



INTERIOR BOARD OF INDIAN APPEALS

John W. Hicks v. Northwest Regional Director, Bureau of Indian Affairs

59 IBIA 285 (01/07/2015)



United States Department of the Interior

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

JOHN W. HICKS,)	Order Vacating Decision and
Appellant,)	Remanding
)	
v.)	
)	Docket No. IBIA 12-050
NORTHWEST REGIONAL)	
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS,)	
Appellee.)	January 7, 2015

John W. Hicks, Esq. (Appellant) appealed to the Board of Indian Appeals (Board) from a November 17, 2011, decision (Decision) of the Northwest Regional Director (Regional Director), Bureau of Indian Affairs (BIA), affirming the decision of the Puget Sound Agency Superintendent (Superintendent) to increase Appellant’s annual rent from \$5,040 to \$8,750 for Lot 1 of the Raymond J. Paul Waterfront Tracts on the Swinomish Indian Reservation, in Skagit County, Washington. In sum, Appellant argues that the rent increase is based on a flawed appraisal of Lot 1’s market value and contrary to real estate market conditions, including a 1.22% median increase in the tax assessed values of other properties in Skagit County. Because the Regional Director does not sufficiently address Appellant’s allegations of error in the Decision, and defends the appraisal with assertions not supported by the record, we vacate the Decision and remand the matter to the Regional Director for further consideration.

Background

On August 1, 2006, Appellant entered into a 50-year ground lease for home site and recreation purposes, Lease No. 122 2087740656 HS (Lease), covering Lot 1 of the Raymond J. Paul Waterfront Tracts.¹ Lease, Aug. 1, 2006, at 1 (unnumbered) (Administrative Record (AR) Tab 2). Lot 1 is located within the Pull and Be Damned area

¹ The leasehold is situated in Government Lot 3, Section 34, Township 34 North, Range 2 East, Western Meridian, in Skagit County, Washington. Lease at 1 (unnumbered).

of the Swinomish Indian Reservation and consists of an approximately 0.382-acre² “waterfront lot with a good water view.” Summary Appraisal Report, July 5, 2011 (Appraisal), at 16 (AR Tab 7). The Lease set the initial annual rent at \$5,040 with a \$10 tideland fee. Lease at 1 (unnumbered). There is no evidence in the record to indicate the source for the \$5,040 initial rent. There is some evidence that it may have been agreed upon without a current appraisal.³

Paragraph 7 of the Lease provides that the annual rent is “subject to review and adjustment . . . at not less than five-year intervals in accordance with the regulations in 25 CFR 162.” *Id.* ¶ 7; *see also* 25 C.F.R. § 162.607 (2006) (leases “shall provide for periodic review, at not less than five-year intervals, of the equities involved”).⁴ Pursuant to the Lease and the regulations, “[s]uch 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.” Lease ¶ 7; 25 C.F.R. § 162.607 (same).

Several months prior to the 5-year anniversary of the Lease, the Superintendent sent Appellant and all other tenants along Pull and Be Damned Road a letter on April 8, 2011,

² The Lease identifies the size of the leasehold as 0.15 acre. Lease at 1 (unnumbered). The Appraisal shows the leasehold to be 0.382 acre. Appraisal at 6. As we discuss *infra*, Appellant does not dispute that 0.382 acre is the approximate legal size of the leasehold, but contends that the appraiser should have applied a physical size of 0.288 acre instead.

³ The Lease states that the rent was subject to rental adjustment on August 1, 2007, *see* Lease at 1 (unnumbered), and in 2008 the Superintendent notified Appellant that, based on an appraisal done in 2006, the annual rent was increased to \$8,500. Letter from Superintendent to Appellant, June 23, 2008, at 1 (unnumbered) (AR Tab 6). The 2006 appraisal appears to have been prepared before the Lease was executed, and arrived at a substantially higher rental value than \$5,040. *See* Appraisal, Feb. 11, 2006 (2006 Appraisal), at 37 (AR Tab 5). But it included markedly differing land value assessments and rates of return, for purposes of calculating rental value. *Compare id.* at 36 with Appraisal Review Report, Oct. 4, 2006, at 4 (AR Tab 5). Appellant objected to the increase as violating paragraph 7 of the Lease, *see infra*, and BIA’s leasing regulations, and the matter was apparently dropped and the initial rent left in place.

