



INTERIOR BOARD OF INDIAN APPEALS

Estate of Thomas R. Kamb v. Northwest Regional Director, Bureau of Indian Affairs

60 IBIA 289 (05/08/2015)

Related Board case:
52 IBIA 74



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ESTATE OF THOMAS R. KAMB,)	Order Affirming Decision
Appellant,)	
)	
v.)	
)	Docket No. IBIA 13-054
NORTHWEST REGIONAL)	
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS,)	
Appellee.)	May 8, 2015

Thomas R. Kamb¹ (Appellant) appealed to the Board of Indian Appeals (Board) from a December 20, 2012, decision of the Northwest Regional Director (Regional Director), Bureau of Indian Affairs (BIA). The Regional Director affirmed a decision by BIA's Puget Sound Agency Superintendent (Superintendent) to adjust Appellant's annual rent for Lot 2 of the Dr. Joe Waterfront Tracts in the Pull & Be Damned area of the Swinomish Reservation, from \$6,200, the initial lease rent set in 2002, to \$7,250, effective June 1, 2012.²

Appellant contends that BIA hides information regarding other leases by making Freedom of Information (FOIA) requests cost-prohibitive; that BIA used a legally impermissible methodology to appraise the rental value of Lot 2; and that BIA cannot justify the appraiser's use of 5% as the rate of return for converting the estimated market value of Lot 2 to its rental value.

We decline to consider Appellant's FOIA-related argument because it is raised for the first time on appeal. We reject Appellant's remaining arguments because BIA's methodology is permissible under the regulations and the appraiser's use of 5% was reasonably explained and is supported by the record.

¹ On May 12, 2014, the Board received a notice from John G. Kamb, Jr., Personal Representative of the Estate of Thomas R. Kamb, to substitute the Estate of Thomas R. Kamb as Appellant. The Board has revised the caption of the case accordingly.

² The lease is identified as Lease No. 122 2086200227 HS, covering Lot 2, Division I, of the Dr. Joe Waterfront Tracts.

Background

The lease for Lot 2 was entered into by Appellant's predecessor in interest in 2002, setting the initial annual rent at \$6,200. *See* Lease No. 8620 02-27 at 1 (Administrative Record (AR) Tab 1). The lease provides that rent shall be subject to review and adjustment at not less than 5-year intervals

in accordance with the regulations in 25 CFR 162. Such review shall give consideration to the economic conditions at the time, exclusive of improvements or development required by this contract or the contribution value of such improvements.

Id. at 2 (unnumbered), ¶ 7.

As relevant to Appellant's arguments in this appeal, the regulations in effect when the lease was entered into required that "no lease shall be approved or granted [by BIA] at less than the present fair annual rental." 25 C.F.R. § 162.604(b) (2002)³; *see* Appellant's Opening Brief (Br.) at 2. The regulations define "fair annual rental" to mean "the amount of rental income that a leased tract of Indian land would most probably command in an open and competitive market." 25 C.F.R. § 162.101. The lease was subject to a requirement in the regulations for periodic review, at not less than 5-year intervals, "giv[ing] consideration to the economic conditions at the time." *Id.* § 162.607; *see* Opening Br. at 3.

In 2008, the Regional Director affirmed a decision by the Superintendent to adjust the rent for Lot 2 to \$9,000, based on an appraisal prepared at the time. *See Kamb v. Acting Northwest Regional Director*, 52 IBIA 74, 78-79 (2010). Appellant's predecessor in interest appealed that rate adjustment to the Board, arguing, among other things, that BIA had adjusted the rent for an adjacent property that was "virtually the same" as Lot 2, but to \$8,000. *Id.* at 81. During that appeal, the lease was assigned to Appellant. We vacated the 2008 rent adjustment decision because BIA had failed to consider the alleged disparity between the rent adjustments for Lot 2 and the adjacent lot.⁴ *Id.* at 85. Following our

³ All citations to Part 162 in this decision are to the regulations in effect in 2002. The regulations have subsequently been revised, but no party contends that the revisions are relevant to this appeal.

⁴ The Board consolidated Appellant's appeal from the 2008 rent decision for Lot 2 with a related appeal by Linda Clingan and Michael Templeton because the properties involved in both appeals were similar in size and amenities and the rent was increased to the same amount based on the same appraisal. *Kamb*, 52 IBIA at 74-75. On remand, BIA found

(continued...)

decision, it appears that BIA did not pursue a rent adjustment for Lot 2 until the decision at issue in this present appeal, and thus continued to charge the \$6,200 annual rent that had been set in the original lease.

