



## INTERIOR BOARD OF INDIAN APPEALS

Patrick and Susan Drew v. Acting Northwest Regional Director, Bureau of Indian Affairs

56 IBIA 132 (01/28/2013)



# 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

PATRICK AND SUSAN DREW,	)	Order Affirming Decision in Part,
Appellants,	)	Vacating Decision in Part, and
	)	Remanding
v.	)	
	)	
ACTING NORTHWEST REGIONAL	)	Docket No. IBIA 10-141
DIRECTOR, BUREAU OF INDIAN	)	
AFFAIRS,	)	
Appellee.	)	January 28, 2013

Appellants Patrick and Susan Drew appeal from a July 29, 2010, decision of the Acting Northwest Regional Director (Regional Director), Bureau of Indian Affairs (BIA), which affirmed a decision by the Puget Sound Agency Superintendent (Superintendent) to adjust the annual rent for Appellants' 50-year ground lease (Lease) in the Pull and Be Damned area of the Swinomish Reservation (Reservation). We affirm the Regional Director's decision in part, vacate it in part, and remand the matter for further consideration.

The Lease requires the rental adjustment in the 10th year to be "based upon an appraisal of the fair market rent" of Appellants' lot. Lease, § 1.3 (Administrative Record (AR) Tab 1). BIA calculated the adjustment in Appellants' rent by using the sales comparison approach to appraise the value of the leased lot (minus improvements) and applying a rate of return to the appraised value of the lot. While we affirm BIA's use of the sales comparison method and the appraised value of Appellants' leased lot, we conclude that BIA has not shown that the applied rate of return—a statutory 5% rate of return set by Congress in 2000 for recreational cabin sites in national forests—is consistent with a market rate of return reasonably applicable to residential ground leases at the time the adjustment was made in 2009. Thus, the chosen rate of return is not supported by the record, for which reason we vacate the Regional Director's decision and remand for BIA to either provide support for the 5% rate of return consistent with the terms of the Lease or apply a different rate of return that it can support. We reject Appellants' remaining arguments.

## Background

Appellants lease Indian trust land (Property) in a residential subdivision on the Reservation. It is 0.26 or 0.34 acre<sup>1</sup> and is located on a bluff that commands “excellent” 270-degree panoramic views of Skagit Bay and the Saratoga Passage in the Puget Sound. Office of the Special Trustee for American Indians (OST) Appraisal at 11 (AR Tab 6); Parsons Appraisal at 1, 23, 34 (AR Tab 14). The Property does not extend to the waterline—there is a “Reserve” area between the property line and the shore. *See* Plat Map, OST Appraisal at 7 (unnumbered). Although the Property is not technically waterfront, it “has similar utility to high bank waterfront whereby you can’t access the water but you have unobstructed marine views.” Parsons Appraisal at 23.

The Lease went into effect on June 1, 1999. Lease (AR Tab 1). It is a ground lease for a term of 50 years, and does not include improvements other than utilities.<sup>2</sup> The initial annual rent was \$5040 plus a \$10 tidelands fee, and the Lease provides for the rent to be adjusted every fifth year. *Id.* §§ 1.2-1.4.<sup>3</sup> The rental adjustments on the 10th, 25th, and 35th anniversaries are required to be based on an appraisal of the current fair market rental value of the Property. *Id.* § 1.3. The appraisal must be done by a BIA appraiser or by a Washington State certified appraiser, shall follow the Uniform Standards of Professional Appraisal Practice (USPAP) or other generally accepted appraisal standards, and shall give consideration to the economic conditions at the time. *Id.* “Fair market rent” means “the *highest* price in terms of money which a property will bring in a competitive and open market under all conditions requisite to a fair rent, the Lessor and Lessee each acting prudently, knowledgeably, and assuming the rent is not affected by undue stimulants.” *Id.* § 1.3(c) (emphasis added).

BIA requested OST’s Office of Appraisal Services to appraise the Property to determine its fair market rent as of June 1, 2009. OST Appraisal at 4. To determine a value for the land, the appraiser used the sales comparison approach, which looks at sales of similar properties to determine what the subject property would sell for in an open market.

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<sup>1</sup> It is not clear why the two appraisals identify different lot sizes for the Property. *Compare* OST Appraisal at 11 (0.26 acres) *with* Parsons Appraisal at 1 (0.34 acres).

