



INTERIOR BOARD OF INDIAN APPEALS

Bien Mur Indian Market Center v. Deputy Assistant Secretary -  
Indian Affairs (Operations)

14 IBIA 231 (08/11/1986)

Clarified:

14 IBIA 242

Judicial review of this case:

Appeal filed, *Bien Mur Indian Market Center, Inc. v. Hodel*, Civil No. 87-1257-JB  
(D.N.M. filed Oct. 6, 1987)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
4015 WILSON BOULEVARD  
ARLINGTON, VA 22203

BIEN MUR INDIAN MARKET CENTER

v.

DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS)

IBIA 85-40-A

Decided August 11, 1986

Appeal from a decision of the Deputy Assistant Secretary--Indian Affairs (Operations) increasing the rent on Lease No. 5501347499, between the Bien Mur Indian Market Center and the Pueblo of Sandia.

Affirmed in part; vacated and remanded in part.

1. Indians: Leases and Permits: Rental Rates

The mere fact that a rental rate adjustment is lower than the rate suggested in an appraisal of the property does not justify the lower rate. In order to be supported by substantial evidence, the decision imposing the rental rate must show the reasons for the adjustment actually made.

APPEARANCES: Sigrid E. Olson, Esq., Albuquerque, New Mexico, for appellant.

## OPINION BY ADMINISTRATIVE JUDGE LYNN

On July 15, 1985, the Board of Indian Appeals (Board) received a notice of appeal from the Bien Mur Indian Market Center (appellant). Appellant sought review of a May 22, 1985, decision of the Deputy Assistant Secretary--Indian Affairs (Operations) (appellee) concerning an increase in the rent paid to the Pueblo of Sandia (Pueblo) under Lease No. 5501347499. For the reasons discussed below, the Board affirms that decision in part and vacates it in part. The case is remanded to the Bureau of Indian Affairs (BIA) for further consideration.

### Background

The lease under review was entered into on May 1, 1974, by the Pueblo, as lessor, and William E. Adams, as lessee. It was approved on August 2, 1974, by the Assistant Albuquerque Area Director--Resource Development and Protection, BIA. The lease covers 6.34 acres of undeveloped land within the Pueblo boundaries, approximately 1 mile north of the Albuquerque city limits and one-half mile east of Interstate 25. The leased property is "to be used

for the construction, maintenance and operation of a trading post engaged in the manufacture, wholesale and retail sales of general merchandise including, but not limited to, the sales of Indian jewelry, pottery, silver, turquoise, rugs, blankets, basketry and the like" (Lease at 1). In addition to the improvements required by the lease, lessee was required to obtain gas, electricity, and telephone lines, and to provide water and sewer systems. The term of the lease was 25 years, with an option in the lessee to renew for an additional 25 years. The initial annual rental was \$2,536.

The only provision of the lease at issue in the present appeal is Article 6, Rental Adjustment:

The rental provisions in all leases which are granted for a term of more than five (5) 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 131. [1/] 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.

The present controversy began with the December 10, 1982, decision of the Southern Pueblos Agency Superintendent, BIA (Superintendent), to increase the annual rent from \$2,536 to \$21,000 per year for the 5-year period May 1, 1983, to April 30, 1988. This decision was affirmed by the Albuquerque Area Director, BIA (Area Director), on February 23, 1983.

On appeal to the Deputy Assistant Secretary, appellant argued that the new rent was established in violation of 25 CFR 162.8. 2/ In a decision dated September 8, 1983, the Acting Deputy Assistant Secretary held at page 3: "[T]he new rent represents an 828 percent increase over the original rent

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1/ Part 131 was renumbered Part 162 without substantive change by notice published in 47 FR 13327 (Mar. 30, 1982).

2/ Section 162.8 provides in pertinent part:

"Leases granted or approved under this part shall be limited to the minimum duration, commensurate with the purpose of the lease, that will allow the highest economic return to the owner consistent with prudent management and conservation practices, and except as otherwise provided in this part shall not exceed the number of years provided for in this section. Except for those leases authorized by § 162.5(b)(1) and (2) [relating to leases for certain public purposes], 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. Any adjustment 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."