On June 8, 2012, the Superintendent issued a decision to adjust Appellant's rent for Lot 2 to \$7,250, effective June 1, 2012. Letter from Superintendent to Appellant, June 8, 2012 (AR Tab 8). The Superintendent's decision was based on an appraisal conducted by the Office of Appraisal Services, Office of the Special Trustee. Summary Appraisal Report, May 2, 2012 (Appraisal) (AR Tab 7). To determine the rental value for Lot 2, the appraiser used a sales comparison methodology to estimate the market value of Lot 2. Appraisal at 13, 24. The appraiser explained that he had not considered other leases from the Pull & Be Damned area because they were not established through the typical market process, the rents having been derived from a calculation in which estimated market value was converted to an opinion of rental value, in a manner similar to the current appraisal. *Id.* at 25. To rely on those rates, according to the appraiser, would create a "closed circular system" that would not reflect rental value fluctuations over time. *Id.* After identifying sales of properties that he determined were comparable to Lot 2, and after making adjustments for property-specific variables, and considering current market conditions, which he believed indicated a conservative value, the appraiser estimated the market value of Lot 2 at \$145,000. *Id.* at 24.

Next, the appraisal converted the estimated market value of the property to an opinion of the annual market rental value of Lot 2 by applying a capitalization rate. The appraiser discussed various rates of return on various commercial leases and commercial and government debt instruments of various durations, and compared them to the lease, taking into consideration the varying risks of the different instruments. *Id.* at 27. Considering the risk-versus-return profiles, the appraiser concluded that a rate of 5% was appropriate for converting the estimated market value of Lot 2 to an estimated annual rental value. Multiplying the market value by 5%, the appraiser estimated the annual rental value of Lot 2 at \$7,250, as of June 1, 2012. *Id.*

Appellant appealed the Superintendent's 2012 rent adjustment decision to the Regional Director, arguing that (1) use of the sales comparison approach does not comply with the regulations; (2) the 5% rate cannot be substantiated; (3) the only way to determine rental value is through an actual rental market ("placing a sign in the street"), not

(...continued)

that the rent for the adjacent rental property had been set at \$9,000, not the \$8,000 alleged, and BIA reaffirmed that rate for the Clingan and Templeton lease. The Board affirmed that decision. *Linda Clingan v. Northwest Regional Director*, 56 IBIA 185, 185-86 (2013).

through a hypothetical market; (4) rents had fallen, not risen; and (5) the Superintendent's rental increase was contrary to a letter from the Superintendent stating that values had risen 1.22% over the applicable period.⁵ Statement of Reasons, Aug. 3, 2012 (AR Tab 10).

The Regional Director affirmed the Superintendent's decision to adjust Appellant's rent to \$7,250. The Regional Director concluded, among other things, that the methodology used to derive an opinion of annual rental value was reasonable and acceptable under the regulations, and that the 5% rate of return had been explained by the appraiser and was reasonable. Letter from Regional Director to Appellant, Dec. 20, 2012, at 4-5 (Decision) (AR No. 12).

Appellant appealed the Decision to the Board. Appellant filed an opening brief, the Regional Director filed an answer brief, and Appellant filed a reply brief.

Standard and Scope of Review

A BIA rental adjustment decision involves an exercise of discretion and judgment, and we review such a decision to determine whether it comports with the law, is supported by substantial evidence, and is not arbitrary and capricious. *Hicks v. Northwest Regional Director*, 59 IBIA 285, 290 (2015). We do not substitute our judgment for that of BIA with respect to an exercise of discretion, but we review legal questions and the sufficiency of evidence *de novo*. *Id.*; *Jimmie Garnenez v. Acting Navajo Regional Director*, 60 IBIA 162, 166 (2015). Appellant bears the burden of demonstrating error in the Regional Director's decision. *Hicks*, 59 IBIA at 290; *see also Strain v. Acting Portland Area Director*, 23 IBIA 114, 118 (1992) ("The burden of proving a rental adjustment unreasonable is on the person who challenges it.").

As a general rule, the Board will not consider arguments raised for the first time on appeal if they could have been, but were not, raised in the proceedings below. 43 C.F.R. § 4.318 (scope of review); *Hicks*, 59 IBIA at 294; *Clingan*, 56 IBIA at 191.

Discussion

On appeal, Appellant first contends that BIA makes Freedom of Information Act (FOIA) requests from tenants cost-prohibitive in order to prevent them from comparing rental rates. The Board lacks jurisdiction over FOIA appeals, *see Hicks*, 59 IBIA at 296-97, but we understand Appellant's argument to suggest that the rental rate procedure for Lot 2

⁵ Appellant also argued that he had not been provided a copy of the appraisal. BIA provided a copy of the appraisal to him via email on August 7, 2012. AR Tab 11.

was flawed because if he were afforded easier access to appraisals and rent adjustment documents for other lots in the area, he would find support for arguing that \$7,250 is too high for Lot 2.⁶ Whether or not such a FOIA-related contention would otherwise fall within our jurisdiction in the context of reviewing the Decision at issue in this appeal, we decline to consider the argument because it is raised for the first time on appeal.

