurrence of the landowner in a rental rate adjustment.

3. Indians: Leases and Permits: Rental Rates

The Bureau of Indian Affairs has discretion on a case-by-case basis to determine what methodology should be used to determine fair annual rental in making adjustments to the rental rates for leased trust land. No decision of the Board of Indian Appeals requires that a particular methodology be used.

4. Indians: Generally--Indians: Leases and Permits: Rental Rates

There is nothing in Federal statutes, regulations, or case law, or in the trust relationship between Indian landowners and the Federal government, which requires, authorizes, or even suggests the possibility that income from Indian trust land can be diminished based on its tax-free status.

APPEARANCES: Grant Kinnear, Esq., and Robert F. Baker, Esq., Seattle, Washington, for appellants; Colleen Kelley, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Area Director.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellants Richard Gossett, Audrey Pentz, Judith Booth, Stewart Hutt, Richard Wells, and Kenneth McDonald seek review of decisions issued on February 18 and 22, 1994, by the Portland Area Director, Bureau of Indian Affairs (Area Director; BIA), adjusting rental rates on appellants' leases for residential/recreational properties along Pull and Be Damned Road on the Swinomish Indian Reservation. For the reasons discussed below, the Board of Indian Appeals (Board) affirms those decisions, except as indicated below in relation to Docket Nos. IBIA 94-91-A and IBIA 94-93-A.

Background

Appellants are either original lessees or assignees of waterfront residential/recreational properties along Pull and Be Damned Road on the Swinomish Indian Reservation. In the fall of 1993, the Superintendent, Puget Sound Agency, BIA (Superintendent), informed each appellant of a rental rate adjustment. Appellants appealed the adjustments to the Area Director, who, after agreeing with appellants that there were problems with the appraisal upon which the Superintendent based his decision, required a new appraisal. The Area Director ultimately lowered each rental rate increase. 1/ Appellants still disagreed with the rental adjustments, and appealed to the Board.

After an initial review of the administrative record and the filings submitted on appeal, the Board requested that the parties attempt to resolve these disputes through mediation or another form of alternate dispute resolution. The parties worked with a mediator, but were unable to reach an agreement.

1/ The lessees, lease numbers, old rent, and rent as adjusted by the Area Director are: Gossett, Lease No. 8069, \$1,240, \$4,560; Pentz, Lease No. 7526, \$1,620, \$4,960; Booth, Lease No. 8059, \$1,260, \$4,800; Hutt, Lease No. 7804, \$1,250, \$4,960; Wells, Lease No. 7475, \$1,790, \$5,120; and McDonald, Lease No. 8036, \$1,310, \$5,040.

In updating briefs filed after mediation proved unsuccessful, the Area Director stated that during the pendency of the appeals he had obtained additional information which supported his decision and which could be provided if the Board desired, and appellants repeated a request for an evidentiary hearing. Both of these matters were taken under advisement. Based upon its disposition of these cases, the Board concludes that neither the Area Director's additional information nor an evidentiary hearing is required.

Discussion and Conclusions

[1] The Board summarized its standard of review of rental rate adjustments in Strain v. Portland Area Director, 23 IBIA 114, 117-18 (1992):

The Board's standard of review in rental adjustment cases is well established. The Board has recognized that the determination of "fair annual rental" requires the exercise of judgment and that reasonable people may differ in their calculation of "fair annual rental." * * * The Board does not substitute its judgment for BIA's. Rather, it reviews a rental adjustment to determine whether it is reasonable, that is, whether it is supported by law and substantial evidence. The Board overturns a BIA determination only when it finds the determination is unreasonable. * * * The burden of proving a rental adjustment unreasonable is on the person who challenges it. [Citations omitted.]

This standard will be applied here.

