



INTERIOR BOARD OF INDIAN APPEALS

Russell L. Hadley v. Northwest Regional Director, Bureau of Indian Affairs

59 IBIA 150 (09/30/2014)



United States Department of the Interior

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

RUSSELL L. HADLEY,)	Order Affirming Decision in Part and
Appellant,)	Reversing in Part
)	
v.)	
)	Docket No. IBIA 12-042
NORTHWEST REGIONAL)	
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS,)	
Appellee.)	September 30, 2014

Russell L. Hadley (Appellant) appealed to the Board of Indian Appeals (Board) from a September 23, 2011, decision (Decision) of the Northwest Regional Director (Regional Director), Bureau of Indian Affairs (BIA), which affirmed the March 25, 2011, decision of BIA’s Puget Sound Agency Superintendent (Superintendent) to increase Appellant’s annual rent from \$4,095 to \$5,000 commencing April 1, 2011, for land located on the Tulalip Reservation in the State of Washington.

Appellant criticizes the Decision and the underlying appraisal of the annual market rent for the leasehold on the grounds that they fail to consider current real estate market conditions or comparable properties, but Appellant provides no evidence to support his criticisms, for which reason we reject them. Appellant also argues that BIA did not give him sufficient advanced notice of the rent adjustment, however, Appellant does not identify any lease or regulatory requirement for earlier notice than he received. The lease expressly allowed an adjustment to occur on April 1, 2011, and Appellant did not object when in 2010 the Superintendent gave him written notice that the rent adjustment was scheduled for April 1, 2011, that the appraisal had been ordered, and that he would receive the adjustment decision by April 1, 2011. Accordingly, we affirm the Decision with respect to the rent increase.

In addition, the Regional Director modified the Superintendent’s decision by making the rent adjustment effective a year earlier, on April 1, 2010, for purposes of the schedule for the next rent adjustment. On our own motion we reverse the modification because it is based on an erroneous interpretation of the Lease.

Background

On April 1, 2006, Appellant entered into a 50-year ground lease for home site and recreation purposes, Lease No. 123 2087500656 HS (Lease), covering Lot 13, Block 1, of the Hermosa Point Summer Homesites on the Tulalip Reservation in Snohomish County, Washington. Lease, Apr. 1, 2006, at 1 (unnumbered) (AR Tab 1).¹ The leased property has a partial water view of Tulalip Bay, which is within Puget Sound. Summary Appraisal Report, May 3, 2011 (May 2011 Appraisal), at 8-9 (AR Tab 12).²

The Lease set the base annual rent at \$4,095. Lease at 1 (unnumbered). Paragraph 7 of the Lease provides that the rent is “subject to review and adjustment . . . at not less than five-year intervals in accordance with the regulations in 25 CFR § 162.”³ *Id.* ¶ 7. Any such rent review “shall give consideration to the economic conditions at the time, exclusive of improvements or development required by the contract or the contribution value of such improvements.” *Id.*; *see also* 25 C.F.R. § 162.607 (same).⁴

On October 6, 2010, the Superintendent sent Appellant a letter stating that pursuant to paragraph 7 of the Lease a rent adjustment was scheduled to occur on April 1, 2011, and that an appraisal had been ordered to determine the fair annual rent. Letter from Superintendent to Appellant, Oct. 6, 2010 (AR Tab 3). The Superintendent advised Appellant that if he did not receive notice of the amount of the rent adjustment by April 1, 2011, then he was to remit the base annual rent. *Id.*

¹ The leasehold is situated in Govt. Lot 1, Sec. 21 and Govt. Lot 5, Sec. 28, T. 30 N., R. 5 E., Western Meridian, Snohomish County, Washington. Lease at 1 (unnumbered).

² The Lease states that the size of the leasehold is 0.15 acre, more or less. Lease at 1 (unnumbered). The appraisal describes the leasehold as 0.072 acre. May 2011 Appraisal at 6, 9. Appellant describes the leasehold as 3,150 square feet, which equates to 0.072 acre, consistent with the appraisal on which the Decision is based. Notice of Appeal at 2 (unnumbered). Therefore, for purposes of Appellant’s appeal, we will assume that the appraisal identifies the correct acreage.