⁴ We cite to BIA’s leasing regulations in effect at the time the Lease became effective in 2006. *See Hawkey v. Acting Northwest Regional Director*, 57 IBIA 262, 263 n.3 (2013). In January 2013, new leasing regulations became effective. *See* 77 Fed. Reg. 72440, 72440 (Dec. 5, 2012). For ground leases governed by the new regulations, “a review of the adequacy of rent must occur at least every fifth year, in the manner specified in the lease.” *Id.* at 72478 (new § 162.328(c)).

inviting them to an educational forum at which BIA planned to discuss a new method for making rent adjustments based on an index. Letter from Superintendent to Tenants, Apr. 8, 2011 (April 8 Letter) (Opening Brief (Br.), Encl.); Answer Br. at 10. The Superintendent explained that, for leases that have been modified to incorporate the new method, rent adjustments would be made every 4 years based on the median percentage change in Skagit County's tax assessed values of 253 parcels of comparable land in the vicinity of the town of La Conner, and every 12 years based on an appraisal. April 8 Letter at 1-2 (unnumbered). The letter states that, for the 2007 through 2011 tax years, the median change was an increase of 1.22%. *Id.* at 1 (unnumbered). According to Appellant, he attended the forum and met with Solicitor's Office counsel for BIA to discuss modifying his Lease, and was told that a new appraisal would be needed and his Lease would not be modified at that time. Opening Br. at 2.

Subsequently, for purposes of making the first adjustment to Appellant's rent under paragraph 7 of the Lease, an appraiser with the Office of Appraisal Services (OAS), within the Office of the Special Trustee for American Indians, conducted an appraisal to provide an opinion on the annual market rent for Lot 1 as of the effective date of the appraisal, August 1, 2011. Appraisal at 10. The appraiser found that a comparison of leases in the Puget Sound market area was not possible, but that there were adequate similar land sales in the market area to employ the sales comparison approach to estimate the market value for Lot 1, if sold as fee simple, unimproved land. *Id.* at 13, 25.⁵

The appraiser visited Lot 1 and 59 other properties in the Puget Sound market area that sold between 2006 and 2011. *Id.* at 10, 13. The appraiser identified two segments in the waterfront market: "traditional suburban" lots in highly developed subdivisions, and "natural" lots in more rural settings. *Id.* at 16. After determining that the Pull and Be Damned area most closely resembles a natural setting, the appraiser selected four sales of natural waterfront lots for further review and comparison to Lot 1. *Id.* The four comparable properties sold for prices ranging from \$95,000 to \$520,000. *Id.* The appraiser considered characteristics of the properties and the transactions that may explain variances in prices paid for real property, including market conditions, property rights conveyed, lot size, width, bank type, and utilities. *Id.* at 16-18, 24. With respect to market conditions, the appraiser found that "in the time period prior to the effective date of the appraisal [the market] was still in decline." *Id.* at 17. The appraiser also stated that, due to

⁵ The sales comparison approach entails comparison of the subject property with recent sales of properties with similar design and utility. Appraisal at 15. Adjustments are made to account for major differences between the comparable sales and the subject property, such that the resulting market price of each comparable sale should be an indication of the value of the subject property in the current sales market. *Id.*

their rarity, the demand for waterfront properties is less elastic than for non-waterfront properties. *Id.*