Rental rate adjustments are governed by 25 CFR 162.8, which provides in relevant part:

[U]nless the consideration for the lease is based primarily on percentages of income produced by the land, the lease shall provide for periodic review, at not less than five-year intervals, of the equities involved. Such review shall give consideration to the economic conditions at the time, exclusive of improvement or development required by the contract or the contribution value of such improvements. Any adjustments of rental resulting from such review may be made by the Secretary where he has the authority to grant leases, otherwise the adjustment must be made with the written concurrence of the owners and the approval of the Secretary.

Section 7 of each of the leases at issue here essentially tracks 25 CFR 162.8:

The rental provisions in all leases which are granted for a term of more than five years and which are not based primarily on percentages of income produced by the land shall be subject to review and adjustment by the Secretary at not less than five-year intervals in accordance with the regulations in 25 CFR [Part] 131

[now Part 162]. Such review shall give consideration to the economic conditions at the time, exclusive of improvement or development required by this contract or the contribution value of such improvements.

Appellants argue that BIA violated 25 CFR 162.8 by adjusting the rental rates without the written concurrence of the landowners. The Area Director contends that appellants lack standing to raise this argument because the provision for landowner concurrence is intended for the protection of Indian landowners, not lessees. He contends that appellants are not "within the zone of interest" established by the regulation, and therefore lack standing to allege such a violation.

[2] As stated by the Supreme Court in Warth v. Seldin, 422 U.S. 490, 500 (1975), "[e]ssentially, the standing question * * * is whether the [regulatory] provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." The Board agrees with the Area Director that appellants lack standing to allege a violation of the provisions of 25 CFR 162.8 relating to written landowner concurrence in a rental rate adjustment. Such a violation may be raised only by a landowner. 2/ Cf. Kombol v. Acting Assistant Portland Area Director (Economic Development), 19 IBIA 123 (1990) (a person doing business with an Indian tribe lacks standing to raise an alleged violation of 25 U.S.C. § 81 (1988)); Clausen v. Portland Area Director, 19 IBIA 56 (1990) (a non-Indian lacks standing to raise an alleged violation of the Federal trust responsibility).

In several arguments, appellants contend that BIA violated 25 CFR 162.8 by failing to consider the "equities involved," particularly the equities of the tenants" (Opening Brief at 3). This contention will be discussed in relation to the specific arguments in which it is raised.

Several of appellants' arguments seek the application of a methodology for determining the fair annual rental other than the one chosen by BIA. They initially argue that, although they are not certain what methodology BIA used in the past, BIA illegally changed that method when it made the rental adjustments at issue here. Appellants contend that this change is shown by the fact that their adjusted rental rates, established in August 1993, were approximately 200 percent higher than adjustments made in October 1992, although there was not a comparable increase in real estate values in the area. They further allege that the market data used by BIA do not support an increase of this size. Appellants contend that, when they decided to enter into the leases and to make improvements to the properties, they reasonably relied on the expectation that the rental adjustments would

2/ The only evidence of possible landowner disagreement with the proposed rental adjustments presented by appellants is a letter from one of the coowners, Norma Joe Johnson. Johnson has been fully informed of this proceeding and has not filed any objection to the Area Director's decision with the Board.

"bear some rational and equitable relationship to the original rental (or the most recent adjusted rental, as the case may be)" (Opening Brief at 6).

An extremely similar, if not identical, argument was considered by the United States District Court for the Western District of Washington in Sandy Point Improvement Co. v. United States, No. C86-773R (W.D. Wash. Apr. 19, 1988). In that case, certain beach and tidal lands belonging to the Lummi Indian Tribe were leased to Sandy Point at an initial rental of \$2,000 per year. After several intermediate adjustments, BIA increased the rent from \$7,500 to \$26,000 per year. Both the Tribe and Sandy Point appealed this increase. The Tribe presented evidence suggesting that the rent should have been increased to \$151,000 per year. Although the court remanded the matter to the Department on procedural grounds, it also addressed several of the substantive issues raised. As relevant to this discussion, the court stated:

Sandy Point argues that the Secretary fundamentally altered the lease by adopting an entirely different methodology for determining the rent increase in the 20th year of a 23 year lease. However, neither the lease nor the regulations specify the method for estimating the value of the property or the amount of the rent adjustment. It merely states that such review "shall give consideration to the economic conditions at the time, exclusive of improvement or development required by the contract or the contribution value of such improvements." 25 CFR § 162.8. [3/] The Court finds that the Secretary's authority to select an appropriate methodology for determining a rent adjustment was not limited in any way by statute, lease terms or past practice.

