



INTERIOR BOARD OF INDIAN APPEALS

Allen Elliott; Jane Wagner; Ernest Brown; George Miller; Thomas D. Kress;
Linda Barnes; Ellen Bynum; Charlotte Buckinger; Jack Wockner; Mike Chevalier;
Jack Hohman; Robert Coffey; Timothy Kress; Bo Miller; John Huffman;
and Marlene Dulin v. Portland Area Director, Bureau of Indian Affairs

31 IBIA 287 (11/25/1997)

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

Reconsideration denied, 34 IBIA 16

31 IBIA 7

31 IBIA 273

31 IBIA 276

31 IBIA 279

31 IBIA 282

31 IBIA 285

31 IBIA 295

31 IBIA 296

34 IBIA 79



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ALLEN ELLIOTT,	:	Order Affirming Decision
JANE WAGNER,	:	
ERNEST BROWN,	:	
GEORGE MILLER,	:	Docket Nos. IBIA 97-18-A
THOMAS D. KRESS,	:	IBIA 97-20-A
LINDA BARNES,	:	IBIA 97-21-A
ELLEN BYNUM,	:	IBIA 97-22-A
CHARLOTTE BUCKINGER,	:	IBIA 97-23-A
JACK WOCKNER,	:	IBIA 97-25-A
MIKE CHEVALIER,	:	IBIA 97-26-A
JACK HOHMAN,	:	IBIA 97-27-A
ROBERT COFFEY,	:	IBIA 97-28-A
TIMOTHY KRESS,	:	IBIA 97-29-A
BO MILLER,	:	IBIA 97-30-A
JOHN HUFFMAN, and	:	IBIA 97-31-A
MARLENE DULIN,	:	IBIA 97-32-A
Appellants	:	IBIA 97-33-A
	:	IBIA 97-34-A
v.	:	IBIA 97-35-A
	:	
PORTLAND AREA DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	November 25, 1997

The above Appellants seek review of an August 26, 1996, decision of the Portland Area Director, Bureau of Indian Affairs (Area Director; BIA), adjusting rental rates for their residential/recreational leases in the Pull and Be Damned area of the Swinomish Indian Reservation. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision. 1/

For the last several years, BIA has been in the process of adjusting rental rates for residential/recreational leases in the Pull and Be Damned area. Appellants are all lessees within this area. The Superintendent, Puget Sound Agency, BIA (Superintendent), adjusted the rental rates for the leases held by Appellants, who then appealed those adjustments to the Area Director.

At the time Appellants filed their appeals with the Area Director, six appeals were pending before the Board from earlier rental rate adjustments in the Pull and Be Damned area. By agreement, the present appeals

1/ Other cases which are related to the appeals addressed in this decision are: Robbins v. Portland Area Director, 31 IBIA 7 (1997); Hutt v. Portland Area Director, 31 IBIA 273 (1997); Kerwin v. Portland Area Director, 31 IBIA 276 (1997); Johns v. Portland Area Director, 31 IBIA 279 (1997); Dentel v. Portland Area Director, 31 IBIA 282 (1997); Cheeka v. Portland Area Director, 31 IBIA 285 (1997); Thiringer v. Portland Area Director, 31 IBIA 295 (1997); and Holloman v. Portland Area Director, 31 IBIA 296 (1997).

were stayed before the Area Director until the Board issued its decision in the earlier appeals. The Board upheld the earlier rental rate adjustments on June 19, 1995. Gossett v. Portland Area Director, 28 IBIA 72.

By letter dated June 27, 1995, and addressed to Appellants' counsel, BIA notified Appellants of the Board's decision in Gossett, informed Appellants of the due date for their statements of reasons, and required those Appellants who intended to continue their appeals to increase their bonds to an amount equal to the difference between the rent as adjusted by the Superintendent and the former rent. Present Appellants increased their bonds.

On January 5, 1996, Appellants filed a joint Statement of Reasons in their appeals to the Area Director. The Statement of Reasons was a two-page document to which was attached a three-volume appraisal report prepared by Kevin Clarke, MAI, of The Clarke Consulting Group (Clarke; Clarke Report). Clarke criticized both the BIA appraisals on which the Superintendent had relied in adjusting the rental rates, and BIA's use of a percentage of the fair market value of each of the leased properties in determining fair annual rent. Because Clarke disagreed with the BIA appraisals, he prepared his own appraisal in which he determined fair annual rent through the comparable rental data methodology. Appellants argued to the Area Director that their rents should be adjusted to the amount which Clarke determined to be the fair annual rent. As to all Appellants, Clarke determined that the fair annual rent was significantly lower than the amount determined by the BIA appraisers. As to two Appellants, Ellen Bynum and John Huffman, Clarke concluded that the adjusted rent should actually be lower than the previous rent.