In his comparison, the appraiser found that three of the four comparable sales were superior overall to Lot 1 due to a combination of factors. *Id.* at 24. Comparable Sale #1, which sold for the least amount, \$95,000, was considered inferior overall to Lot 1 due to inferior lot width, bank type, and utilities. *Id.* at 20, 24. With respect to lot width, in particular, the appraiser found that Lot 1 had a width of 65.15 feet, which was an average of its width at the bank (40.94 feet) and at the road frontage (89.35 feet), and that Comparable Sale #1 had an inferior width of 50 feet. *Id.* at 9, 24. The remaining three comparable properties were determined to have similar or superior widths as compared to Lot 1, ranging from 66 to 220 feet. *Id.* at 24. In addition, the appraiser noted that Comparable Sale #2 included the tidelands in the sale, whereas Lot 1 (and all other properties in the Pull and Be Damned neighborhood) lacks exclusive rights to the tidelands. *Id.* at 7, 24.

Based on this analysis, the appraiser determined that the range of values for Lot 1 was between the two lowest comparable sale prices, i.e., greater than \$95,000 (Comparable Sale #1) and below \$235,000 (Comparable Sale #3). *Id.* at 24. The appraiser opined that, “[c]onsidering current market conditions,” the market value of the fee simple interest in Lot 1 was \$175,000. *Id.*

The appraiser then analyzed the market rates of return for various financial instruments. *See id.* at 26-27. The appraiser considered the rates used for the master lease of the nearby Shelter Bay community, commercial real estate properties, Treasury securities, tax-free municipal bonds, and corporate bonds, as well as the statutory 5% rate for recreational cabin sites in national forests.⁶ *Id.* The appraiser considered the investment risk versus return profile for each of the foregoing, and concluded that the 5% rate used by the Forest Service was the most appropriate to be applied to Lot 1. *Id.* at 27. Applying the 5% rate of return to the appraised value of Lot 1 made, in the appraiser’s opinion, the annual market rent \$8,750. *Id.* The Appraisal was then reviewed and approved by an OAS review appraiser. Northwest Regional Office, OAS, Review, July 15, 2011, at 1-4 (AR Tab 7).

On July 28, 2011, the Superintendent informed Appellant of the estimated market value of Lot 1 and advised him that, pursuant to paragraph 7 of the Lease, the annual rent

⁶ *See* 16 U.S.C. § 6206; 71 Fed. Reg. 16622, 16633 (Apr. 3, 2006) (Procedures for Appraising Recreation Residence Lots and for Managing Residence Uses Pursuant to the Cabin User Fee Fairness Act).

would be increased to \$8,750, effective August 1, 2011. Superintendent's Decision, July 28, 2011, at 1 (unnumbered) (AR Tab 8). The Superintendent included a paragraph referring to the new type of index leases and suggesting that Appellant contact BIA for a modification of the Lease. *Id.* at 2 (unnumbered). The Superintendent did not provide Appellant with a copy of the Appraisal.

Appellant appealed the rent adjustment decision to the Regional Director. Notice of Appeal to Regional Director, Aug. 12, 2011 (AR Tab 9). In his statement of reasons, Appellant raised several issues concerning the estimated market value of Lot 1, mostly consisting of one-or-two-sentence assertions. For example, Appellant stated that the lot is "pie-shaped" and has a width of 40.94 feet "at the bank level, not at the water's edge," whereas "[m]ost other lots enjoy 50 feet." Statement of Reasons, Aug. 29, 2011 (SOR), at 1 (AR Tab 10); *see also* Appraisal at 7 (noting that most lots in the Pull and Be Damned area are approximately "50 feet in width"). Appellant also alleged that there was an encroachment on Lot 1 from adjoining Lot 2. SOR at 1. Next, Appellant asserted that there was a dilapidated outhouse on another neighboring lot, and that nearby Nanna Lane "has become a junkyard for abandoned vehicles and boats," and blights the area. *Id.* at 1-2. In addition, Appellant contended that since the start of the Lease, vegetation growing between Lot 1 and a neighboring parcel had reduced his view by 35%, and that he was denied permission to reduce the vegetation. *Id.* Addressing the Superintendent's April 8 letter regarding the new method for determining rent adjustments, Appellant stated that in reliance on the letter he attended the educational forum and met with an attorney in the Solicitor's Office on May 5, 2011, and "was then told that a new appraisal would be needed and that the existing lease would not be modified." *Id.* at 2. Finally, Appellant expressed frustration that he had not been provided a copy of the Appraisal. *Id.* He also complained that he had submitted a Freedom of Information Act (FOIA) request to BIA for copies of appraisals of other lots and that he had not received the requested documents. *Id.* at 1-2; *see also* Letter from Superintendent to Appellant, Aug. 31, 2011, at 1 (unnumbered) (AR Tab 11).