\* \* \*. Our review of the record indicates that there is insufficient justification for the new rent and that, in so fixing that rent the Superintendent failed to properly consider the equities involved.” After finding that insufficient weight was given to a 1979 BIA appraisal and 1981 update recommending a much smaller increase than that adopted and that the report on which the increase was based was not reliable enough to support the conclusions, the Acting Deputy Assistant Secretary concluded at pages 4-5:

Thirdly, we are persuaded that the Superintendent's decision to set the new annual rent at \$21,000 amounts not to an adjustment of the rent but rather a renegotiation of the lease itself. Such action has been rebuked by the Federal Courts, and in rather stark prose. In Wooding v. Morton (Civil No. 77-72C3, 1973) the United States District Court, Western District of Washington, addressed the imposition of a 1000 percent increase in the rent in the following manner:

The right granted in the lease to reevaluate the rent does not support action that amounts to complete renegotiation at five-year intervals; rather it allows only incremental adjustments to protect the beneficial owners. If the rule were otherwise, the valuable 25-year term of the lessee would be illusory, and he would hold a mere option to negotiate a renewal at those intervals.

The Wooding case was remanded to the Bureau for reconsideration, in part because the record did not contain sufficient appraisal data to justify the new rent. Some three years later, the matter was once again before the Court--this time the issue involved was the base rent established for the next five-year period. The Court found that the documented record now before it would lend “. . . a reasonable mind . . .” to accept the \$9,668 rental figure. The implications seem clear: solid appraisal evidence which would convince a reasonable mind is required in the process of adjusting rentals. The matter before us fails those tests. The Bureau erred in (1) relying on its November 3, 1982, review memorandum, which was based on a “market estimate” (and not an appraisal) submitted by the lessor, and (2) seemingly ignoring its earlier (1979 and 1981) review memorandum appraisals.

The Bureau of Indian Affairs' documents do not contain sufficient evidence in the form of specific sale and lease data to adequately and convincingly support the conclusions of value. Lessee has correctly inferred that the decision to adjust the rent does not meet the test of reasonableness, especially as relates to the “economic conditions at the time of reevaluation” and “consideration of the equities” criteria of 25 CFR 162.8.

Therefore, this matter is remanded to the Albuquerque Area Director for his reconsideration, consistent with the following instructions:

- (1) Secure an independent appraisal of the Bien Mur property from a source acceptable to the Bureau and the Pueblo, and suggest to the Lessee that he may wish to do the same.
- (2) Evaluate this appraisal in conjunction with your internal review memorandum appraisals of 1979 and 1981 and inform the lessor of your findings.
- (3) Establish a new rental rate consistent with the dictates of 25 CFR 162.8.

By letter dated October 13, 1983, the Area Director informed lessee that he was securing an independent appraiser to conduct a new appraisal. The Area Director also advised appellant that he might wish to conduct his own appraisal. BIA eventually contracted with Brooks, Lomax & Fletcher, Inc., for an appraisal (Brooks appraisal). This appraisal was submitted to BIA on May 10, 1984. BIA states lessee was advised by telephone on May 14, 1984, that it had received the Brooks appraisal.

After reviewing the appraisal, BIA scheduled meetings with lessee on July 27 and August 3, 1984, to discuss the appraisal's findings and conclusions. Lessee did not attend either meeting. Therefore, by letter dated August 3, 1984, the Area Director gave lessee until August 10, 1984, to submit any additional appraisal data. Lessee was informed that if he did not submit any data by that date, a new rental rate would be established.

By letter dated August 8, 1984, lessee requested a postponement of the August 10, 1984, meeting until September 10, 1984. No BIA response to this letter appears in the record.

On August 15, 1984, the Area Director issued a decision establishing a new rental rate. The decision states the Brooks appraisal found the market rent for the property to be \$34,500 per year as of November 3, 1982; \$37,500 per year as of May 1, 1983; and \$43,000 per year as of May 1, 1984. The Area Director further indicated that he believed it was necessary to proceed with the matter and lessee had been given a sufficient opportunity to submit his own appraisal data. After evaluating the Brooks appraisal in regard to its previous studies, BIA concluded that equitable rentals would be \$21,000 per year as of November 3, 1982; \$22,750 per year as of May 2, 1983; and \$26,300 per year as of May 1, 1984. The new rental rate was set at \$26,320 per year effective May 1, 1984. <sup>3/</sup>

Lessee appealed this decision to appellee. Appellee's decision, dated May 22, 1985, affirmed the new rental rate.

Appellant's appeal to the Board was received on July 15, 1985. After receiving several extensions of time, appellant filed an opening brief. Appellee did not file an answer brief.

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<sup>3/</sup> The imposition of a new rental rate of \$26,320, rather than \$26,300, is perhaps a typographical error. This discrepancy was not addressed in appellee's decision.

By order dated April 22, 1986, the Board requested BIA to supplement the administrative record with those documents relating to its 1979 and 1981 review memorandum appraisals. The requested supplemental materials were received on June 5, 1986.

