



## INTERIOR BOARD OF INDIAN APPEALS

Debra Pitts and Brian Garrett v. Northwest Regional Director, Bureau of Indian Affairs

62 IBIA 238 (02/25/2016)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
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DEBRA PITTS and BRIAN GARRETT,	)	Order Affirming Decision
Appellants,	)	
	)	
v.	)	
	)	Docket No. IBIA 14-080
NORTHWEST REGIONAL	)	
DIRECTOR, BUREAU OF INDIAN	)	
AFFAIRS,	)	
Appellee.	)	February 25, 2016

Debra Pitts and Brian Garrett (Appellants) appealed to the Board of Indian Appeals (Board) from a February 26, 2014, decision (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 Appellants’ annual rent for Lot 99, Block 1, of the Replat of the Hermosa Point Summer Home Sites on the Tulalip Reservation in Snohomish County, Washington (Lot 99), from \$7,360 to \$8,245.

We affirm the Decision. We reject Appellants’ arguments that the Decision should be set aside on the grounds that the underlying appraisal of the unimproved market value of Lot 99 failed to consider the cost of repairing Lot 99’s bulkhead, identified an access improvement, and failed to consider nearby home foreclosures and vacancies. The Regional Director considered the grounds for Appellants’ appeal from the Superintendent’s decision, and provided reasonable explanations for affirming the rental adjustment. In addition, we decline to consider several arguments that are raised by Appellants for the first time on appeal to the Board.

## Background

On November 1, 2007, Appellants entered into a 50-year lease for Lot 99. Lease No. 8926 07-57 (Lease) at 1 (unnumbered) (Administrative Record (AR) 4). The lot contains less than half of an acre. *See id.* (stating that the leased property is .15 acre); Summary Appraisal Report, July 22, 2013 (Appraisal), at 14 (AR 7) (finding that Lot 99 is .281 acre). While the lot “provides good views of Puget Sound to the west,” and has a low

bank, it has “a bulkhead and thus has no beach.” Appraisal at 13, 19. The initial annual rent was set at \$7,360. Lease at 1 (unnumbered).

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 [Part] 162.” *Id.* ¶ 7; *see also* 25 C.F.R. § 162.607 (2007)<sup>1</sup> (leases “shall provide for periodic review, at not less than five-year intervals, of the equities involved”). 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).

The Lease also states that the rent was subject to adjustment in 2008. Lease at 1 (unnumbered). On July 20, 2009, the Superintendent notified Appellants that the rent would remain at \$7,360 “for a period [of] 5 years beginning the adjustment year of 2008.” Letter from Superintendent to Appellants, July 20, 2009 (AR 6). The record does not show whether an appraisal was completed in advance of the Superintendent’s 2009 rental adjustment decision.

On August 2, 2013, the Superintendent informed Appellants that, pursuant to paragraph 7 of the Lease, the annual rent would be increased to \$8,245, effective August 1, 2013. Superintendent’s Decision, Aug. 2, 2013, at 1 (unnumbered) (AR 8). The Superintendent’s decision was based on an appraisal conducted by the Office of Appraisal Services (OAS), Office of the Special Trustee, and reviewed by an OAS review appraiser. *See* Appraisal; Northwest Regional Office, OAS, Review, July 29, 2013 (AR 7). In order to provide an opinion on the rental value for Lot 99, the appraiser used a sales comparison methodology<sup>2</sup> to first estimate the market value of Lot 99, if sold as fee simple, unimproved land. Appraisal at 7-8, 17; *see also id.* at 7 (“[a] hypothetical condition is that the property is considered as if unimproved when it has been improved with structures”).

The appraiser visited Lot 99 and, after an initial review of sales in the Puget Sound market area, selected four sales of properties for further review and comparison to Lot 99. *Id.* at 5, 18. Each of the properties selected for comparison was smaller than 1/2 acre and had a low or medium bank. *Id.* at 18. The comparable properties sold between

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<sup>1</sup> All citations to Part 162 in this decision are to the regulations in effect in 2007. *See Hawkey v. Acting Northwest Regional Director*, 57 IBIA 262, 263 n.3 (2013). The regulations have subsequently been revised, *see* 77 Fed. Reg. 72440 (Dec. 5, 2012), but no party contends that the revisions are relevant to this appeal.

<sup>2</sup> The appraiser explained that it was not possible to compare leases in the Puget Sound market area. Appraisal at 8.