<sup>2</sup> When Appellants signed the Lease, there was already a house and outbuildings on the Property. Those improvements are not trust property, are not owned by the Indian landowners, and are not part of the Lease. Appellants separately purchased the improvements from the former lessee.

<sup>3</sup> No adjustment was made to the rent at the time of the 5th anniversary of the Lease’s effective date.

*Id.* at 13. The appraiser determined that there were too few arms-length sales of trust property on the Reservation, and therefore used off-Reservation, non-trust property sales as comparisons. *Id.* at 13-14. The appraiser found 19 sales of similar undeveloped properties and rated them on a variety of characteristics, including lot size, view amenity, and amount and type of water frontage. *Id.* at 14-16. After identifying three sales that were most similar to the Property, and after making adjustments for differences between them and the Property, the appraiser arrived at an appraised value of \$225,000 for the Property. *Id.* at 16-17.<sup>4</sup> He then applied a 5% rate of return to the appraised value of the land, and arrived at \$11,250 as the annual fair market rent. *Id.* at 17.

The appraiser chose the 5% annual rate of return because “[t]he U.S. Forest Service uses a 5.0 percent rate of return of the estimated market value for managing recreational residences and assessing fees. This rate is used nationally and is well established.” *Id.* The appraisal was reviewed and approved by an OST Review Appraiser. Appraisal Review Report (AR Tab 6). The Superintendent incorporated the appraisal into a September 25, 2009, letter to Appellants informing them of the new rental rate. Superintendent’s decision (AR Tab 7).<sup>5</sup>

Appellants appealed the Superintendent’s decision to the Regional Director and raised a variety of objections to the OST Appraisal. *See* Statement of Reasons to Regional Director, Nov. 23, 2009 (AR Tab 10). They argued that the appraiser was not qualified, had not personally inspected the Property, had ignored certain attributes of the Property that they allege would have reduced its appraised value, had applied an irrelevant rate of return, and had improperly used sales of off-Reservation fee-simple properties as comparables instead of nearby Pull and Be Damned leaseholds. Appellants commissioned a new appraisal, which they submitted to the Regional Director.

Appellants’ appraiser (Parsons) appraised the value of Appellants’ leasehold interest (i.e., the amount a third party would pay to assume the Lease from Appellants), and calculated a rate of return, using an effective date of June 1, 2009, for both. *Id.* at 1. He valued the leasehold at \$120,000 and applied a 3.75% rate of return, which would result in an annual rent of \$4500. *Id.* at 38, 43.

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<sup>4</sup> This valuation does not consider that the United States holds legal title to the Property in trust for the landowner, OST Appraisal at 9-10, which apparently is consistent with the Department of the Interior’s practices, *id.* at 9 (citing United States Department of the Interior – Appraisal Policy Manual § 5.30.2).

<sup>5</sup> The Superintendent issued a technical correction on October 15, 2009. AR Tab 8.

Like the OST appraiser, Parsons used the sales comparison approach, but valued Appellants' leasehold interest by comparing it to recent sales and listings for sale of leaseholds in the Pull and Be Damned neighborhood. *See id.* at 29-38. Parsons identified five recent sales of improved leaseholds with sales dates between May 2007 and June 2009 and five active listings of leaseholds for sale, four improved and one unimproved. Because 9 of the 10 comparable sales and listings were of both a leasehold and improvements, Parsons subtracted the estimated depreciated value of the improvements from the sale or list prices to establish the values of the leaseholds. *Id.* at 30-31. After making adjustments based on differences between the Property and the comparables (as was done in the OST Appraisal), Parsons concluded that Appellants' leasehold interest, without improvements, was worth \$120,000 as of June 1, 2009.

Parsons then calculated a rate of return for the Property. After rejecting three other approaches for calculating rates of return, all of which he agreed were "acceptable forms of appraisal analysis," Parsons used the "Band of Investment Technique," which calculates a rate of return by considering and weighing bond rates and actual rates of return collected on other leases in the neighborhood. Parsons Appraisal at 40, 42. Using this approach, Parsons obtained a rate of return of 3.75%. *Id.* at 43. He thus determined the fair annual rent to be \$4500 ( $\$120,000 \times 0.0375$ ).