³ The applicable regulation is the regulation in effect at the time the Lease became effective, i.e., 25 C.F.R. § 162.607 (2006). *See Hawkey v. Acting Northwest Regional Director*, 57 IBIA 262, 263 n.3 (2013) (*Hawkey II*).

⁴ Relevant to the Regional Director’s modification of the Superintendent’s decision, the Lease also contains a “note” stating that the rent is “subject to . . . adjustment in the year 2010 and will be adjusted as soon as an appraisal is available.” Lease at 1 (unnumbered).

An appraiser within the Department of the Interior's Office of the Special Trustee for American Indians (OST) conducted the appraisal to provide an opinion on the annual market rent for the subject property. Summary Appraisal Report, Mar. 8, 2011 (March 2011 Appraisal), at 10 (AR Tab 5). The appraiser visited the property and reviewed information regarding it and the Hermosa Point neighborhood, and collected market data regarding the Puget Sound area. *Id.* at 8-10, 13. The appraiser determined that there were adequate sales of similar land in the market area, totaling 32 properties located within the counties of Snohomish, Island, and Skagit, to apply the "sales comparison approach." *Id.* at 13.⁵

The appraiser visited the 32 properties and selected for further review the 8 properties that, like the subject property, lack water frontage but have a water view. *Id.* at 13, 16. Those eight lots are located in the city of Anacortes, in Skagit County. *Id.* at 20. Next, the appraiser excluded from the analysis one lot as much superior to the other sales and the subject property. *Id.* at 16. The appraiser excluded three other lots on the basis of their larger size and also noted that one of them has a less desirable, distant water view, compared to the subject property. *Id.* at 18-19. The appraiser reasoned that, all other factors being equal, small lots typically sell for more per square foot than larger lots. *Id.* at 18.

The appraiser compared the four remaining properties, the sale prices of which ranged from \$130,000 to \$167,500 per unimproved lot,⁶ to the subject property. *Id.* at 19. Because each of these four smallest lots is still more than double the size of the subject property, which the appraiser described as "significantly smaller than market standards," he adjusted each sale price downward to reflect the differences in lot size. *Id.* at 25-26. The appraiser then made additional qualitative adjustments to each comparable sale based on location, access, view, and date of sale. *Id.* at 26. For example, the appraiser found that the four sales occurred in a declining market, between 2006 and 2010, and that this factor

⁵ The sales comparison approach entails a comparison of the property being appraised to similar properties that have recently been sold. March 2011 Appraisal at 15. Adjustments are made to each of the comparable sales to account for major differences between those sales and a hypothetical sale of the appraised property on the open market. *Id.* at 15, 17. Units of comparison, such as price per square foot of property, are applied to arrive at an estimate of the appraised property's market value. *Id.* at 15.

In selecting the sales comparison approach, the appraiser explained that he found no comparable residential leases. *Id.* at 13.

⁶ One of the comparable sales included a mobile home and related site improvements, however, the improvements were considered to have no contributory value because the typical buyer would remove and replace them. March 2011 Appraisal at 23.

called for a downward adjustment of each sale price. *Id.* The appraiser also considered utilities, topography, and the sales terms and conditions, and found that no adjustment was warranted based on those factors. *Id.* Based on the analysis summarized above, the appraiser opined that the market value of the subject property was \$100,000, as of April 1, 2011. *Id.* at 27.

Next, the appraiser applied a 5% market rate of return to the appraised value of the subject property, which made, in his opinion, the annual market rent \$5,000.⁷ *Id.* at 30. The appraisal, which states that it was prepared in accordance with the requirements of the Uniform Standards of Professional Appraisal Practice (USPAP), *id.* at 32, was reviewed for conformance with USPAP and approved by another OST appraiser on March 11, 2011. *See* Northwest Regional Office, OST, Review, Mar. 11, 2011 (AR Tab 5).

On March 25, 2011, the Superintendent mailed Appellant notice that pursuant to paragraph 7 of the Lease the annual rent was adjusted to \$5,000, effective April 1, 2011. Letter from Superintendent to Appellant, Mar. 25, 2011 (Superintendent's decision) (AR Tab 6). Appellant received the Superintendent's decision on March 30, 2011. *Id.* at 3 (unnumbered) (certified mail receipt).