(Slip Op. at 7-8). The Board agrees with this analysis. Assuming arguendo that BIA used a methodology different from that previously employed to make rental adjustments, that fact would not invalidate the adjustments made to appellants' rents.

Appellants contend, however, that past practice, in the form of a previous Board decision, has limited the manner in which adjustments can be made in their cases. They state that it is possible that their initial rental rates were not actually based on fair market value, but were in effect negotiated rates established at less than fair market value in order to promote leasing of the lots. They state that although "Mr. Wallace Barr, the former president of the West Shore Tenants Association has advised [them] that representatives of the BIA told him this was the case" (Opening Brief at 7), they were not so informed when they entered into or purchased their leases. They argue, however, that if this is the case, the rental adjustments are limited by the Board's holding in Wooding v. Commissioner of

^{3/} Although not quoted by the court, at all times relevant to the Sandy Point case, sec. 162.8 included the requirement to consider "the equities involved."

Indian Affairs, 4 IBIA 255 (1975) (Wooding I). 4/ Appellants describe this case as holding "that the proper approach in this situation [when the initial rent was below fair market rent] was to adjust the initial rental by the percentage increase of fee simple land property over the relevant time period" (Opening Brief at 7).

[3] The Board initially notes that appellants' description of Wooding combines two separate rental rate adjustments and two Board decisions. See also Wooding v. Commissioner of Indian Affairs, 9 IBIA 158 (1982). However, their more significant error is in reading a mandate into the Board's holding in Wooding I. Appellants correctly state that the basis for the rental rate adjustment in Wooding I was the percentage increase in fee simple land values. However, the Board carefully noted that this method provided "a basis for formulating a fair rental solution to this case." 4 IBIA at 260. (Emphasis added.) Nowhere in Wooding I, or in any of its other decisions concerning rental rate adjustments, does the Board state that one method must be used in all cases, or even in all similar cases. Instead, in recognizing that the determination of fair annual rental involves the exercise of judgment, the Board has, implicitly if not explicitly, acknowledged that the exercise of judgment includes the choice of methodology to be used to determine fair annual rental. 5/ The Board rejects appellants' argument that if their initial rents were set below fair market value, then the method for adjusting rent set forth in Wooding I must be used.

Appellants argue that Section 5 of a document entitled "Guidelines for Using the Rental Adjustment Memorandum" (Guidelines) requires BIA to base the adjustments on a comparison of rental rates for similar properties. 6/

4/ Recon. denied, 5 IBIA 9 (1976); aff'd, Wooding v. Kleppe, No. C-76-86T (W.D.Wash. Nov. 4, 1976); dismissed for failure to prosecute (9th Cir. June 6, 1977).

5/ Although not deciding this issue, which is not before it, the Board notes the possibility that BIA's authority to choose a methodology for determining the rental rate adjustments along Pull and Be Damned Road may be limited by the terms of some of the leases. The record contains copies of Lease Nos. 8118 and 8156. Both of these leases contain the following provision:

"7. Rental Adjustment - * * * The parties agree that rental adjustments, if any, shall be made based on the change in the Consumer Price Index (CPI) (U.S. City Average - All Urban Consumers) from starting date of this lease to the date of the rental adjustment."

Appellants' leases do not contain this provision or any other standard for establishing the rental rate adjustments.

