



INTERIOR BOARD OF INDIAN APPEALS

Robert Mize v. Northwest Regional Director, Bureau of Indian Affairs

50 IBIA 61 (07/09/2009)

Distinguishing and clarifying:
44 IBIA 72



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

ROBERT MIZE,)	Order Affirming Decision in Part as
Appellant,)	Modified and Dismissing Remaining
)	Claim as Moot
v.)	
)	
NORTHWEST REGIONAL)	Docket No. IBIA 07-55-A
DIRECTOR, BUREAU OF)	
INDIAN AFFAIRS,)	
Appellee.)	July 9, 2009

Appellant Robert Mize appeals the October 25, 2006, decision of the Northwest Regional Director, Bureau of Indian Affairs (Regional Director; BIA), that affirmed the Puget Sound Agency Superintendent's April 12, 2006, decision to adjust the annual rental payment from \$5,060 to \$5,580 for Lease No. 8241 99-24, covering Lot 108, Block 1, of the Hermosa Point Summer Homesites on the Tulalip Reservation in Snohomish County, Washington,¹ effective in April 2006. Appellant appeals the effective date of the lease adjustment, the method of determining the fair market lease rate, and the conflicting notices that he received from BIA concerning the rental increase.

As to the effective date of the lease adjustment, the Board of Indian Appeals (Board) affirms the Regional Director's decision. Appellant's lease expressly permits the annual rental to be increased at not less than 5-year increments, and Appellant's rent was increased after 6.5 years. The Board's decision, as a final decision of the Department of the Interior, also resolves any uncertainty or confusion resulting from BIA's admittedly conflicting notices concerning Appellant's rent increase. As to the appraisal method utilized by BIA, we dismiss this claim on the grounds that such a claim is moot where Appellant declines to appeal the amount of his rental adjustment.

¹ The lease is situated in Sec. 21, T. 30 N., R. 4 E., Willamette Meridian, Snohomish County, Washington.

Background

On November 1, 1999, the Acting Superintendent, Puget Sound Agency, approved Homesite and Recreational Lease No. 8241 99-24 (lease) between Robert and Diann Mize, as lessees, and the Secretary of the Interior, on behalf of the Indian landowners. The lease contains 0.15 acres, more or less, and has a term of 25 years, which began on its approval date and ends on October 31, 2024. The initial annual rent was set at \$5,060, due each year on November 1. It appears from the record that Appellant has paid the annual rent in full each year. Section 7 of the lease, entitled “Rental Adjustment,” provides:

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 162[.²] 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.

Administrative Record (AR) 1 at 2 (emphasis added). On October 28, 2004, the Puget Sound Agency issued a Bill for Collection to Appellant informing him that \$5,050 (sic) was due for the rental period of November 1, 2004, to October 31, 2005.³ A notation on the

² 25 C.F.R. § 162.8 (2000) provides in relevant part:

Except for those leases authorized by § 162.5(b)(1) and (2), unless 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.

(Emphasis added.) Part 162 was substantially revised in 2001, and section 162.8 was moved to section 162.607.

³ The Regional Director’s decision explains that the Puget Sound Agency made a typographical error in the Bill for Collection when it stated that the annual rent was \$5,050, and states that the amount should have been \$5,060. *See* Regional Director’s Decision at 3, 4, and 5.

bill advised, “Rental adjustment due - subject to provision 7 of the Lease.” AR 12 at 9. Appellant paid the billed amount of \$5,050.

Thereafter, the Puget Sound Agency contracted with Apex Appraisers, Inc. (Apex), to provide a review of the subject property’s rental value. In its August 29, 2005, appraisal, Apex utilized the “Sales Comparison” method of appraising rental value. Under this method, the property’s market value (principal) is determined and a rate of return is applied to the principal to calculate the amount of income that could be generated if the property were sold for market value and the proceeds invested. Apex then looked at several sales of comparable property in the area and, based on those sales and with various adjustments, determined that the market value of the land was \$131,250. Apex then applied an interest rate of 6.2% to this principal to reach the recommended annual rental appraisal of \$8,140.⁴