After reviewing Appellants' brief and the Parsons Appraisal, the Regional Director rejected Appellants' arguments and affirmed the Superintendent's decision. Regional Director's Decision, July 29, 2010 (Decision). First, he rejected Appellants' argument that the appraisal should have compared the Property to other trust properties and not to fee simple properties. He stated that trust properties are appraised as fee properties because of the rarity of arms-length sales of trust lands on the Reservation. He held that this approach was appropriate for appraising the Property and that, aside from the status of the title to the properties, the comparison properties were similar to the subject. The Regional Director rejected Appellants' objections to applying the statutory 5% rate of return to the Property. He held:

You also argue that using the Forest Service rate of return does not relate to a lot in an Indian Reservation on Puget Sound. However, the U.S. Forest Service uses a 5.0 percent rate of return of the estimated market value for setting rental rates for recreational residences. While the precise characteristics of the land may differ (forest versus marine waterfront land), the expected return from leasing such land is similar and supports the use in this situation.

Decision at 9-10.

The Regional Director also addressed the substance of the Parsons Appraisal. He determined that the Parsons Appraisal was not “persuasive” because it appraised the value of Appellants’ leasehold interest instead of the Indian landowner’s ownership interest. *Id.* at 10. Similarly, he held that Parsons’s calculation of the rate of return was flawed because it focused not on the return to the Indian landowners, but on a potential return to Appellants (e.g., if Appellants subleased the Property). *Id.* The Regional Director affirmed the Superintendent’s September 25, 2009, decision.

Appellants appealed the Regional Director’s decision to the Board. Appellants filed an opening brief, the Regional Director filed an answer, and Appellants filed a reply.

### Discussion

We affirm BIA’s valuation of the Property, using the sales comparison method. However, we vacate that portion of the Regional Director’s decision that accepts the 5% rate of return applied by OST to the appraised value of the Property because the use of this rate of return is not sufficiently justified or supported. We remand the Regional Director’s decision solely to determine a reasonable market rate of return and to explain how the rate was calculated and why it is appropriate. We reject Appellants’ remaining arguments that: (1) the OST Appraisal was flawed, and the Parsons Appraisal should be used in its place, (2) the amount of the rent increase, standing alone, was unreasonable, and (3) the adjustment was arbitrary under *Kamb v. Northwest Regional Director*, 52 IBIA 74, 82 & n.13 (2010).

#### I. Standard of Review

We explained our standard of review for residential real estate rent adjustment matters in *Kamb*, 52 IBIA at 80-81:

We will not substitute our judgment in place of BIA’s, but we will review the Regional Director’s decisions to determine whether they are in accordance with applicable law, are supported by the record, and are not arbitrary or capricious. *Strain v. Portland Area Director*, 23 IBIA 114, 118 (1992). The burden of proving that a rental adjustment fails to comport with this standard rests with Appellants. *Id.*

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“[T]he determination of ‘fair annual rental’ requires the exercise of judgment and . . . reasonable people may differ in their calculation of ‘fair annual rental.’” [*Id.*] at 117-18.

## II. Establishing Fair Market Rent for the Property

In establishing rents for trust lands, such as the Property, BIA owes a trust duty to the Indian landowners to obtain fair market rent. *See* Lease, § 1.3(d); *see also* 25 C.F.R. § 162.604(b). Under the terms of the Lease, BIA is required to obtain an appraisal on the 10th anniversary of the Lease to determine the present fair market rent and to adjust the rent for the Property accordingly. Lease, § 1.3. “Fair market rent” is defined by the Lease as “the highest price in terms of money which a property will bring in a competitive and open market under all conditions requisite to a fair rent, the Lessor and Lessee each acting prudently, knowledgeably, and assuming the rent is not affected by undue stimulants.” *Id.* § 1.3(c); *cf.* 25 C.F.R. § 162.101 (“fair annual rental” means “the amount of rental income that a leased tract of Indian land would most probably command in an open and competitive market”). As we discuss in greater detail below, the parties agree that it is appropriate to calculate the fair market rent by using the sales comparison method to determine the value of the Property and then applying a rate of return to that appraised value. Appellants contend that BIA should have used a different group of comparables to calculate the fair market value of the Property and further challenge the rate of return applied by BIA.

### A. Sales Comparison Method

Appellants agree that the sales comparison method is an appropriate appraisal method for valuing the Property. Parsons Appraisal at 28 (“the Sales Comparison Approach is considered the only applicable valuation method” for vacant land). Under this method, Appellants contend that the proper comparables for determining the value of the Property are the sales of other leaseholds in the same waterfront area as the Property, after extracting the value of improvements and controlling for those characteristics that distinguish the comparables from the Property (e.g., lot size and view amenity). We disagree, and affirm BIA’s reliance on OST’s use of the sales of undeveloped, fee simple, waterfront property to establish the value of the Property at \$225,000.