6/ At page 8 of their Opening Brief, appellants state that they

"submitted a Freedom of Information Act request to the BIA requesting copies of all regulations, guidelines, memoranda, manuals and other information and documents related to leasing pursuant to 25 CFR Part 162. The only information provided by the BIA in response to this request was a copy

They contend that rental rates for direct comparison exist in the form of leases of residential/recreational properties on other Indian reservations and in national forests. Appellants argue that BIA has information for leases on other Indian reservations, but refuses to release or apply it in adjusting their rentals. Noting that, at page 5 of his decisions, the Area Director rejected the use of rental rates for properties on other reservations, appellants quote 25 CFR 162.5(a) and (b) in arguing:

Something does not make sense here. If the BIA has been following the regulations, then all leases (except those falling within the exceptions specified in the regulations which could easily be excluded from any appraisal analysis) approved by the BIA must be at least at the present fair annual rental. On the other hand, the Portland Area Director does not believe that this is the case because he does not consider the rental data from leases approved by the BIA to be reliable. This very statement supports the Appellants["] position that the prior rentals were set low to induce the tenants to move in. However, the data concerning leases of comparable property on this and similarly situated reservations is the best evidence of the actual rental market. However, for reasons known only to itself, the BIA does not wish to use that data. [Emphasis in original.]

(Opening Brief at 14). Most of appellants' reply brief is devoted to a discussion of why BIA should be required to base appellants' rental adjustments on the rates of leases for residential/recreational properties on other reservations.

25 CFR 162.5 provides in pertinent part:

(a) All leases made pursuant to the regulations in this part shall be in the form approved by the Secretary and subject to his written approval.

(b) Except as otherwise provided in this part no lease shall be approved or granted at less than the present fair annual rental.

* * * * *

(3) Leases may be granted or approved by the Secretary at less than the fair annual rental when in his judgment such action would be in the best interest of the landowners. [Z/]

fn. 6 (continued)
of the 25 CFR Part 162. Accordingly the best evidence of BIA policy is found in the Guidelines." [Emphasis in original.]

The Board must disagree with appellants' conclusion. It believes that the best evidence of BIA policy is found in 25 CFR Part 162.

Z/ Presumably, appellants included leases granted under 25 CFR 162.5(b)(3) in their parenthetical statement that those rental rates "falling within the

Section 5 of the Guidelines states:

There are two primary methods of estimating rental value:

a. Direct Comparison with rental rates paid for similar properties. This is considered the superior method.

b. A rate of return applied to market value. This method is usually used when there are no leases of comparable property. If the lessor owns any improvements, the recapture of the improvements must be considered. [Emphasis in original.]

The Area Director responds that there is nothing to suggest that the Guidelines are, or ever were, binding on BIA. The Board agrees. The only evidence is that the Guidelines were prepared by an unknown person or persons and were not signed by any BIA official. Appellants have failed to show that the Guidelines are binding upon BIA.

Furthermore, assuming that the Guidelines did have some application, appellants have not shown that BIA violated the Guidelines. The Guidelines state that direct comparison is "considered the superior method," and that a rate of return "is usually used when there are no leases of comparable property." However, nothing in the Guidelines prohibits the use of the rate of return methodology even if direct comparison properties exist.

BIA applied an 8 percent rate of return against market value in establishing appellants' new rental rates. Appellants employed an appraiser to review BIA's rental rate adjustments. This appraiser stated at page 13 of his appraisal report that "a rate of 8% appears reasonable, in the absence of direct market evidence." Appellants, however, argue that, despite the initially reasonable appearance of the analysis justifying an 8 percent rate of return, the analysis includes only investments with taxable income. They contend that proper consideration of the "equities involved" requires that BIA use tax-free yields in determining an appropriate rate of return, so that the landowners do not receive a windfall. Based on an analysis of taxfree investments, appellants argue that the rate of return should be in the range of 5 to 5% percent.^{8/}

[4] The Board rejects the argument that the tax-free status of income from trust land is open to consideration as an "equity" between the parties. Appellants have cited no authority supporting this argument. The Board is not aware of anything in Federal statutes, regulations, or case law which would require, authorize, or even suggest the possibility that income from trust land can be diminished based on its tax-free status. In fact, such

fn. 7 (continued)

exceptions specified in the regulations * * * could easily be excluded from any appraisal analysis."