Appellant next contends that using a methodology based on fair market sales value to determine rental value does not comply with BIA's leasing regulations because the regulations refer to "fair annual rental," and define that to mean "the amount of rental income that a leased tract of Indian land would most probably command **IN AN OPEN AND COMPETITIVE MARKET.**" Opening Br. at 3. According to Appellant, the regulations do not permit rental value to be based upon an "arbitrarily selected rate of return." *Id.* Appellant argues that the 5% rate of return cannot be justified because 10-year and 30-year U.S. Treasury bills, and 5-year certificates of deposit, return far less. Appellant argues that the regulations require consideration of economic conditions in determining rental rate adjustments, and that the Superintendent "found property values had risen 1.22%." *Id.*; *see id.* Ex. 1 (Letter from Superintendent to Tenants, Apr. 8, 2011). Appellant contends that the methodology used by BIA for his rent adjustment was "contrived," and the reference to "an open and competitive market" in the definition "fair annual rental" means "hang a For-Rent sign out and see if the price asked is taken." *Id.* at 3-4.

We disagree that the use of a sales comparison approach to first determine fair market value, and then convert market value to rental value, is inconsistent with BIA's leasing regulations. Appellant emphasizes the clause "in an open and competitive market," found in the definition of "fair annual rental," but effectively ignores the language in the definition referring to the amount of rental income that the leased land "would most probably command" in an open and competitive market. *See* 25 C.F.R. § 162.101. An appraisal, whether based on a sales comparison approach, or some other accepted methodology, is designed to estimate what a parcel of land would likely be worth, whether expressed in terms of market value or rental value. The regulations do not prescribe a specific valuation methodology, e.g., requiring BIA to "hang a For-Rent sign out." As long as the approach used by the appraiser is a generally accepted appraisal methodology, it is permissible as a means of determining "the amount of rental income that a [lot] would most probably command in an open and competitive market," 25 C.F.R. § 162.101.

⁶ On the other hand, according to Appellant, "[i]t is becoming general knowledge" in the Pull & Be Damned neighborhood "that \$7,250 is the going rate" for all lots, with one exception, a lot with a higher rate. Opening Br. at 2. Thus, Appellant's argument concerning the effect of BIA's alleged FOIA practices is not entirely clear.

We also disagree with Appellant that the 5% rate of return used by the appraiser to convert the estimated market value to estimated rental value is arbitrary and capricious. Appellant argues that the 5% figure is arbitrary because it is taken from U.S. Forest Service leases, which he contends are not comparable. In the present case, however, although the Forest Service's 5% rate was used for comparison purposes, and was the rate ultimately selected by the appraiser, the appraiser did not select it simply *because* it is used by the Forest Service. The appraisal contains a reasoned comparison of varying rates of return, associated with debt instruments of varying duration and risk, and the appraiser offered a reasonable explanation for selecting the 5% figure. *See* Appraisal at 27. Appellant's contention that several no-risk instruments (U.S. Treasuries and certificates of deposit) offer lower rates of return does nothing to undermine the appraiser's analysis.

Finally, we are not convinced that the Superintendent's letter regarding an index-based alternative method for making rent adjustments, and reporting what is described as a 4-year "median average change" in appraised values as 1.22% for the 2007-2011 period, demonstrates that the appraised rental value of \$7,250 for Appellant's lot was unreasonable. As explained by the Superintendent, the index methodology is designed to be a simpler, more predictable method for adjusting rent every 4 years using the index, with a rental adjustment at the 12-year period determined by an appraisal. Letter from Superintendent to Tenants, Apr. 8, 2011 (Ex. 1 to Appellant's Opening Br.). In the present case, Appellant's rent was unchanged for 10 years before BIA adjusted the rent.⁷ Without a reliable baseline determination of fair annual rental value, in reasonable proximity to the period from which the index percentage change is measured, we see no basis to find the index percentage probative in evaluating the reasonableness of the appraisal used in this case to determine the fair rental value of Lot 2.⁸

⁷ As noted earlier, BIA unsuccessfully attempted in 2008 to adjust the rent to \$9,000. We vacated that decision, not on the merits of the valuation but because BIA had failed to consider the allegation by Appellant's predecessor in interest that BIA had adjusted the rent for an adjacent lot that was "virtually the same" to \$8,000. As explained in *Clingan*, 56 IBIA at 187-88, that allegation turned out to be incorrect—rent for the adjacent lot was adjusted to \$9,000.

⁸ The Regional Director appears to suggest that any consideration of the 1.22% figure would be improper, per se, because Appellant has not entered into a lease that incorporates the index methodology. Regional Director's Answer Br. at 8. We are not convinced that the index value could not be relevant to a BIA rental rate decision for a lease that is not directly governed by the index. If BIA considers the index as an indicator of market trends, it is conceivable that a rental rate determination based on an appraisal that appeared to take a different view of market trends would require additional explanation.

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 the Regional Director's December 20, 2012, decision.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

//original signed
Thomas A. Blaser
Administrative Judge