November 2010 and July 2012 for prices ranging from \$160,000 to \$520,000. *Id.* at 21. As part of his analysis, the appraiser made adjustments for property-specific variables, or “elements of comparison,” such as location, site size, utilities, bank type, view, access, density, water frontage, and topography. *Id.* at 18-27. The appraiser found that three of the four comparable properties were superior overall to Lot 99, due to a combination of elements. *Id.* at 27. After making the adjustments, the appraiser determined that the range of values for Lot 99 was between \$160,000 (equal to the selling price of the overall inferior comparable, Comparable Sale #2) and \$200,000 (equal to the selling price of the overall superior comparable that sold for the lowest amount, Comparable Sale #3). *Id.* In his final value opinion, the appraiser estimated that, “considering the somewhat unusual parking and access” of Lot 99, the market value of the fee simple interest in Lot 99 was \$170,000. *Id.*

The appraiser then analyzed the market rates of return for various financial instruments. *See id.* at 29-31. The appraiser considered the rates used for the master lease of the nearby Shelter Bay community, commercial real estate properties, corporate bonds, tax-free municipal bonds, Treasury securities, as well as the statutory 5% rate for recreational cabin sites in national forests.<sup>3</sup> Appraisal at 31. Considering the risk-versus-return profiles, the appraiser concluded that a rate of 4.85% was the most appropriate to be applied to Lot 99. *Id.* Applying that rate of return to the appraised value of Lot 99 made, in the appraiser’s opinion, the annual market rent \$8,245, as of August 1, 2013. *Id.* at 32.

Appellants appealed the Superintendent’s rent adjustment decision to the Regional Director. Notice of Appeal to Regional Director, Aug. 30, 2013 (AR 9). In one or two-sentence assertions, Appellants asserted that: (1) “[t]he bulkhead has been damaged and needs to be repaired”; (2) “[t]he lack of accessibility affects the desirability of the property”; and (3) one nearby house remained unsold after 3 years and a price reduction to \$79,000, and a second nearby house remained vacant after foreclosure “many years ago.” Statement of Reasons, Oct. 1, 2013 (AR 16).<sup>4</sup> Appellants did not further articulate the grounds for their disagreement with the Superintendent’s decision.

The Regional Director affirmed the Superintendent’s decision to adjust Appellants’ rent to \$8,245. Decision, Feb. 26, 2014, at 5 (AR 18). In sum, the Regional Director found that Appellants failed to articulate reasons or provide evidence that would support

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<sup>3</sup> *See* 16 U.S.C. § 6206(a).

<sup>4</sup> Appellants also argued that Snohomish County’s tax assessed value of Lot 99 had decreased between 2009 and 2013—an argument that Appellants abandon on appeal and which we therefore address no further.

setting aside the Superintendent's adjustment decision as unreasonable and/or erroneous. *Id.*

Appellants appealed the Decision to the Board. Appellants filed an opening brief and the Regional Director filed an answer brief.

## 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. *See Kamb v. Acting Northwest Regional Director*, 52 IBIA 74, 80 (2010) (citing *Strain v. Portland Area Director*, 23 IBIA 114, 118 (1992)). The burden of proving that the rental adjustment fails to comport with this standard rests with Appellants. *See 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."). The Board does not substitute its own judgment for BIA's, but will review *de novo* the sufficiency of the evidence to support BIA's decision, *Clingan v. Northwest Regional Director*, 56 IBIA 185, 189 (2013), and will also review the sufficiency of BIA's explanation, *Seminole Tribe of Florida v. Eastern Regional Director*, 53 IBIA 195, 210 (2011). 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." 43 C.F.R. § 4.318 (scope of review); *see Kamb*, 52 IBIA at 84. Thus, the Board ordinarily will decline to consider for the first time on appeal matters that could have been but were not first raised before the Regional Director. *See Hicks v. Northwest Regional Director*, 59 IBIA 285, 294 (2015); *Kamb*, 52 IBIA at 84.

### II. Analysis

On appeal, Appellants argue that the Appraisal has "significant errors" and should not have been relied upon by the Regional Director. Opening Brief (Br.), May 21, 2014, at I (unnumbered). Appellants argue that the Appraisal fails to consider the cost of bulkhead repairs; the Appraisal erroneously considers that Lot 99 has access via a tram,<sup>5</sup> when the Appraisal is supposed to assume that the property is unimproved; and the Appraisal fails to consider neighborhood home foreclosures and vacancies. As we explain below, Appellants fail to meet their burden on appeal with respect to their arguments regarding bulkhead repairs and property access. Regarding the cited foreclosures and vacancies, we conclude that the Regional Director's response was not unreasonable, given

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<sup>5</sup> The tram was apparently installed by Appellants. *See* Addendum, Dec. 31, 2007 (AR 5).

the cursory nature of Appellants' statement of reasons. The Regional Director understood Appellants to be referring to *improvements* on the market, which he reasonably distinguished from sales of underlying real estate. On appeal, Appellants expand this argument beyond the scope of their statement of reasons, and raise four additional allegations of error for the first time. We decline to consider such new arguments.