^{8/} In Strain, the Board approved the use of a 9.5 percent rate of return.

a diminution of income would probably be found to violate the Department's trust responsibility to maximize income from trust lands.

Appellants contend that BIA violated standard appraisal techniques and failed to consider the "equities involved" when it did not include the full amount of a pending tribal assessment for construction of facilities to provide water and sewer service to, *inter alia*, the leased properties. Appellants acknowledge that, in calculating the value of the comparables in its appraisal, BIA reduced the value of those properties which had water and sewer service by between \$4,000 and \$6,500. They argue, however, that the actual Tribal assessments significantly exceed the reduction BIA made.

The most comprehensive statement concerning the utility project and its costs that is before the Board is contained in a January 17, 1994, ^{9/} letter from the tribal Natural Resources Manager to the Acting Director of the Washington State Governor's Office of Indian Affairs:

The Tribe is responsible for determining and collecting the utility assessments for approximately 55% of the total construction costs of a \$3.8 million water and sewer project on the Westside of the Reservation. The new water service to the district serves to abate existing public health and environmental pollution problems by extending the Swinomish Utility System water service to all district residents. The project consists of a new transmission main, a new water reservoir providing capacity storage and pressure head for fire flow, individual water meters, and fire hydrants. A portion of the project funding was provided by a Washington [State] DOH Referendum 38 grant.

The sewer project was partially funded by a [United States Environmental Protection Agency] wastewater construction grant (\$638,000 collection system and \$384,000 transmission system, together with a Washington State DOE design grant of \$227,500. The project provides collection throughout the Westshore District, and, together with effluent flows from neighboring Sewer District No. 1 (which contributes its fair share of \$701,320), is transmitted to the Regional Treatment Facility at LaConner. The Tribe executed a cost saving service agreement with the Town of LaConner in 1993 for treatment of the Westshore's 20 year projected effluent capacity flows.

The local cost is shared with tenants on Tribal land, fee simple residents and Sewer District No. 1. Water and sewer assessment costs are based on the benefit and cost of services calculated for every buildable lot in the district. Each lot regardless of whether it is leased or vacant, Indian or non-Indian owned, is assessed based on the cost of installing the specific water and sewer services to the particular lot. On

^{9/} Sic. It appears possible that this date should be 1995.

leased Indian owned land, current tenants will be assessed; on vacant Indian owned land the future tenants will be responsible for paying the assessment. Current tenants will continue to pay lower rents based on an "unimproved" lot appraisal because they are paying the local match cost of the improvements on their lot. The difference in rent between "improved" and "unimproved" lots has been estimated by the BIA to approximate the assessment. * * * The Tribe is actively seeking additional grant funding, including a recently submitted Community Development Block Grant submitted jointly with Skagit County, and improved financing to further reduce local match costs. Tenants have the option of paying the total assessment or making monthly payments based the financing the Tribe has obtained.

(Jan. 17, 1994, Letter at unnumbered 2).

There is no dispute that the lessees will be responsible for paying the tribal assessment. 10/ In their updating brief, appellants state that they have each been assessed \$11,517, payable as \$2,500 down, with payments of \$1,795.82 per year for 10 years. 11/ They further assert that the Tribe made no provision for the remaining term of each lease so that, e.g., appellant McDonald, whose lease expires in 1997, was assessed the same amount as appellant Gossett, whose lease does not expire until 2013. 12/ Appellants are among those persons who have challenged the assessments in tribal court. The Board understands that the tribal court has expedited this case. It does not know, however, if the court's decision will be final, or if there is a right of appeal. In any event, the final amount of the assessments is still uncertain.