### Discussion and Conclusions

On appeal, appellant argues (1) under the terms of the lease, no rental adjustment could be made until May 1986, (2) it was not given an adequate opportunity to present its appraisal data, (3) the Brooks appraisal is improper under 25 CFR 162.8, (4) the Brooks appraisal is internally flawed, and (5) if the Brooks appraisal is used, it should be allowed to offset the value of improvements and utilities it provided. The Board will address only those arguments necessary for a decision.

The first issue before the Board is the date on which BIA was permitted to increase lessee's rent. Article 6 of the lease states that rental provisions "shall be subject to review and adjustment by the Secretary at not less than five-year intervals." The lease was entered into on May 1, 1974. The initial rental amount of \$2,536 was thus in effect through May 1, 1979.

Appellee's argument that no rental adjustment can be made until May 1986 is apparently based on its construction of the 1981 BIA review memorandum appraisal as a decision not to adjust the rent. The record shows, however, that although both the 1979 and 1981 memoranda made recommendations about rental adjustments, no decision either to adjust or not to adjust the rent was made in 1979 or 1981. Rather, recommendations were made by BIA to the Pueblo during those years, but the Pueblo did not act until September 1982 when it notified appellant of its intent to invoke the rental adjustment clause of the lease. No decision regarding rental adjustment was made until December 10, 1982, when the Superintendent notified appellant of the rental increase which gave rise to the present controversy.

Assuming arguendo that failure to adjust the rent at the first opportunity, i.e., May 1, 1979, constituted a decision not to adjust the rent, appellee's decision to adjust the rent as of May 1, 1984, would still be proper, because that date represents the beginning of the second 5-year period under the terms of the lease. The Board thus affirms that part of appellee's decision imposing any rental adjustment as of May 1, 1984.

Appellant questions the adequacy of the Brooks appraisal. The Board discussed its role in reviewing rental rate adjustments in Fort Berthold Land and Livestock Association v. Aberdeen Area Director, 8 IBIA 230, 246-47, 88 I.D. 315, 324 (1981):

In our review of that determination [of an adjusted rental rate], the Board's requirement is to overturn the decision only if it is found to be unreasonable. It is possible that we could set a different rate from the evidence adduced as could anyone else. However, as long as the Bureau's action is supported in law and by substantial evidence, it would be an inappropriate intrusion into the Bureau's function for this body to substitute its judgment for the agency's.

Following Fort Berthold, in Wooding v. Portland Area Director, 9 IBIA 158 (1982), the Board upheld as reasonable the methodology employed by BIA in calculating a rental adjustment, while holding that the use of certain comparables was not supported by substantial evidence.

The Board has reviewed both the Brooks appraisal and the appraisal prepared for appellant by Gillentine & Keever (Gillentine appraisal), which was submitted on appeal. Both appraisals demonstrate the problems inherent in determining fair annual rental on the property at issue. There are few comparable rentals in the area because most properties are sold rather than rented, and there are no developments similar to appellant's on the Pueblo. Each appraisal, therefore, attempts to draw comparisons from other types of real estate transactions. The Gillentine appraisal concludes that the fair annual rental as of May 1, 1984, was \$12,200; the Brooks appraisal concludes it was \$43,000.

[1] Appellee's decision, however, accepted neither of these appraisals. Instead, stating that his determination was based on the Brooks appraisal, appellee found the fair annual rental as of May 1, 1984, was \$26,300. No explanation or justification is offered in the record or the decision for this particular rental rate. BIA may have considered appropriate factors in its decision to impose this particular rental rate, including, perhaps, some of the factors raised by appellant, such as the fact that it had supplied water, sewer, and other amenities to the leased property. There is, however, no evidence of BIA's reasoning in the record. The mere fact that the Brooks appraisal suggests a rental rate higher than the one ultimately imposed does not mean the lower figure is automatically supported by substantial evidence. As stated by the Supreme Court in Bowen v. American Hospital Association, 476 U.S. 610, 106 S.Ct. 2101, 2112 (1986), "[i]t is an axiom of administrative law that an agency's explanation of the basis for its decision must include 'a "rational connection between the facts found and the choice made".'" The Board thus holds that because BIA has provided no justification for the rental rate actually imposed, that rate is not supported by substantial evidence.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, that part of the Deputy Assistant Secretary's May 22, 1985, decision establishing the new rental rate must be vacated and the case remanded to the Bureau for further consideration. As stated infra, the imposition of the new rental rate as of May 1, 1984, is affirmed.

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//original signed

Kathryn A. Lynn  
Administrative Judge

I concur:

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//original signed

Anita Vogt  
Administrative Judge