Upon receiving the Appraisal for Lot 1, Appellant submitted an amended statement of reasons. Amended Statement of Reasons, Sept. 6, 2011 (AR Tab 12). Appellant argued that it was erroneous for BIA to apply the 5% rate of return, because, according to Appellant, the comparable sales used in the Appraisal included the value of "improvements made to the propert[ies] such as water, sewer, septic, roads, clearing and other matters." *Id.* at 2. Quoting a portion of the definition of "recreation residence lot" in the Forest Service's regulations, 36 C.F.R. § 251.51, Appellant argued that the four comparable sales would have a lesser value if they were in their "native state" and a buyer had to install the so-called improvements. *Id.* at 1-2. Appellant concluded by stating that "improvements should not be included in the value determination of [Lot 1]." *Id.* at 2.

On November 17, 2011, the Regional Director issued the Decision affirming the rent adjustment to \$8,750. Decision, Nov. 17, 2011 (AR Tab 13). The Regional Director briefly addressed each issue raised by Appellant, with the exception of his assertions regarding the conditions on Nanna Lane and the reduced view. *Id.* at 4-5. The Regional Director concluded that Appellant had failed to show that the rent adjustment was unreasonable. *Id.* at 5.

Appellant appealed the Decision to the Board. He filed a notice of appeal and an opening brief. The Regional Director filed an answer brief, and Appellant replied. After the close of briefing, Appellant filed a supplemental reply brief. The Regional Director filed a brief in response, which the Board construed as a motion to disregard Appellant's supplemental reply brief. The Board afforded Appellant an opportunity to respond to the motion, and he filed a statement in which he made more arguments regarding his FOIA request.

Discussion

I. Standard of Review

The Board reviews the Regional Director's decision to determine whether it comports with the law, is supported by substantial evidence, and is not arbitrary or capricious. *Kamb v. Acting Northwest Regional Director*, 52 IBIA 74, 80 (2010) (citing *Strain v. Acting Portland Area Director*, 23 IBIA 114, 118 (1992)). We apply a *de novo* standard when reviewing the sufficiency of the evidence. *Clingan v. Northwest Regional Director*, 56 IBIA 185, 189 (2013). Appellant bears the burden of demonstrating error in the Regional Director's decision. *Kamb*, 52 IBIA at 80; *see also Strain*, 23 IBIA at 118 ("The burden of proving a rental adjustment unreasonable is on the person who challenges it.").

II. Analysis

As we understand Appellant's arguments on appeal, the Regional Director did not adequately respond to Appellant's allegations of error in the Appraisal regarding lot dimensions, neighborhood conditions, view, and rate of return, and Appellant raises new allegations of error. Appellant also argues that the Regional Director's decision to increase the rent to \$8,750 is unreasonable as it represents a 74% increase over the initial rent and is disproportionate to general real estate market conditions and to the 1.22% median increase in the tax assessed values of other properties in Skagit County during the adjustment period. Finally, Appellant contends that BIA has failed to produce rent information for other similar properties, which he contends is necessary to determine whether BIA's rent determinations are inconsistent with one another.