In his answer brief, the Area Director states:

Given these circumstances [that the assessments were not yet official and the amounts were not yet determined when he made his decisions, he] was not convinced that any figures available

10/ Section 19 of each of the leases provides in pertinent part:

"Lessee shall pay, when and as the same become due and payable all taxes, assessments, license fees and other like charges levied during the term of this lease upon or against the leased land, all interests therein and property thereon. Lessee shall also promptly pay all taxes, assessments, license fees and other like charges levied against the Lessee by the Tribe during the term of this lease."

11/ It appears that appellants also have the option of making one payment of \$11,517. The total to be paid under the installment option appears to be \$20,458.20.

12/ It is not clear from the materials before the Board who is responsible for paying the assessment if a lease that expires before the assessment is paid in full is not renewed. This may be one of the issues before the tribal court, discussed infra.

to him at the time were reliable enough to substitute for those his appraisers generally use.

To not substitute the then current figures for the standard sewer and water figure was not a violation of any uniform standard of appraisal practice. The standards cited by appellants merely require that the appraiser consider and analyze assessments. The "assessments" were considered but were deemed too uncertain to rely on.

(Answer Brief at 11). In his updating brief, the Area Director notes that in addition to the continuing challenge to the assessments, he "has been informed that Skagit County has been awarded a \$500,000 Community Development Block Grant to assist low income individuals who are subject to the utility assessments" (Area Director's Updating Brief at 2). He states that although the details of the program have not yet been announced, and this money is also available to qualified persons living on fee land who will be served by the utilities, most will be available to low-income individuals leasing Indian land. He contends that "[t]he fact that the utility assessments have been challenged, and that it is unclear whether some appellants may receive financial aid in paying the assessments, indicates that the actual amount and impact of the assessments upon lessees is unclear at this time." Id.

BIA clearly considered the impact of the tribal assessments. It was authorized to adjust appellants' rent at 5-year intervals; unfortunately, that interval fell in the midst of a tribal initiative intended to benefit, inter alia, appellants. Without a crystal ball, BIA could not know the final amount of the tribal assessment, when appellants would begin to pay the assessment, or even if they would personally be responsible for paying the assessment. Under these circumstances, BIA made an educated guess. It considered the equities of the parties by determining that appellants should not be responsible for paying rent based on the availability of water and sewers when they would also be responsible for paying the cost of installing those amenities. Therefore, it determined the fair market value of the leased properties as if water and sewers were not available--in essence, treating these amenities as lessee improvements--by reducing the value of those comparables used in its appraisal which had water and sewers by between \$4,000 and \$6,500. At the time, it appears that BIA believed this reduction would result in a rental rate that acknowledged the increase in the value of the leaseholds, while allowing appellants to recoup the amount of the assessments. With better information obtained during the pendency of these appeals, it appears probable that the assessments will exceed the reductions BIA made.

This fact, however, does not invalidate the methodology. The Board concludes from the evidence before it that BIA intended to allow appellants to recoup the assessments through reductions to their rent. This intention clearly considers the equities of the parties. Furthermore, appellants have not shown that using a standard reduction for the presence of certain amenities violates any standard appraisal practice, especially in the absence of

any other concrete evidence of the cost of those amenities at the time the rental adjustments were made. The Board, therefore, affirms BIA's use of a standard reduction.^{13/}

Appellants argue that any financial assistance for which they might qualify

is absolutely irrelevant with regard to determining fair annual rental. The fair rent is the fair rent. If an individual qualifies for some type of financial assistance to help pay that rent, it does not change the rental amount. This is just as true on Indian land as it is in an apartment building. We seriously hope that the BIA does not contend that it can charge more if a tenant happens to qualify for low income assistance. That would defeat the whole purpose of such assistance. (Appellants' Updating Brief at 5).