As the Regional Director explained, “[t]he rental adjustment decision is not based upon the value of the leasehold to [Appellants], but the value of the leased land to the Indian landowners. Consequently, it is not appropriate to apply a rate of return to the value of the leasehold to calculate the fair annual rental.” Decision at 10. Appellants did not address this issue in their briefs or otherwise explain why Appellants’ leasehold interest, rather than the landowner’s beneficial interest, was the relevant starting point for determining the fair market rent due to the landowners.

We agree with the Regional Director's analysis. To calculate a fair annual rent using the sales comparison method and applying a rate of return, the relevant "return" is the income to the landowners flowing from their ownership of the Property. Appellants have not persuaded us otherwise. The Parsons Appraisal is flawed because, in using the sales comparison method, Parsons appraised the value of Appellants' *leasehold* by looking at sales of other leaseholds in the Pull and Be Damned area and subtracting the depreciated value of improvements. A leasehold interest is *not* the same interest held by the Indian landowners. Appellants' leasehold interest allows them to use the land for a finite time, provided that the annual rental amount is paid to the landowners and that other terms of the Lease are met. The Indian landowners' ownership interest is a greater property interest. It is an unconditional, perpetual interest and, as such, is a more valuable asset than Appellants' term lease interest. The Parsons Appraisal is therefore not a persuasive substitute for the OST Appraisal.

We reject Parsons' criticism of size of the comparison sampling utilized by OST for its sales comparison analysis. After identifying 17 sales of vacant waterfront fee land in the Anacortes-La Conner area that closed between 2006 and 2009, Parsons then opined that "[f]ee simple vacant lots have decreased significantly [in value] however very little can be taken from this analysis as there have been very few transactions." Parsons Appraisal at 33. He argues that using this limited data would "likely lead to a misleading analysis" because of the small number of sales. *Id.* However, Parsons himself identified only 11 sales of improved leaseholds in the same area during the same 2006 to 2009 time period, and he used a subset of only 5 such sales (plus 5 listings for sale) for his sales comparison analysis. *Id.* at 33, 36-37. He does not explain how this even smaller sample size would not also "likely lead to a misleading analysis." Thus, Parsons' criticism of OST's reliance upon its sampling size is not well taken.

Appellants also argue that, even assuming the use of sales of non-trust land is appropriate, the comparable sales used by OST were not sufficiently similar to the subject. *See, e.g.*, Opening Br. at 6, 8. But the OST appraiser noted the differences between the properties and made adjustments accordingly. *See* OST Appraisal at 14-17. Parsons used the same method and made the same types of adjustments in his appraisal of Appellants' leasehold. *See* Parsons Appraisal at 34-37.<sup>6</sup>

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<sup>6</sup> In a separate analysis, Appellants estimate the value of the lot immediately adjacent to theirs to be \$368,900 and other lots in the Pull and Be Damned area between \$107,300 and \$462,500, based on valuations published online by the Skagit County Assessor (County) for 2009. Opening Br., Attach. F at 1. Using the same online information from the County, the Regional Director demonstrated that the County's valuation of the Property is \$430,900—nearly twice OST's appraised value. Answer Br. at 12 & Ex. D. In

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Therefore, Appellants have failed to identify an error in the OST Appraisal's valuation of the Property that would warrant rejecting it, and Appellants' own appraisal contains material flaws that render it unusable.

## B. Rate of Return

In determining a rate of return to apply to the appraised value of the unimproved Property, the OST appraiser borrowed the statutory rate of return used by the U.S. Forest Service for recreational cabin sites in national forests. According to his report, the OST appraiser relied upon the Forest Service's rate because it "is used nationally and is well established [for recreational residences]." OST Appraisal at 17. Appellants argue that this rate of return is "overstate[d], . . . unreasonable and unsupported." Opening Br. at 9. We agree that it is unsupported, and we vacate that portion of the Regional Director's decision on this ground.

As previously explained, the terms of the Lease require the 10th year rent adjustment to be based on a formal appraisal of the fair market rent, taking into "consideration the economic conditions at the time [of any rent adjustment]," and excluding the value of any improvements (unless owned by the lessors). Lease, § 1.3.