Based on Appellant's allegations that the Decision is erroneous and does not address his objections to the Appraisal, compounded by several defenses by the Regional Director that lack support in the record, we vacate the Decision and remand the matter for further consideration. In doing so, we leave for the Regional Director to consider on remand, as appropriate, several new allegations of error that are outside the scope of this appeal. We reject Appellant's challenge to BIA's use of the 5% rate of return. We also reject Appellant's argument that the effective 74% increase in Appellant's rent over the initial rent, standing alone, requires that the Decision be set aside. We express no opinion on whether the 1.22% median increase in the tax assessed values of other properties in Skagit County is relevant to a determination of the fair rental value of Lot 1. Finally, we leave it for BIA to address, on remand, Appellant's argument that BIA must disclose the rents being charged on other properties in the Pull and Be Damned area in order to permit a transparent evaluation of whether BIA is making decisions that are consistent with one another.

A. Appellant's Allegations of Error in the Appraisal

1. Lot shape and dimensions

Appellant argues that the Appraisal, and the subsequent Decision, did not properly consider the pie shape and "frontage" of Lot 1 relative to other properties. Opening Br. at 4-6. While unclear, Appellant appears to believe that the width of Lot 1 should be measured at the bank, whereas the appraiser applied its average width. *See id.*; Appraisal at 9, 24. Appellant also argues that the Regional Director wrongly dismissed the alleged encroachment on Lot 1. Opening Br. at 3. For the first time on appeal, Appellant argues specifically that the encroachment reduces the physical or "usable" size of Lot 1 from approximately 0.303 acre to 0.288 acre, and he submits a declaration to support that assertion. *Id.* at 4 and Attach. (Van Buren Declaration). In addition, according to Appellant, the appraiser should have estimated the market value of Lot 1 based on its reduced physical size instead of its legal size of approximately 0.382 acre, because the legal size includes beyond-bank area that is less usable, i.e., cliff and restricted use tidelands. *Id.* at 4.

In the Decision, the Regional Director responded that the appraiser took into account Lot 1's "pie shape, bank type, and waterfront footage." Decision at 4 (citing Appraisal at 8-9). The Regional Director also responded that no encroachment was obvious to the appraiser, or else it would have been noted, and that Appellant could raise the alleged encroachment with the tribal planning office if it presented a problem. *Id.* On appeal, the Regional Director further asserts that even if the physical size of the property is less than shown in the Appraisal, it would "not impact the market value," because of the small difference, and because the lot remains one of the largest lots along Pull and Be Damned Road. Answer Br. at 6-7. And, as reasons for valuing Lot 1 based on its legal size

rather than its physical size, the Regional Director states that the Lease incorporates the legal description of the leasehold, which includes the land from the edge of the bank “to the line of ordinary high water,” and that the appraiser used the legal size of Lot 1 for comparison to the reported legal sizes of the comparable sales. *Id.* at 5-6 (quoting Lease, Ex. A (Legal Description)); *see also* Appraisal at 6 (stating that “[t]he lot sizes reported for the comparable sales are . . . the legal sizes, and thus the legal size is used for [Lot 1] for accurate comparison”).

Whether or not the Regional Director’s assertions regarding lot shape and dimensions may prove correct, they are not adequately supported by the record. While the appraiser made no mention of an encroachment, we have no way of knowing whether he considered the condition described by Appellant as an encroachment from a neighboring lot. And whether the purported encroachment could affect market value would seem to be a matter for the appraiser to consider, and not one we can determine based solely on the Regional Director’s argument in his brief. As for the proper way to consider the property’s width—the average width, or the bank frontage, or the water frontage—we leave this for the Regional Director to address on remand. We note, however, that the Appraisal is not clear in describing the widths of the comparable properties, i.e., whether what is enumerated is the average width, bank frontage, or water frontage. We therefore set aside the Decision and remand the matter for further consideration.

With respect to Appellant’s other contention that the appraiser should have applied the physical size of the property, Appellant has not met his burden to show that use of the legal size instead was unreasonable. *See Strain*, 23 IBIA at 118. Appellant does not dispute that the legal size of Lot 1 is 0.382 acre, and in his reply brief Appellant states only that he “simply makes it very clear that a significant portion of the lot is not usable (cliff) and the beach area[] abutting each lot has severely restricted use.” Reply Br. at 2. Appellant does not address the Regional Director’s explanation that the legal size was used for accurate comparison to the comparable sales, and does not otherwise show how the use of the legal size affects the reasonableness of the Appraisal, which included a site visit, noted that Lot 1 lacks exclusive rights to the tidelands, and made adjustments to the comparable sales based on whether the property rights conveyed included the tidelands. Appraisal at 6-7, 10, 24.