The Board cannot accept this argument. Initially, although the Board does not have much information about this particular Community Development Block Grant, such grants are for the purpose of assisting low and moderate income individuals with the payment of special assessments levied to recover the capital costs of a public improvement, not for the payment of rent. See 24 CFR 570.200. Appellants have also consistently argued that, in adjusting their rent, BIA must consider the "equities involved;" however, the owners of apartment buildings are under no such obligation.

Most significantly, however, this argument ignores the fact that BIA calculated the "fair annual rentals" for the leaseholds as if water and sewers were not available, and therefore appellants are not paying the "fair annual rental" for properties having water and sewer service. The fair annual rentals have been reduced based on the consideration of the equities between the lessees and the landowners, and a recognition of the fact that appellants will be paying the assessments.

Appellants contend that BIA's rental adjustments do not consider the fact that the rental market in the Pull and Be Damned Area, which is "virtually controlled by the BIA's ability to dictate rents for leased property in the area, has been decimated" (Appellants, Updating Brief at 6). They argue that BIA must take this "economic condition" into account.

Whatever may be the case now, a matter on which the Board makes no finding, when BIA made the rental rate adjustments--which is the relevant time period--the market was not "decimated." The Board rejects appellants'

^{13/} The Board knows of no statutory or regulatory prohibition on negotiated rental adjustments at less than 5-year intervals, especially when there is a dramatic change in circumstances, so long as the negotiated rate is properly approved.

argument that BIA must retroactively consider the fact that this rental market "has been decimated" in adjusting their rents.

Based upon appellants' appraiser's analysis of BIA's appraisals, appellants very briefly contend that BIA's appraisals are unreliable. They argue that

BIA totally misused the multiple regression analysis procedure. These errors included an inadequate sample size, improper application of regression coefficients, improper application of the analysis, and failure to apply the normal tests to validate the analysis. In his decisions, the Portland Area Director acknowledges some of the problems with the multiple regression analysis identified by [appellants' appraiser] and states that he found the remainder of [appellants' appraiser's discussion] puzzling and confusing. Appellants submit that the BIA does not understand the proper use of multiple regression analysis.

(Opening Brief at 14). Appellants provide no other discussion of or support for this argument, perhaps, although never so stating, intending to rely on the report prepared by their appraiser prior to the issuance of the Area Director's decision.

As previously discussed, an appellant bears the burden of proving the error in the decision under review. Appellants' unsupported argument does not carry this burden. Thus, the Board could summarily reject this argument. However, giving appellants the benefit of the doubt, it will address these issues.

Appellants' appraiser discusses, at some length, the problems he says exist in BIA's appraisal and with IBIA's use of multiple regression analysis, and presents his own estimate of fair market value. For comparison purposes, the following table shows the estimated fair market value determined by BIA and by appellants' appraiser, and the suggested rentals.

<u>Appellant</u>	<u>BIA's Market Value</u>	<u>Appellants' Market Value</u>	<u>BIA's Rent</u>	<u>Appellants' Rent</u>
Gossett	\$57,000	\$55,000	\$4,560	\$3,500-3,750
Pentz	62,000	62,500	4,960	4,000-4,250
Booth	60,000	48,000	4,800	3,100-3,250
Hutt	62,000	60,000	4,960	3,850-4,050
Wells	64,000	50,000	5,120	3,700-3,400 (<u>sic</u>)
McDonald	63,000	None	5,040	None

Despite appellants' appraiser's alleged problems with BIA's appraisals, his estimated fair market values of the properties are actually quite close to BIA's. In fact, appellants' appraiser valued the property leased by appellant Pentz at \$500 more than did BIA. Only two properties have significantly different estimated values; *i.e.*, those leased by appellants Booth and Wells. This discrepancy is directly attributable to the fact that BIA

used a 50-foot waterfront footage for both of these properties, while appellants' appraiser used 40 feet. In these two cases, there is a clear factual dispute as to the width of the properties. However, that dispute can readily be resolved simply by measuring the properties. If BIA is correct and the waterfront footage for both properties is 50 feet, appellants' appraiser's analysis indicates that he would find that the market value of the property leased by appellant Booth would be \$60,000 (the exact amount determined by BIA); while the market value for the property leased by appellant Wells would be \$62,500. It is not as clear what BIA's fair market value would be if the waterfront footage is actually only 40 feet.