Appellant filed with the Regional Director a notice of appeal objecting to the rent increase and to the issuance of the Superintendent's decision a week prior to the effective date of the increase. Notice of Appeal to Regional Director, Apr. 11, 2011 (AR Tab 7). Upon review of Appellant's appeal, the Northwest Regional BIA office determined that under the Lease the rent adjustment "was due to occur on April 1, 2010 instead of April 1, 2011, and . . . requested that the Appraiser reanalyze the comparable sales data to determine whether the fair market land value had changed." Decision, Sept. 23, 2011, at 4 (AR Tab 15); Request for Real Estate Appraisal Services, Apr. 27, 2011 (AR Tab 9). On May 3, 2011, the appraiser who prepared the March 2011 Appraisal issued a revised appraisal report (May 2011 Appraisal) with an effective valuation date of April 1, 2010. AR Tab 12. The May 2011 Appraisal, which is identical to the March 2011 Appraisal except for certain differences not relevant to the arguments made by Appellant on appeal, utilized the same four comparable sales as before, which as noted occurred between 2006 and 2010. *Id.* at 19. The appraiser opined that the market value of the subject property was \$100,000 on April 1, 2010—the same as it was on April 1, 2011. *Id.* at 27. The May 2011 Appraisal was reviewed and approved by OST. *See* Northwest Regional Office, OST, Review, May 11, 2011 (AR Tab 12).

⁷ Appellant does not challenge BIA's decision to apply the 5% rate of return.

Subsequently, on May 13, 2011, the Regional Director received Appellant's statement of reasons in support of the appeal, which enclosed photos of the subject property and the Hermosa Point neighborhood, and other photos and promotional flyers of four properties in Anacortes.⁸ Statement of Reasons to Regional Director, May 11, 2011, and Encl. (AR Tab 13). Essentially, Appellant contended that the four comparable sales used in the appraisal are distant from and superior to the subject property, and that sales in the Hermosa Point or nearby Marysville area should have been used instead. *Id.* at 1 (unnumbered). BIA's Northwest Regional office requested that OST review Appellant's statement of reasons and submit a response to BIA. Request for Appraisal Services, May 19, 2011 (AR Tab 14). OST responded that the four comparable sales were the best available at the time of the appraisal. Memorandum from Northwest Regional Appraiser, OST, to Northwest Regional Realty Officer, BIA, May 27, 2011, at 1 (unnumbered) (AR Tab 14). OST explained that "[i]t has historically been part of the appraisal problem for Hermosa Point lots that truly comparable sales are seldom found in the immediate area, and the appraiser has to use sales that are not in close proximity to the subject." *Id.* OST agreed with Appellant that the four comparable sales used in the appraisal are superior overall to the subject property, and stated that this is reflected in the appraisal through the adjustments that were made to the sale prices, ranging from a 23.1% to 40.3% total reduction in each of the four sale prices. *Id.* at 1-2 (unnumbered).

On September 23, 2011, the Regional Director issued the Decision, which found that the appraisal was reasonable and supported by the record, rejected Appellant's arguments to the contrary, and affirmed the Superintendent's decision to adjust the annual rent for the leasehold to \$5,000, payable commencing April 1, 2011. Decision at 4-7. The Regional Director, however, modified the Superintendent's decision "to state, consistent with the terms of [the] lease, that the rental adjustment . . . was scheduled for April 1, 2010, instead of April 1, 2011," for purposes of the schedule for the next rent adjustment, which according to the Regional Director is scheduled for April 1, 2015. *Id.* at 7.

Appellant appealed the Decision to the Board. Appellant included arguments in his notice of appeal and attached the statement of reasons that he previously submitted to the Regional Director. In a subsequent letter received by the Board on January 9, 2012, which

⁸ Several of the photos and flyers that depict properties in Anacortes list addresses that are different than the four comparable sales used in the appraisal. It appears that Appellant submitted the photos and flyers primarily to show that properties, including homes, in Anacortes tend to be superior to the subject property and surrounding area. *See* Statement of Reasons to Regional Director at 2 (unnumbered) ("The views these homes have are some of the most magnificent views in all of Anacortes. These are houses listed in this area \$400,000 and up with and without views (see attached flyers))."

we construe as an opening brief, Appellant summarized his arguments. In response, the Regional Director filed an answer brief. Appellant did not file a reply brief.