2. Neighborhood conditions and view

Appellant also contends that the Regional Director did not adequately address his allegations regarding a dilapidated outhouse and abandoned vehicles near Lot 1, and diminished view, as compared to the start of the Lease, resulting from overgrown vegetation. Opening Br. at 3. In his Decision, the Regional Director responded regarding the outhouse only. The Regional Director stated that the alleged outhouse on a nearby property “has no bearing” on the value of Lot 1 because the appraiser valued Lot 1 as

unimproved land and “did not consider any structures on other properties” when valuing Lot 1. Decision at 4. Assuming that the appraiser excluded the value of structures, if any, on the comparable sales properties,⁷ it appears that the appraiser did consider general conditions or aesthetics of the neighborhood. See Appraisal at 7, 16. Considering that the appraiser visited the site, this may mean that the appraiser was well aware of various aesthetic-related conditions in the neighborhood. But in the absence of consultation by the Regional Director with the appraiser to address Appellant’s appeal from the Superintendent’s decision, we have no way of knowing. In dismissing Appellant’s allegations solely because the properties were compared for value without improvements, the Regional Director arguably misses the point. While we express no opinion on the effect, if any, of the alleged outhouse and abandoned vehicles on the market value of Lot 1, the record does not seem to support the Regional Director’s apparent conclusion that the alleged outhouse and abandoned vehicles are completely irrelevant to the property’s market value. The Regional Director should address this issue on remand.

The Decision did not respond to Appellant’s allegation that the view from Lot 1 has been diminished by 35% from the start of the Lease due to overgrown vegetation. The Appraisal does recognize that the quality of the view affects value, and that “view is often a factor of elevation, vegetation, (such as trees), distance, and improvements on nearby properties.” *Id.* at 17. The appraiser visited Lot 1 on April 20, 2011, and found that Lot 1 had a “good water view,” which was “similar” to each of the four comparable sales. *Id.* at 10, 16, 24. Based on the findings regarding the view from Lot 1 at the time of the Appraisal, which was the time period relevant to the appraiser’s comparison of Lot 1 to the comparable sales, it is possible that Appellant’s allegation regarding the view is entirely misplaced because it fails to address the view in relation to the comparable properties. On the other hand, the Decision did not respond at all to the diminished-view argument. And on appeal, the Regional Director defends the Appraisal as reliable, among other reasons, by comparing it to the prior estimate of annual market rent in 2006, Answer Br. at 11, which is the baseline from which Appellant contends the view has diminished by 35%. And as Appellant points out, the 2006 appraisal also included a much lower appraised market value of Lot 1 by the appraiser, before an OAS review appraiser arrived at a higher estimate of the land value. Reply Br. at 1; see *supra* note 3. Both parties cherry pick from portions of the 2006 appraisal and the OAS review of that appraisal, but the fact that it never served as

⁷ We note that the Appraisal contains photographs of two comparable properties that show what appear to be improvements, and we cannot determine whether the appraiser made any adjustments to the sales prices to subtract the value of improvements. See Appraisal at 20, 23. In addition, it is unclear whether other comparable properties contained improvements, and if so, whether an appropriate adjustment to the sales price was made to estimate the “land-only” value.

the basis for any final decision undermines the Regional Director's ability—particularly on appeal—to use it as a defense. Thus, the Regional Director should address the view issue on remand as well.

3. New allegations of error

For the first time on appeal, Appellant raises several new arguments. As we understand the arguments, they are: (1) the Indian trust status of Lot 1 and other properties in the Pull and Be Damned area reduces their value relative to fee-owned properties; (2) the Appraisal should have considered other rentals instead of comparable sales in estimating the market value of Lot 1; (3) the rents of nearby properties demonstrate that the rent adjustment for Lot 1 is too high; and (4) the comparable sales were not properly adjusted to account for differences from Lot 1. Opening Br. at 3-7. The Regional Director objects to these arguments as outside the scope of the appeal. Answer Br. at 11-12.