The real discrepancy between the rental rates established by BIA and those advocated by appellants' appraiser does not result from the estimated fair market value of the rented properties, but rather from appellants' appraiser's determination that, after applying the 8 percent rate of return used by BIA to determine the rental amount, a reduction of 15-20 percent should be made because of the water and sewer assessment. Appellants' appraiser states at pages 13-14 of his appraisal report:

Typically, the primary benefit from a new sewer system is reflected in the value of the land, with a homeowner or tenant recognizing only the avoided cost of a septic system. While the exact amount of the sewer assessment is not known, it is understood that the sewer assessment will only be immediately applied to existing improved properties with a large down payment required. As this situation exceeds the burden normally imposed by a sewer LID, the excess burden, over and above that normally expected, would result in a deduction from a fair market rental with normal lease terms and sewer impacts. As the exact terms and impact of the sewer assessment are not known at this time, and a specific adjustment cannot be calculated, only generalized discount for uncertainty caused by the potential impact can be made. A review of discounts made for similar situations, where the outcome was unknown, indicates that an additional discount of about 15% to 20% is appropriate. * * * It is understood that the appellants are requesting lower rental rates [than reflected in appellants' appraiser's analysis] based on their original lease rates and the "equities involved." The above estimate does not reflect any consideration or adjustment for the original lease rates and respective "equities involved." It does reflect what disinterested arm-length's [sic] parties would expect to get on a new market level lease.

Appellants' appraiser suggests that a 15-20 percent reduction in rent be made based upon the uncertainty as to the exact amount of the utility assessment. As previously discussed and as appellants' appraiser admits at page 7 of his appraisal report, BIA reduced the value of its comparables to address the utility assessment. Appellants' appraiser made a similar reduction to his comparables, as is shown on page 10 of his report, although the amount of the reduction is not clear.

The Board has already affirmed the BIA's use of a standard reduction to address the uncertainties surrounding the assessment. Appellant's appraiser's suggested 15-20 percent reduction is a different method of dealing with the assessment's uncertainties.

Appellants have merely shown that there may be several different ways to deal with uncertainties when establishing a rental rate; they have not shown that the method BIA used is unreasonable. Accordingly, they have failed to carry their burden of proof.

Finally, in their reply brief, appellants present an elaborate discussion of the economics of buying a home versus renting one. This discussion appears related to appellants' various attacks on BIA's choice of appraisal methodology. The Board has already found that BIA acted within its discretionary authority in choosing an appraisal methodology. To the extent appellants may be attempting to raise a new argument in their reply brief, the Board declines to consider it for the reasons stated in Strain, 23 IBIA at 120.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions of the Portland Area Director in Docket Nos. IBIA 94-89-A, 94-90-A, 94-92-A, and 94-94-A are affirmed. The decisions in Docket Nos. IBIA 94-91-A and 94-93-A are affirmed except as to the determination of fair market value for the rented properties, which must be recalculated following the measurement of the width of these properties. Docket Nos. IBIA 94-91-A and 94-93-A are remanded to the Area Director for further consideration in accordance with this decision. 14/

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge

14/ Several of appellants' arguments raise matters that are not part of this appeal, as, for example, arguments directed against the tribal assessment, related to other leases not before the Board, or raised for the first time on appeal. These arguments have not been addressed and are not further identified.

Any arguments not addressed were considered and either rejected or deemed not properly before the Board.