The Superintendent next met with the Indian landowners, and the landowners agreed to decrease the rate of return — used to calculate the rental increase — from 6.2% to 5%. The landowners also agreed to adjust the market value of the land based on such factors as lot size, erosion, and slope stability. The Indian landowners applied a 15% reduction to the appraised value of the leased lot, which reduced the appraised market value of the lot to \$111,596. Applying a 5% rate of return to the reduced value of the land, the landowners elected to adjust Appellant’s rent from \$5,060 to \$5,580. The Superintendent then notified Appellant on April 12, 2006, that the annual rent had increased to \$5,580, and informed Appellant that “[t]he rental adjustment for [his] lease was scheduled to occur on November 1, 2004.” AR 5 at 1. The Superintendent did not explicitly set forth the date on which the rental increase would become effective.⁵

Appellant appealed the Superintendent’s decision to the Regional Director. In an October 25, 2006, decision, the Regional Director affirmed the Superintendent’s decision to adjust Appellant’s annual rental to \$5,580. The Regional Director prorated the increased rent from April 2006 (when Appellant was notified of the rental increase) through the end of the lease-year in the amount of \$299.19, stating that “[t]he rental adjustment is not an

⁴ Multiplying \$131,250 by 6.2% equals \$8,137.50. Apex stated that it “rounded” the amount to \$8,140. AR 3 at 35.

⁵ According to the record, the Superintendent mailed the rent increase notice to an old address for Appellant and not to Appellant’s current address, to which BIA had sent Appellant’s most recent Bill for Collection. The Superintendent apparently realized her error and re-sent the notice to Appellant’s correct address. Appellant received the notice on April 28, 2006.

advance notice, nor is it retroactive.” AR 11 at 4. Subsequently, on October 31, 2006, Appellant received a Bill for Collection from the Puget Sound Agency, for payment of \$1,590 to recover the increased amount of rent as of November 1, 2004, instead of April 2006 as specified in the Regional Director’s Decision.

Appellant has now appealed the Regional Director’s decision to the Board. Appellant asserts that he “[does] not appeal the amount of the lease adjustment to \$5,580,” but instead is appealing “[t]he effective date of the lease adjustment[, t]he method of determining ‘fair market lease’ rate[, and n]otification details.” Notice of Appeal. He argues, *inter alia*, that his rental rate was adjusted downwards (to \$5,050 per year) at the beginning of the fifth year of his lease and therefore he objects to another adjustment 2 years thereafter. He further argues that no “effective date” is shown in the Regional Director’s decision, and contends that any adjustment should be made effective on the tenth anniversary of his lease in 2009. The Regional Director filed an answer brief addressing the Appellant’s arguments, and arguing, based on the Board’s decision in *Yakima Ridgerunners, Inc. v. Acting Northwest Regional Director*, 44 IBIA 72 (2007), that Appellant should be held responsible for the rental increase, effective November 1, 2004, rather than April 2006. No other briefs have been filed.

Discussion

Appellant essentially raises two issues in his appeal: He appeals the effective date of his rent increase and he appeals the method utilized by Apex to arrive at its appraised rental value. We affirm the Regional Director’s decision to prorate Appellant’s rent increase from April 2006, the date of the Superintendent’s notice to Appellant of the rent increase, because it is consistent with the terms of Appellant’s lease. To the extent that the Board’s decision in *Yakima Ridgerunners* suggests otherwise, we clarify that decision. As for Appellant’s challenge to Apex’s appraisal method, we conclude that this claim is moot because Appellant expressly disclaims any appeal from the amount of his rental increase and, therefore, nothing turns on our review of the appraisal method.⁶ For us to evaluate the method used by Apex to arrive at its rental value recommendation would now be but a mere academic exercise in which we decline to engage.⁷

⁶ Moreover, we note that Appellant’s rental increase ultimately was substantially lower than Apex’s recommended increase as a result of the landowners’ determination to reduce the amount of the increase.

⁷ To the extent that Appellant appeals from the inconsistent notices he received from BIA, *compare* Regional Director’s Decision of October 25, 2006, *with* October 31, 2006, Bill for
(continued...)

1. Standard of Review

Appellant bears the burden of showing error in the Regional Director's decision. *Tafoya v. Acting Southwest Regional Director*, 46 IBIA 197, 200 (2008). We review the Regional Director's decision to determine whether it is supported by the record, comports with the law, and is not arbitrary or capricious. *See Denny*, 36 IBIA at 226.