The scope of the Board's review ordinarily is "limited to those issues that were before the . . . BIA official on review." 43 C.F.R. § 4.318. Thus, the Board ordinarily will decline to consider for the first time on appeal matters that were not, but could have been, raised to the Regional Director. *See id.*; *Drew v. Acting Northwest Regional Director*, 56 IBIA 132, 144 (2013); *Kamb*, 52 IBIA at 84. We see no reason to make an exception here. Accordingly, we decline to consider Appellant's new arguments as outside the scope of this appeal and leave them for the Regional Director to consider on remand, as appropriate.

B. Rate of Return

Appellant next challenges the decision to apply the Forest Service's 5% statutory rate of return to the appraised market value of Lot 1. According to Appellant, the Forest Service's rate of return applies to recreation residence lots valued in their "natural, native state," without improvements. Opening Br. at 7 (citing 36 C.F.R. § 251.51 (definition of "recreation residence lot")).⁸ Appellant argues that the appraiser, in contrast, erroneously valued Lot 1 and the comparable sales as including so-called "improvements" such as

⁸ While we express no opinion on how the Forest Service's regulations, which have no bearing on our decision, should be interpreted, we note that Appellant leaves out the portion of the definition stating that recreation residence lots include "septic systems, water systems, boat houses and docks, major vegetative modifications, and so forth." 36 C.F.R. § 251.51; *see also* 71 Fed. Reg. at 16635 ("access, utilities, and facilities that service a typical lot . . . shall be included as features of the typical lot to be appraised").

“water, sewer, septic, roads, clearing and other matters.” Opening Br. at 7; Reply Br. at 2. Appellant is correct that, when estimating the value of Lot 1 based on the comparable sales, the appraiser considered the existence and quality of utilities, roads, and the like. Appraisal at 9, 17, 20-24. Appellant errs in referring to utilities, roads, and the like as improvements. For purposes of the Appraisal, improvements are structures and fixtures, such as houses. *Id.* at 9.

Appellant also errs in criticizing the Appraisal for including utilities, roads, and the like in the value estimate of Lot 1. The Regional Director explained that the appraiser did not select the Forest Service’s rate of return based on the degree to which Lot 1 and the comparable sales fit the definition of a recreation residence lot. Decision at 5 (citing Appraisal at 27). The appraiser did so on the basis that, among the risk versus return profiles of various types of financial instruments considered in the Appraisal, Appellant’s long-term lease most closely corresponds to the Forest Service’s leases of recreation residence lots.⁹ *Id.* (citing Appraisal at 26-27). Appellant does not show that the appraiser’s choice of the 5% rate of return, and BIA’s reliance on it, is flawed. Thus, we affirm BIA’s decision to apply the 5% market rate of return.¹⁰

C. Rent Increase Relative to Market Conditions

While we have determined that Appellant’s allegations of error warrant remand, and may result in a different rent adjustment decision, we also address, and reject in part, Appellant’s argument that the effective 74% increase over the initial rent is unreasonable on its face, as compared to a general decline in the real estate market, and as compared to the 1.22% median increase in the tax assessed values of other properties in Skagit County during a 4-year period. Opening Br. at 6; Reply Br. at 4.¹¹

⁹ Thus, whether or not the comparable sales properties included in the Appraisal contained improvements (i.e., structures or fixtures, such as houses), *see supra* note 7, is also irrelevant to the decision to apply the 5% rate of return.

¹⁰ The Board previously rejected BIA’s adoption of the Forest Service’s rate of return when BIA failed to support its decision to do so. *Drew*, 56 IBIA at 139-40. That is not the case here.