Discussion

I. Standard of Review

The Board explained its standard of review for residential real estate rent adjustment matters in *Kamb v. Northwest Regional Director*, 52 IBIA 74, 80-81 (2010), as follows:

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.*

With certain exceptions not relevant here, the rental amount for properties leased through BIA shall be the fair market rental value, 25 C.F.R. § 162.604(b), taking into consideration the economic conditions at the time of any rent adjustment, *id.* § 162.607. "Fair annual rental" is defined as "the amount of rental income that a leased tract of Indian land would most probably command in an open and competitive market." *Id.* § 162.101. The determination of fair market rental value "should be made in accordance with generally accepted appraisal principles." *Strain*, 23 IBIA at 118 (citing *Navajo Nation v. Acting Deputy Assistant Secretary - Indian Affairs (Operations)*, 15 IBIA 179, 194 (1987)). However, "the determination of 'fair annual rental' requires the exercise of judgment and . . . reasonable people may differ in their calculation of 'fair annual rental.'" *Strain*, 23 IBIA at 117-18.

BIA's interpretations of lease provisions are subject to *de novo* review. *Dobbins v. Acting Eastern Oklahoma Regional Director*, 59 IBIA 79, 87 (2014) (citing *Seminole Tribe of Florida v. Eastern Regional Director*, 53 IBIA 195, 210 (2011)).

II. Analysis

As we explain below, Appellant has not met his burden of showing that the Regional Director's decision is unreasonable or is not supported by law or substantial evidence. Thus, we affirm the Decision with respect to the rent increase.

Appellant first argues that the annual rent should not be increased because of “current terrible real estate market and general economic conditions,” under which Appellant asserts that “all other property values have declined by as much as fifty percent.” Notice of Appeal at 1 (unnumbered); Opening Brief (Br.). Appellant, however, provides no evidence to support his negative view of the market conditions for water view property in the Puget Sound area, which is the relevant market in this case, nor of its purported effect on the fair annual rental of the leasehold. The Board has previously held that an appellant’s bare assertions, standing alone, are insufficient to satisfy the appellant’s burden of showing that a regional director’s decision is unreasonable. *Linabery v. Acting Great Plains Regional Director*, 53 IBIA 42, 48 (2011). Moreover, the appraisal on which the Decision is based did examine relevant market conditions. The appraisal examined the water view property sales that occurred between 2006 and 2010 in the market area to identify trends in the sale prices over time. May 2011 Appraisal at 17. After finding only a slight decrease, the appraiser explained that, “[w]hile it is generally true that demand for single-family home sites has generally declined over the last four years, water view sites are rarer than an ordinary lot, and thus the decline is much less pronounced.” *Id.* And, as we explained as background, the appraiser made downward adjustments to each of the four comparable sales used in the appraisal based on those sales having occurred in a declining market. *See supra* at 152-53. Thus, Appellant’s general assertions regarding market conditions are inadequate to show that the appraisal and the Decision failed to sufficiently take relevant market conditions into account.

Next, Appellant challenges the Regional Director’s reliance on the four comparable sales used in the appraisal, contending that the properties in Anacortes are “not at all comparable” to the subject property and that the appraiser should have used comparable sales in Hermosa Point or Marysville instead. Opening Br. More specifically, Appellant contends that “the water views on the comparable areas are panoramic, whereas mine would be considered to be a peek-a-boo view.” Notice of Appeal at 1 (unnumbered). Appellant also contends that the resulting appraisal of the leasehold, when considered by the rent amount per square foot, is unrealistically high. *Id.* at 2 (unnumbered).

The fundamental problem with Appellant’s challenge to the Regional Director’s reliance on the four comparable sales in Anacortes is that the appraiser found no comparable water view sales in Hermosa Point or Marysville, and Appellant has failed to meet his burden on appeal to show that any were overlooked. As we have said, a bare assertion that evidence was not considered is insufficient to show that the Decision is unreasonable. *Linabery*, 53 IBIA at 48. Further, there appears to be no dispute that properties in Anacortes are generally superior to those in Hermosa Point, and that the four comparable sales used in the appraisal are superior overall to the subject property. The Decision and the record show that significant differences were taken into account through

quantitative adjustments for lot size and through various other qualitative adjustments. Decision at 6; May 2011 Appraisal at 26.