Here, OST's appraiser applied the 5% rate of return that the Forest Service is required by law to use for its recreational properties. *See* 16 U.S.C. § 6206. The Regional Director argues that the 5% rate of rate is "a conservative and reasonable choice," Answer Br. at 7, because the Forest Service's leasing program is similar to the leasing of Indian recreational homesites, *id.* at 6. The Regional Director maintains that the 5% rate of return is advantageous to Appellants because "the program is managed to provide recreational opportunities for citizens rather than just seeking the highest economic return for the . . . landowner," *id.*, thereby suggesting that the 5% rate of return must *ipso facto* be less than the going rate. Nothing in the record or the Regional Director's brief or decision provides any support for this assertion. Moreover, BIA's fiduciary responsibility is not to provide a rate of return that is advantageous for lessees but to determine the *highest* fair market rent in accordance with the terms of Appellants' Lease.

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their reply brief, Appellants did not address this valuation for the Property. Because there is no showing by the parties as to the methodology employed by the County to arrive at the estimated land values, the resulting valuations add little to our discussion other than to show that the Property is considered to be substantially more valuable than the surrounding properties and that OST's appraised value is not inflated.

The Forest Service’s statutory rate of return has been fixed since 2000. It was established by the Cabin User Fee Fairness Act specifically to *standardize* the adjustment of annual fees for recreation residence permits on national forest lands. Pub. L. No. 106-291, 114 Stat. 1014 (Oct. 11, 2000), *codified at* 16 U.S.C. § 6206. The Forest Service’s use of this fixed, statutory rate of return for its recreational cabin sites does not mean that it is the current market rate of return for unimproved homesites. In fact, as the statute explains, the 5% rate of return is “an *adjustment to the typical market rate of return* due to restrictions imposed by the [recreation residence] permit.” 16 U.S.C. § 6206(a) (emphasis added). Therefore, the Forest Service’s statutory 5% rate of return bears no relation, per se, to any market rate of return that might be applicable in the present case.

We thus find that BIA’s adoption of the Forest Service’s statutory rate of return for the lease adjustment here is unsupported.<sup>7</sup> We do not hold that a 5% rate of return is per se unreasonable, but we hold that BIA’s conclusory explanation for adopting that rate here—that “the expected return from leasing [Recreation Residence] land is similar” to that for leasing reservation land, *see* Decision at 10—bears no relation on its face to an appropriate rate of return that would apply in an open and competitive market in 2009. Under the terms of the Lease, BIA must give consideration to the economic conditions at the time the rental adjustment is due and determine “the highest price” that the Property can command in an open and competitive market. Lease, § 1.3. Utilizing a rate of return set by Congress in 2000 is not, without more, reflective of “the economic conditions” prevailing in 2009 when the rental adjustment was made. *See id.* We therefore vacate that portion of the Decision to the extent that it relies on an appraisal that utilizes a 5% rate of return, and we remand the matter to BIA to determine a reasonable market rate of return for the Property and to provide a sufficient explanation for how it arrived at its conclusion.

### III. Other Arguments

#### A. The Rental Increase *Ipsa Facto* was Unreasonable

Appellants argue that the relative amount of the increase, compared to the original rent, is unreasonable. Opening Br. at 4 (“no landlord could double a tenant’s rent in the middle of a recession”). Appellants miss the point. The inquiry is not into the reasonableness of the increase, but into the reasonableness of the new rent. The Board held in *Strain* that “the fact that a rental adjustment results in a substantial increase does not prove that it is unreasonable. It might simply indicate, for instance, that previous rental

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<sup>7</sup> BIA also relied on the Forest Service rate of return for the adjustment of rent in *Kamb*. *See* 52 IBIA at 78. We did not address the propriety of the rate of return in that appeal because the appellants conceded that the 5% rate of return was appropriate. *Id.* at 84.

rates were unrealistically low.” 23 IBIA at 118. Here, the rental rate had not been adjusted in 10 years and the fact that the eventual adjustment doubled the rent does not satisfy Appellants’ burden of showing that the new rate is unreasonable. We therefore reject Appellants’ argument that this increase in rent, after no increase for 10 years, was unreasonable on its face.