¹¹ Appellant’s arguments regarding the reasonableness of the rent increase relative to any market conditions do not appear to have been raised until this appeal. But the Regional Director does not object to the arguments on that basis, and responds to them on appeal. In our discretion under 43 C.F.R. § 4.318, we address the parties’ arguments.

As a threshold issue, Appellant questions why BIA contracted for an appraisal instead of applying the 1.22% median increase to his initial rent. Opening Br. at 1-2. The answer—apart from the fact that Appellant’s lease does not incorporate the new index method—may well be that BIA suspects that Appellant’s initial rent was, in fact, below the fair rental value. Whether or not that is the case, the record before the Board lacks any evidence to support the initial rent, and in the absence of a reliable benchmark, the 1.22% figure certainly provides no basis for us to find the Regional Director’s reliance on a current appraisal unreasonable.

For the same reason, we have no basis to determine whether the 74% increase, as compared to Appellant’s initial rent, is meaningful. “[T]he fact that a rental adjustment results in a substantial increase does not prove that it is unreasonable.” *Strain*, 23 IBIA at 118. Instead, the Board has allowed that a significant increase could suggest that “previous rental rates were unrealistically low,” or reflect a market increase. *Id.* Thus, we conclude that the effective 74% rent increase over Appellant’s initial rent, standing alone, does not require that the Decision be set aside. See *Morris v. Northwest Regional Director*, 59 IBIA 266, 272-73 (2014) (rejecting the appellant’s argument that an effective 42% rent increase over the initial rent was “simply unjustifiable”). Nor do we find sufficient Appellant’s argument that “[v]alues, generally, in the region have fallen as much as 40% since the real estate bubble burst.” Opening Br. at 6. The Board has rejected such generic arguments as insufficient to meet an appellant’s burden to show that the rent adjustment decision is unreasonable. *Hadley v. Northwest Regional Director*, 59 IBIA 150, 156 (2014) (while the appellant complained of poor economic conditions generally, he “provide[d] no evidence to support his negative view of the market conditions for water view property in the Puget Sound area,” which was the relevant market in that case).

Ultimately, in light of Appellant’s allegations of error in the Appraisal, for which we vacate the Decision and remand the matter, we need not decide whether it would be appropriate to do so based solely on the disparity, which remains unexplained on the record before us, between the amount of the rent increase over the initial rent and the 1.22% median increase in tax assessed values of other properties in Skagit County.

D. FOIA Requests

On appeal, Appellant argues that he submitted four FOIA requests to BIA regarding leases and appraisals for other properties in the Pull and Be Damned area, and has not received the requested documents.¹² Opening Br. at 8; Reply Br. at 4. To the extent

¹² Appellant did not provide the Board with copies of the FOIA requests or any responses by BIA.

Appellant seeks relief under FOIA, the Board lacks jurisdiction over FOIA requests or appeals, *Drew*, 56 IBIA at 144 n.15, and thus we do not consider Appellant’s FOIA challenge. On the other hand, to the extent Appellant is contending that BIA’s record for determining rental rates should include the appraisals and rental determinations for other comparable properties in the Pull and Be Damned neighborhood, in order to ensure that BIA’s appraisals and rental rate decisions are consistent with one another, we leave it for the Regional Director to respond on remand.

E. Supplemental Briefing

Finally, we grant the Regional Director’s motion to disregard Appellant’s supplemental reply brief. The supplemental reply brief was submitted several months after the close of merits briefing, and Appellant has not convinced us that additional briefing was necessary. *See* 43 C.F.R. § 4.311(b) (an appellant may reply to an answering brief within 15 days of receipt, and, “[e]xcept by special permission of the Board, no other briefs will be allowed on appeal”). Even were we to consider the supplemental reply brief—which discusses the tax assessed value of structures and buildings in Skagit County, not unimproved land—we would reject it on the merits for reasons we have already discussed.

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 vacates the Decision and remands the matter for further consideration and issuance of a new decision.

I concur:

 // original signed
Thomas A. Blaser
Administrative Judge

 //original signed
Steven K. Linscheid
Chief Administrative Judge