While these appeals were pending before the Area Director, at the request of the Westshore Tenants Association, a group of which some or all Appellants may be members, the Deputy Assistant Secretary - Indian Affairs discussed the rental adjustments with representatives of the Swinomish Tribal Community and the Westshore Tenants Association. The materials before the Board do not show whether the individual Indian landowners were included in this meeting. As a result of the meeting, it was agreed that BIA would hire another appraiser to review both BIA's original appraisals and the Clarke Report. The BIA Central Office in Washington, D.C., contracted with Arvel Hale, Certified General Real Estate Appraiser, for this purpose (Hale; Hale Report). Because Hale had problems with both the BIA appraisals and Clarke's appraisal, he prepared a third appraisal. The Area Director gave Appellants an opportunity to respond to the Hale Report. The Area Director received Appellants' supplemental filing addressing the Hale Report on April 6, 1996.

In his August 26, 1996, decision, the Area Director commented extensively on both the Clarke Report and the Hale Report. He ultimately relied on the original BIA appraisals in adjusting the rents. He continued to use a percentage of the fair market value in determining the amount of the rent, but reduced that percentage from 8 and 8.5 percent to 6 percent. 2/

2/ This reduction was the subject of the appeal in Cheeka, *supra*.

Appellants appealed to the Board, and filed both an Opening and a Reply Brief. The Area Director filed an Answer Brief.

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.]

These cases vividly illustrate the point the Board was making when it stated that the determination of a fair annual rent "requires the exercise of judgment and that reasonable people may differ in their calculation" of such a fair annual rent. The various appraisers involved in these matters have strong disagreements. On occasion, the language used in discussing opposing appraisals has become quite acrimonious. For purposes of this decision, however, the Board assumes that all of the appraisers involved are competent professionals attempting to produce a professional appraisal. It has therefore disregarded the rhetoric of the appraisal reviews.

Appellants first argue that the Area Director's use of the BIA appraisals was arbitrary and unreasonable because the Clarke Report showed--and the Hale Report agreed--that those appraisals were not conducted in accordance with the Uniform Standards of Professional Appraisal Practice (USPAP), developed by the Appraisal Standards Board of the Appraisal Foundation. ^{3/} Appellants contend:

The method which the BIA purports to use in setting rent adjustments is to establish the rent by appraisal. At the time the Portland Area Director made his decision he had the BIA appraisals and the Clarke appraisal included in the Clarke Report. The BIA appraisals did not comply with USPAP. The Clarke appraisals did comply with USPAP. In other words, the Clarke appraisals met the standards of the appraisal profession and the BIA appraisers did not meet those standards. On this basis alone we submit that the decision of the Portland Area Director is both arbitrary and unreasonable.

Opening Brief to the Board at 7.

^{3/} There are also references throughout the materials before the Board to the Uniform Standards for Federal Land Acquisitions (USFLA), published in 1992 under the auspices of the Interagency Land Acquisition Conference. The Board concludes that the USFLA would not apply to the present appeals, which do not concern land acquisitions by the Federal government, and therefore does not discuss any arguments based on USFLA.

The Board finds this reasoning overly simplified. As stated by Hale at unnumbered page 4 of a February 20, 1996, letter transmitting his report to the Chief, Division of Real Estate Services, BIA, "[f]ollowing the USPAP helps appraisers maintain a high level of professionalism. However, compliance [with USPAP] does not guarantee accuracy of the appraisal estimate nor does noncompliance guarantee that an appraisal estimate is in error."

At unnumbered page 3 of his February 20, 1996, letter to BIA, Hale stated: "BIA has adopted the USPAP as its standard for real estate appraisers. Therefore, BIA appraisers are required to follow the USPAP." Hale did not, however, cite or include any authority for his statement. There is no other evidence before the Board showing that every BIA appraisal must conform to the USPAP. Appellants appear to rely on Hale's statement because Hale is a former Chief Appraiser for BIA.

Hale is no longer a BIA official and has no present authority to speak for BIA. In the absence of the introduction into evidence of a document which requires BIA appraisers to follow the USPAP, the Board declines to hold that BIA is presently required to do so. The question of whether or not to require BIA appraisers to follow the USPAP, and if so, to what degree, must be decided by the appropriate BIA program officials. 4/

The BIA appraisals were conducted for in-house use. They were not prepared in a vacuum, but rather were part of an ongoing, multi-year process involving the setting and adjustment of rents for the properties in the Pull and Be Damned area. For this reason, the Board can understand why the BIA appraisals might not conform to all of the standards that the appraisal profession may believe to be appropriate for appraisals in general.