2. Effective Date of the Rent Increase

Appellant argues that, given the confusion generated by various bills and notices from BIA adjusting his rent, the effective date for the \$5,580 rent increase should be set for the 10th anniversary of his lease on November 1, 2009. In addition, Appellant argues that his rent already was adjusted on the 5th anniversary of his lease from \$5,060 to \$5,050 and, therefore, the increase to \$5,580 cannot be effective until the lease's 10th anniversary. Appellant further asserts that BIA's process of "re-evaluating the lease amounts, and notifying the [lessees]" makes it difficult for lessees to "reasonably plan for the future" and "discourages people from committing to leases on Trust Land." Notice of Appeal at Appendix A. Finally, Appellant argues that, given the delay in billing, he should not be held liable for the unpaid rent. He essentially claims it is unfair and unjust to require him to pay the additional rental. We disagree.

Appellant has a long-term lease — for 25 years — for waterfront property on the Puget Sound. The terms of his lease, to which Appellant agreed, limit any increases in rent to a maximum of 4 increases during the life of the lease at no less than 5-year intervals. Appellant's lease became effective on November 1, 1999, and, thus, Appellant knew that his first increase could come *any time after* November 1, 2004. The Superintendent notified Appellant of his rent increase by notice dated April 12, 2006, which was received by Appellant on April 28, 2006. Appropriately, the Regional Director's decision, which

⁷(...continued)

Collection, we recognize the frustration and uncertainty that they apparently created. That the Regional Director would attempt to alter his decision further by way of his answer brief only adds to the confusion already evident in the record. Nonetheless, Appellant's claim regarding the contradiction established by the notices he received is not, itself, an appealable claim but, instead, is a complaint concerning BIA's internal administrative processing over which the Board has no jurisdiction. *See, e.g., Denny v. Northwest Regional Director*, 36 IBIA 220, 225 (2001). We note, however, that Appellant has appealed the substance of these notices, i.e., the effective date of his rental increase, which we address herein.

affirms the Superintendent's decision to raise the rent to \$5,580, prorated Appellant's rent increase for the 2006 rental year.⁸

Although Appellant argues that his lease already was adjusted in 2004 — from \$5,060 to \$5,050 — and that a second adjustment two years later is contrary to the terms of the lease, the Regional Director explains that the amount of \$5,050 on the 2004 Bill for Collection was a typographical error. Moreover, we note that the 2004 Bill for Collection states, "Rental Adjustment *due*," which suggests that the adjustment had not yet occurred. (Emphasis added.) Therefore, we accept the Regional Director's explanation that the amount of \$5,050 was a typographical error on the 2004 Bill for Collection, and conclude that the increase in rent to \$5,580 is the first adjustment of Appellant's rent.

While we understand that Appellant may be frustrated because he does not know precisely if or when his rent will be adjusted after every 5th year following a previous rent adjustment or for how much, he nevertheless agreed to these terms in his lease. The benefit to Appellant is that, once adjusted, his rent cannot again be adjusted for at least 5 years and he can, therefore, rely on an unchanging amount of rent due during this time. The fact that Appellant also may have been frustrated with the contradictory notices he received from BIA concerning his rent increase does not provide a basis for delaying the implementation of the rent increase, nor do his appeals serve to postpone the effective date.

BIA, on the other hand, argues that we should follow our decision in *Yakima Ridgerunners*, and hold that Appellant's rent should be due and payable as of November 1, 2004, the earliest date on which Appellant's rent could be adjusted pursuant to the terms of the lease. Our role is to review the decision actually rendered by the Regional Director to determine whether his decision complies with the law. If the Regional Director intends to

⁸ The Regional Director determined that Appellant's prorated rent for 2006 came to \$5,349.19, with an amount due and owing from Appellant of \$299.19 after subtracting the lessees' payment of \$5,050. The Regional Director does not explain how he arrived at his figures nor does he identify the date on which he believes the rent increase became effective, although it appears to be some time in April 2006. Because Appellant did not receive notice of the rent increase until halfway through the seventh year of his lease, the correct amount of prorated arrears for 2006 is \$270:

Rent for Nov. 1, 2005 - Apr. 30, 2006 =	\$2,530 (\$5,060 ÷ 2)
Rent for May 1, 2006 - Oct. 31, 2006 =	<u>2,790</u> (\$5,580 ÷ 2)
Pro-rated rent Nov. 1, 2005 - Oct. 31, 2006 =	\$5,320
Less rent paid	(5,050)
Outstanding for Nov. 1, 2005 - Oct. 31, 2006 =	\$ 270

amend his decision, the proper course is to request the Board to vacate his decision and remand it to him for the issuance of a new decision because, once the decision came before the Board on appeal, the Regional Director lost his authority or jurisdiction over the subject matter of the appeal. See *Bullcreek v. Western Regional Director*, 39 IBIA 100, 101-02 (2003). However, to the extent that the Regional Director's brief may be construed as a request to the Board to vacate and remand his decision, the request is denied because the Regional Director's decision correctly construed the terms of the lease. To the extent that our decision in *Yakima Ridgerunners* suggests that a rental increase may be implemented and collected as of a date *prior* to notice of the increase to the lessee, we clarify our decision and here hold that BIA may not, consistent with the terms of the lease held here by Appellant, impose or collect a rental increase prior to the date a lessee is duly notified of the increase.

In *Yakima Ridgerunners*, it was undisputed that the appellant had failed to timely appeal an initial November 1996 decision by the Superintendent to increase the appellant's rent, effective December 1995. 44 IBIA at 74. In that case, the issue of retroactivity arose because the appellant there argued that even *after* it had received notice of the rent increase, BIA continued to issue bills at a lesser amount, which the appellant paid. The appellant argued that under Washington state law, BIA's attempt to collect the balance of the rental increase, after the bills had been paid, rendered the increase impermissibly "retroactive." The Board rejected that argument, holding that the fact the appellant may have been billed for a lesser amount, after being notified of the rent increase, did not make the rent increase retroactive. *Id.* at 80. That statement was overbroad at best and, as applied to the terms of the leases in *Yakima Ridgerunners* and in this case, is incorrect. Where, as here, a lessee is subject to a rental "review" at not less than 5 year intervals, there is insufficient notice to the lessee either of *when* a rent adjustment will occur or *how* any adjustment might be calculated. Therefore, under the circumstances of this case, which calls only for a rental *review* to occur — which suggests that, upon review, there could be no adjustment at all in the rent — we hold that rental increases may not be implemented or collected prior to notice to the lessee.

Because the Regional Director appropriately made the rental increase for Appellant's leasehold effective from the date of notice to Appellant in April 2006, we affirm his decision but clarify that the effective date can be no sooner than the date notice is received by the lessee.

3. Appraisal Method

To the extent Appellant seeks to challenge the method utilized by Apex to appraise the rental value of his leasehold, we conclude that this issue is moot, given Appellant's express statement that he does not appeal the amount of his rental increase.

As we explained in *Forest County Potawatomi Community v. Deputy Assistant Secretary – Indian Affairs*, 48 IBIA 259, 264 (2009),

The doctrine of mootness, to which the Board adheres, is based on the principle that an active case or controversy must be present at all stages of litigation. *Harris-Noble v. Acting Southern Plains Regional Director*, 45 IBIA 224, 229 (2007); *Pueblo of Tesuque v. Acting Southwest Regional Director*, 40 IBIA 273, 274 (2005). When nothing turns on the outcome of an appeal, . . . an appeal is deemed to be moot. A related principle is that the Board does not issue advisory opinions. *United Keetoowah Band of Cherokee Indians of Oklahoma v. Eastern Oklahoma Regional Director*, 47 IBIA 87, 89 (2008); *Harris-Noble*, 45 IBIA at 230.

The same is true here. Because Appellant has not challenged the amount of his rent increase, “nothing turns on the outcome of [his] appeal” of the appraisal method used by Apex. If we were nevertheless to reach the merits of this challenge, our decision would only be advisory. Moreover, should BIA rely on the “sales comparison” appraisal method for the purpose of adjusting Appellant's rent in the future, Appellant will have the opportunity, if he chooses, to challenge the amount of the rent increase and the appraisal method at that time. But for now, Appellant has chosen not to appeal the amount of his rent increase, for which reason we conclude that any challenge to the appraisal method is moot.

Conclusion

We clarify our decision in *Yakima Ridgerunners* to state that the challenge to the rental increase in that appeal was untimely, and that the Board's dicta suggesting that rental increases may be retroactive was overbroad at best. We hold that, for leases that are subject to periodic “rental reviews,” any decision to increase the rent may not be implemented or collected prior to notice to the lessee(s). Consequently, Appellant is liable for the increased amount of rent as of May 1, 2006. We conclude that Appellant's claim concerning Apex's appraisal method is moot because Appellant has not appealed the amount of his rent increase.