In a related argument, Appellants argue that the general downturn in the housing market between 2006 and 2009 *ipso facto* means that the 2009 fair market rent should be lower than the initial rent set in 1999. See Opening Br. at 5-7. We disagree. Nothing supports Appellants’ assumption. Assuming that the 1999 rent were fair market rent then, there is simply no indication that the Property’s 2009 value was lower than it was in 1999, or that the Property’s fair market rent otherwise experienced a net decline over the 10-year period. We thus reject the argument that the recent economic recession indicates that the fair market rent for the Property is lower in 2009 than the rental rate set in 1999.

#### B. Utilizing Other Indian Leases to Establish Market Rent

We reject Appellants’ argument that BIA should have looked at the rental rates for other waterfront lots in the Pull and Be Damned area. We have held in the past that looking only to other BIA-approved on-Reservation leases to determine fair annual rent creates “an unending closed loop of information,” such that reference to off-Reservation rents is needed to accurately determine the fair market rent. *Elliott v. Portland Area Director*, 31 IBIA 287, 292 n.6 (1997); see also *Fort Berthold Land and Livestock Association v. Great Plains Regional Director*, 35 IBIA 266, 275 (2000) (off-reservation comparables appropriate for setting grazing permit rates, for the same reasons that were explained in *Elliott*). In order to determine fair market rents for properties on the Reservation, an appraiser must look beyond the closed system of BIA-approved leases to the open, competitive market. To the extent Appellants urge that the rents should be standardized throughout the Pull and Be Damned area, we can neither rewrite the terms of Appellants’ lease nor the terms of other leases in the area.

#### C. Application of *Kamb*

We reject Appellants’ argument that because nearby properties’ rents are lower than Appellants’ adjusted rent, the rental rate adjustment was arbitrary.<sup>8</sup> In *Kamb*, the appellant

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<sup>8</sup> Although the Regional Director argues that the Board should not consider this argument because it was not first raised before the Regional Director, *Kamb* was not decided until 6 weeks after the Regional Director issued his decision. Appellant therefore could not have made an argument based on *Kamb* to the Regional Director.

argued that the adjustment to the rent was arbitrary because “the property adjacent to hers . . . received a rental adjustment at the same time as she did but to a lesser amount than hers even though both lots [were] the same size with the same waterfront view.” *Kamb*, 52 IBIA at 79. The Board held:

If an appellant identifies specific properties and shows the properties to be comparable to his property in material respects—e.g., in lot size, topography, community, and view amenity—and if the fair market rent is adjusted or established by BIA at approximately the same time, then the information *is* relevant to the appellant’s rent adjustment. That is, whether the Regional Director is being “reasonable” in his adjustment of rents necessarily includes whether he is consistent—and therefore fair and not arbitrary or capricious—in his assessment of specifically identified, described, and similarly situated properties whose annual rents are under review at the same or nearly the same time.<sup>13</sup>

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<sup>13</sup> Of course, if the properties are not comparable — because the property characteristics are demonstrably different — or if the rents were adjusted or established at different points in time, the Regional Director need only explain and document the differing circumstances between the properties.

*Kamb*, 52 IBIA at 82 & n.13.

Here, Appellants have identified two sets of properties, which they claim highlight the disparity in rents for waterfront properties on the Reservation, particularly for their leasehold. Both sets of properties are located in the Pull and Be Damned area and apparently all of the properties are Indian trust lands with ground-only leases. The first set, consisting of 28 properties identified in Attachment E to Appellants’ opening brief, are alleged to be “similarly situated” to the Property, and have annual rents ranging from \$2390 to \$9000 per year; the most recent rental rate was set in May 2007. Opening Br. at 12 & Attach. E.<sup>9</sup> The second set, consisting of eight properties identified in Attachment F to Appellants’ opening brief, are alleged to have “similar lot sizes, topography, and views” as the Property’s, with annual rents (as represented by Appellants) ranging from \$6000 to

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<sup>9</sup> Appellants separately identified a 29th property, located at 9963 Pull and Be Damned Road and rented by C.J. Ebert, for which BIA set the rent at \$4600 in 2005. Opening Br. at 12 & Attach. G. We include this property with our discussion of the properties identified in Attachment E.

\$17,400. Opening Br. at 12.<sup>10</sup> Appellants argue that both lists “show[] a haphazard grouping of leases and rent amounts [with] no consistency.” *Id.* They argue that the “rents are more dependent on who negotiates than on the lot’s amenities” and, therefore, the rents are arbitrary. *Id.* We are not persuaded by Appellants’ arguments.