The Board declines to hold that the Area Director acted arbitrarily or unreasonably in relying on the BIA appraisals solely because those appraisals did not conform to the USPAP.

Appellants characterize the Area Director's decision as an appraisal and attack it on the grounds that it does not conform to the USPAP. The Area Director's decision is not an appraisal; it is the decision of a Federal official charged with responsibility for setting and adjusting rental rates for Indian lands. The fact that the decision is based on appraisals does not render the decision itself an appraisal. Therefore, even assuming that BIA appraisals were required to conform to the USPAP--a decision the Board does not make for the reasons discussed above--there is no reason why the Area Director's decision adjusting rental rates should conform to the USPAP.

Appellants next contend that the Area Director improperly based their rental adjustments on a percentage of fair market value rather than on comparable rental data. The Board specifically addressed this argument when

4/ The Area Director has made this decision for future appraisals provided by his staff. He stated at page 5 of his Aug. 26, 1996, decision:

"Although the [appraisals] are intended strictly as internal documents, they should have complied with the USPAP requirements for Restricted Appraisal Reports. The Area Chief Appraiser has instructed his staff to revise the format utilized for the appraisal reports in the future."

Appellants' present counsel raised it in Gossett. The Board held that "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." 28 IBIA at 77.

In the section of their Opening Brief devoted to this argument, which begins at page 7, Appellants do not mention Gossett. However, they refer to Gossett in footnote 5 on page 3 of their Opening Brief:

It should be noted that this appeal concerns both leases and property substantially similar to the leases and property considered by this Board in [Gossett]. In Gossett the appellants argued that the proper method for determining "fair annual rental" is to use comparable rental data. However, the appellants were frustrated in this argument because of a lack of data provided by the BIA concerning comparable leases.

In their Opening Brief, Appellants do not ask the Board to reverse Gossett, nor do they attempt to distinguish it. In fact, they fail even to acknowledge that the holding in Gossett is contrary to their present position. It appears Appellants believe that, because they can now provide information on "comparable" lease data, the Board should simply overlook its holding in Gossett and order BIA to use their comparable lease data in adjusting their rents.

At pages 5-6 of their Reply Brief, Appellants contend that the rate of return methodology used by the Area Director

may be a widely accepted technique and it may have recently been upheld [by the Board in Gossett], but that does not make it reasonable under the circumstances of this case. The appropriate appraisal technique for a particular appraisal assignment must be made on a case by case basis.

* * * * *

When there is comparable rental data available, it is undisputed that the market comparison approach to value is the appropriate appraisal technique to use and that using the "rate of return" method is not as reliable an approach.

To the extent that Appellants' contention and supporting argumentation in their Reply Brief constitute a request to reverse or otherwise modify the decision in Gossett, the Board is not required to consider arguments raised for the first time in a reply brief. See Winlock Veneer Co. v. Juneau Area Director, 28 IBIA 149, 157, recon. denied, 28 IBIA 220 (1995), and cases cited therein. 5/

5/ Much of the argumentation presented in Appellants' 33-page Reply Brief goes far beyond anything presented in their 19-page Opening Brief. Although some of this argumentation may be characterized as responses to the Area Director's Answer Brief, other parts constitute new arguments. See, e.g.,

Furthermore, the Board specifically considered and rejected this argument in Gossett. The Board declines to reverse or ignore Gossett. 6/

Appellants contend that the Area Director erred in relying on the BIA appraisals because those appraisals were inherently unreliable for the reasons set forth in the several documents Clarke produced for these appeals. The Board has rejected Appellants' allegations of inherent unreliability in the BIA appraisals.

In his 23-page decision, the Area Director gave careful and thoughtful consideration to Clarke's criticisms of the BIA appraisers and appraisals. Further, he explained in great detail his reasons for adopting the BIA appraisals but for the percentage rate. In choosing a percentage rate different than that shown in the appraisals, he also gave a detailed explanation of his reasons for doing so.

Under its standard of review in rental adjustment cases, discussed in Strain and quoted above, the Board does not substitute its judgment for BIA's or weigh various appraisals to determine which is the best. Rather, it affirms a BIA rental adjustment decision unless an appellant can show that the BIA decision is unreasonable. The Board concludes that Appellants here have failed to show that the Area Director's rental adjustment decision was unreasonable.

Finally, Appellants attack the statement in the Area Director's decision that they will be required to pay interest on the rental payments that were not made or were made in an amount less than the adjusted rent. Paragraph 5 of Appellants' leases deals with interest. As originally printed on the standard lease form, Paragraph 5 stated:

It is understood and agreed between the parties hereto that, if any installment of rental is not paid within 30 days after becoming due, interest at the rate of 6 percent per annum will become due and payable from the date such rental became due and will run until said rental is paid.

fn. 5, continued

discussion of the Area Director's decision to use 6 percent in determining the fair annual rental, Reply Brief at page 31.