With respect to the quality of the view in particular, the appraiser categorized the water view for two of the comparable sales as “good,” the third as “distant,” and the fourth as “partial.” May 2011 Appraisal at 19. To the extent that Appellant contends the four comparable sales offer panoramic views, that contention is unsupported. *See supra* note 8. The appraiser accounted for the differences in the quality of view by adjusting three of the comparable sales downward, while he considered the fourth to be equivalent to the subject property. *Id.* at 26. Appellant does not show that these or any other adjustments made (or not made) to the comparable sales are erroneous or inadequate. While the decision on the fair annual rental of the leasehold, as measured per square foot, may seem excessive to Appellant, he does not dispute that, all other factors being equal, a smaller lot typically sells for more per square foot than a larger lot, and he does not demonstrate that the appraisal is unreasonable in light of the small size of the leasehold. In sum, none of Appellant’s arguments rise above disagreement with the appraisal’s selection and evaluation of the comparable sales, and that is not enough to establish that the Decision is in error or unreasonable. *See Hawkey v. Acting Northwest Regional Director*, 52 IBIA 86, 91 (2010) (*Hawkey I*).

Finally, Appellant contends that he did not receive adequate advanced notice of the rent adjustment. Notice of Appeal at 1 (unnumbered). We are not persuaded. Appellant does not identify any Lease provision or regulation entitling him to more advanced notice of the rent adjustment than he received. Appellant should not have been surprised when he received the Superintendent’s decision on March 30, 2011, that the rent was being increased effective April 1, 2011. *See* AR Tab 6. The Lease expressly allowed an adjustment on April 1, 2011. *See* Lease ¶ 7. And Appellant had received a letter from the Superintendent more than 5 months earlier, on October 22, 2010, notifying him that pursuant to paragraph 7 of the Lease a rent adjustment was scheduled for April 1, 2011, that the appraisal had been ordered, and that he would receive the adjustment decision by April 1, 2011. AR Tab 3. Appellant did not object to such notice until after the adjustment was made on April 1, 2011. Even were we to find fault with the Superintendent’s issuance of the decision a week prior to the effective date of the adjustment—which under the facts of this case we do not—Appellant does not allege any prejudice to him apart from general surprise.

It appears that both Appellant and the Regional Director interpreted the notation in the Lease stating that the rent was “subject to . . . adjustment in the year 2010 and will be adjusted as soon as an appraisal is available,” Lease at 1 (unnumbered), as *requiring* a rent adjustment on April 1, 2010. *See* Notice of Appeal at 1 (unnumbered) (Appellant argues that when the rent was not adjusted on April 1, 2010, he assumed that the rent would

remain the same for the next 5 years); Answer Brief at 5 (The Regional Director contends that the Lease “requir[ed]” an adjustment in 2010 and that there was a 1-year “delay” in giving notice of the “2010 adjustment.”). Based on his interpretation of the Lease, the Regional Director modified the Superintendent’s decision to make the rent adjustment effective April 1, 2010, for purposes of scheduling the next rent adjustment. Decision at 7. We conclude that the Lease did not require any rent review and adjustment in 2010. The language of the Lease states that the rent is “subject to” adjustment in 2010—not that it “shall be” adjusted then—and that any such adjustment was to occur only when an appraisal became available. Lease at 1 (unnumbered). The earliest possible date of an adjustment was when the March 2011 appraisal was finalized on March 11, 2011. While it was reasonable for the Superintendent to issue the decision making the adjustment effective April 1, 2011, there was no basis for the Regional Director to conclude that the next 5-year review and adjustment may occur in 2015, rather than 2016. We therefore reverse the Regional Director’s modification of the Superintendent’s decision, which had no effect on the amount of the rent increase, and affirm the Decision in remaining part.

Conclusion

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 reverses in part the Regional Director’s September 23, 2011, decision.

I concur:

// original signed
Thomas A. Blaser
Administrative Judge

//original signed
Steven K. Linscheid
Chief Administrative Judge