The effective date of Appellants’ rent adjustment is June 2009. The rents identified in Appellants’ Attachments E and G are *not* contemporaneous with Appellants’ rent adjustment and are therefore irrelevant, even assuming that the properties are “similarly situated.”<sup>11</sup> We therefore reject Appellants’ attempt to draw some correlation between these leases and their own lease.

With respect to those rents set out in Attachment F and assuming that lot sizes, topography, and views of the properties in Attachment F are, in fact, comparable to Appellants’ leasehold,<sup>12</sup> it appears that the rents shown are the rental amounts charged to subtenants,<sup>13</sup> and not the amounts payable to the Indian landowners as ground rent. There is no showing of rent paid to the Indian landowners or when this rent was set. Therefore, on this ground, we reject the comparison of these properties to Appellants’ leasehold. Moreover, it does not appear from Attachment F that Appellants intended for these properties to serve as comparables. Attachment F consists of three pages, one of which is a handwritten document that asserts at the top that it is “an income approach to valuation.”<sup>14</sup> It identifies eight property addresses and the rent paid by the sub-tenants, and then

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<sup>10</sup> Appellants assert that the list identifies 11 properties. Opening Br. at 12. It does not. It identifies nine properties and lists rental amounts for eight of the nine.

<sup>11</sup> The conclusory description of the 28 properties as “similarly situated” does not carry Appellants’ burden of showing that the properties are, in fact, comparable to the Property. Instead of making a blanket assertion that the properties are “similarly situated,” Appellants must show that the characteristics of these other properties are indeed comparable to Appellants’ leasehold, which Appellants have not done. *See Kamb*, 52 IBIA at 82.

<sup>12</sup> Appellants’ appraiser described their leasehold as “a unique property . . . located on a bluff/point [with] panoramic views.” Parsons Appraisal at 34. The appraiser describes the panoramic views as spanning 270 degrees and states that the comparable leasehold sales on which he relied in his appraisal “do not share the same panoramic view amenity.” *Id.* In addition, the Regional Director points out that several of the properties in Attachment F are not waterfront properties, which assertion is not disputed by Appellants.

<sup>13</sup> The rents are identified on Attachment F as “sublease annual land,” “sub-tenant yea[r]ly rent,” and “sub-tenant rental figures.”

<sup>14</sup> The other two pages are a tract map of the Pull and Be Damned area and a typed sheet that contains a subset of the information found on the handwritten sheet.

purports to determine how much of the rent paid by the eight sub-tenants is attributable to the value of the land, and from there, to determine the rate of return on the value of the land. To the extent that Appellants intended to offer this analysis as an alternative to the OST Appraisal (and Parsons Appraisal), this argument should have been raised in Appellants' appeal to the Regional Director and was not. Therefore, the argument was not preserved for appeal to the Board and we decline to consider it. *See Kamb*, 52 IBIA at 84 (“Unless manifest error or injustice is evident, it is well settled that the Board is limited in its appellate review ‘to those issues that were before . . . the BIA official on review,’” quoting 43 C.F.R. § 4.318).

In conclusion, we affirm BIA's sales comparison analysis, but we vacate and remand the Decision so that the Regional Director may determine a reasonable market rate of return to apply to the appraised value of the Property, explain how he determined that rate, and recalculate the adjusted annual rent if the new rate of return is something other than 5%. We reject the remaining arguments made by Appellants.

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 Board affirms in part and vacates in part the Regional Director's July 29, 2010, decision and remands this matter for further consideration consistent with our decision.<sup>15</sup>

I concur:

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// original signed  
Debora G. Luther  
Administrative Judge

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//original signed  
Steven K. Linscheid  
Chief Administrative Judge

<sup>15</sup> Appellants request that the Board order BIA “to assemble a spreadsheet with each leased parcel in Pull & Be Damned, its rent amount, lease anniversary date, and location.” Opening Br. at 13. Appellants state that they submitted a request under the Freedom of Information Act (FOIA) for this information, and BIA required remittance of \$32,866.50 to cover the cost of processing their request. *Id.* at 12-13. The Board has no jurisdiction over FOIA requests, *Descendants and Heirs of Tulalip Allottee Behalh/Katrina Jim v. Northwest Regional Director*, 53 IBIA 131, 132 (2011), nor does the Board have general supervisory authority over BIA to demand that they produce such a spreadsheet, *Menominee Indian Tribe v. Midwest Regional Director*, 55 IBIA 14, 15 (2012). Therefore, Appellants' request is denied.