6/ In any case, the Board would not adopt Clarke's appraisal. That appraisal is based on rental rates for other BIA leases in the Pull and Be Damned area which were entered into between 1989 and 1990, for waterfront lots, and between 1990 and 1992, for backland lots. Clarke separately adjusted these rental rates to 1990 for waterfront lots and to 1992 for backland leases, and concluded that the rental rates established in these earlier leases, as adjusted, were evidence of the market as of the date of the rental rate adjustments under review.

The Board agrees with the Area Director that "[r]elying on earlier BIA approved leases merely creates an unending closed loop of information. At some point the BIA must look beyond earlier BIA-approved leases for information to see if land values are increasing." Area Director's Answer Brief at 8.

Paragraph 5 was amended to provide for interest at the rate of 18 percent per annum. In some of the copies of Appellants' leases in the materials before the Board, the number "18" has been substituted for the number "6" in Paragraph 5; in other copies, a notation indicates the new interest rate; and in still other copies, it is not clear whether the change in the interest rate was included in the lease.

Appellants contend that, if they are required to pay interest as set out in their leases, they would be penalized for appealing rental adjustment decisions. As the Area Director points out, however, Appellants had the option of paying their increased rents under protest in order to avoid the accumulation of interest during the appeal process. The Indian lessors had no equivalent opportunity to protect themselves from the loss of income while these appeals were pending. However, if Appellants are now relieved of the obligation to pay interest as required by their leases, the lessors would be penalized.

Appellants posit a theory under which their rents are not actually due on the dates specified in their leases, but rather are "due" only when all appeals of the rental adjustments are exhausted. ^{7/} Appellants appear to base this contention upon BIA's appeal regulations, under which BIA decisions are not final while appeals are pending. Thus, Appellants appear to argue that the appeal regulations constitute an amendment to their leases.

Given the fact that such an implied amendment of the leases would work to the detriment of the lessors, whose consent to an amendment has not been shown, it is highly unlikely the Board would accept the premise of Appellants' theory. In this case, however, the Board finds it unnecessary to consider the theory further because Appellants fail entirely to present any argument in its support. The Board is not required to make an appellant's argument for him/her, especially when the appellant is represented by counsel. Delgado v. Acting Anadarko Area Director, 27 IBIA 65, 77 n.8 (1994), aff'd, Delgado v. United States, No. CIV-95-262-A (W.D. Okla. Feb. 5, 1997).

Appellants also contend that, if they are required to pay interest at all, that interest "should not exceed normal passbook interest for the period in question." Opening Brief at 19.

The Board addressed a remarkably similar argument raised by Appellants' present counsel in Aghjayan v. Acting Portland Area Director, 29 BIA 128 (1996), in which counsel argued that the interest rate should not exceed the rate charged by banks for commercial loans. The Board there held:

[A]ppellant's contention that he should be required to pay interest at the lower rate charged by banks is not only in conflict with the terms of his lease but also premised upon an obvious fallacy--i.e., that in failing to pay his rent for two years, appellant was simply borrowing money from the landowners. Unlike

^{7/} Somewhat inconsistently, Appellants concede that their rental adjustments, if upheld on appeal, "relate back in time" (Reply Brief at 32), presumably to the dates on which their rental payments are due under the leases.

bank, however, the landowners were not willing lenders. Nor was it a purpose of appellant's lease to provide him with a source of borrowed funds at commercial interest rates. Rather, as stated in the Area Director's decision, "[t]he reason for the 18 percent rate is to encourage lessees to pay their rent in a timely manner" (Area Director's Decision at 6). * * * Appellant's failure to pay rent deprived the landowners of the use of money to which they were entitled. For this, they were entitled to be compensated at the rate specified in the lease.

29 IBIA at 133.

Again, Appellants do not attempt either to show why they are not bound by the decision in Aghjayan, or to distinguish it. In fact, Appellants do not even mention Aghjayan. 8/ The Board concludes that it has already considered and rejected the argument that interest for late payments can be at a rate other than the rate established in the lease. It further concludes that Appellants have failed to show any basis upon which they can be relieved of the requirement in their leases that they pay interest upon rent unpaid after 30 days of becoming due.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the August 26, 1996, decision of the Portland Area Director is affirmed. 9/

//original signed
Kathryn A. Lynn
Chief Administrative Judge

//original signed
Anita Vogt
Administrative Judge

8/ Aghjayan was decided approximately 10 months before Appellants' Opening Brief was filed in these cases.

9/ Any arguments raised but not specifically addressed were considered and rejected.