A. Bulkhead Repairs

On appeal, Appellants contend that “[t]he bulkhead has deteriorated and substantial work will be required” to repair the bulkhead and preserve the property, and that “[t]he cost of this required maintenance affects property value and should be considered in the appraisal.” Opening Br. at 3 (unnumbered).

In the Decision, the Regional Director acknowledged Appellants' argument that the bulkhead was “damaged and needs to be repaired.” Decision at 2 (quoting Statement of Reasons). He also noted that the appraiser visited Lot 99 on June 15, 2013, before the August 1, 2013, effective date of the Appraisal. Decision at 3. The appraiser described the property as having a bulkhead, without mentioning any damage to the bulkhead, or otherwise commenting on the bulkhead's condition. Appraisal at 19.

The Regional Director rejected Appellants' argument for failure to provide evidence showing when the bulkhead damage occurred, the extent of the damage, or an estimate of the repair costs. Decision at 5. The Regional Director also reasoned that, even assuming that the bulkhead was damaged after Appellants entered into the Lease, they failed to demonstrate that the market value of the property would be affected so as to justify a reduced annual rental. *Id.*

In their brief on appeal, Appellants do not allege any error in the Regional Director's rationale for finding their bare-bones assertion unconvincing to show error in the Appraisal. Nor do Appellants cite any evidence in the record, and we have located none, that supports their assertions regarding the bulkhead. They simply reiterate that the bulkhead was damaged at some point in time and to some extent, and that the rental should therefore be reduced by some amount. The Board has previously explained that an appellant's bare assertions, standing alone, are insufficient to satisfy an appellant's burden of showing that a regional director's decision is unreasonable. *Hadley v. Northwest Regional Director*, 59 IBIA 150, 156 (2014) (citing *Linabery v. Acting Great Plains Regional Director*, 53 IBIA 42, 48 (2011)). Here, Appellants' general assertions regarding the bulkhead are inadequate to meet their burden to show that the Decision failed to sufficiently address the allegation that the bulkhead was damaged and in need of repair. *See Hadley*, 59 IBIA at 156 (“general assertions regarding market conditions are inadequate”); *Strain*, 23 IBIA at 118 (“bare allegations that [appellants'] rental adjustments were excessive is insufficient”).

## B. Access

In their appeal to the Regional Director, Appellants asserted that “[t]he lack of accessibility affects the desirability of the property.”<sup>6</sup> Statement of Reasons. On appeal to the Board, for the first time, Appellants argue that the Appraisal erred in considering Lot 99 as accessible “via a tram that runs from the bluff on the east side of the property down to the low-bank subject site.” Opening Br. at 1 (unnumbered) (quoting Appraisal at 13). Appellants argue that the Appraisal should have assumed that there was no tram, which was an improvement, and should have considered Lot 99 to be accessible “by foot only, via a steep trail from the bluff.” Opening Br. at 1 (unnumbered). Appellants contend that access to the comparable properties was therefore “significantly superior,” relative to Lot 99, rather than the “superior” access recognized in the Appraisal. *Id.* at 1-2 (unnumbered).

The Decision did not address Appellants’ argument that the tram should have been omitted, which is both understandable and reasonable under the circumstances. Appellants made no mention of the tram in their statement of reasons, and the general allegation regarding *lack* of accessibility would hardly provide a basis for the Regional Director to discern the argument that Appellants now raise. In his answer brief, however, the Regional Director also responds that the Appraisal sufficiently considered what the Regional Director refers to as “poor access” to Lot 99 in calculating a market value opinion for the property. Answer Br., June 12, 2014, at 5. The Regional Director explains that the appraiser described the access as via “foot trail, tram, [and] poor roads,” and thus did not overlook the foot trail and road conditions. *Id.* (quoting Appraisal at 27). The Regional Director further explains that the Appraisal found that each of the comparable properties had overall “superior” access as compared to Lot 99. *Id.* (citing Appraisal at 27). And the Regional Director notes that the appraiser reconciled the market value indications (i.e., of between \$160,000 and \$200,000) to \$170,000, after expressly considering “the somewhat unusual parking and access of the subject [lot].” *Id.* (quoting Appraisal at 27). Appellants did not file a reply brief.

We conclude that Appellants have not shown that the issue should be remanded for further consideration. As noted, Appellants’ argument rests on the contention that the comparable properties have “significantly superior” access, and not simply “superior” access as found in the Appraisal. Even were we to assume that Appellants’ description is fitting, Appellants do not show that the Regional Director’s decision failed to reasonably respond to their “lack-of-accessibility” assertion, or that the adjustments the appraiser made to the

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<sup>6</sup> It is not entirely clear that the assertion actually referred to Appellants’ property, because it was included with Appellants’ assertion that a nearby house had failed to sell after several years on the market. *See* Statement of Reasons ¶ 3.

comparable sales were insufficient. The appraiser made adjustments based on whether an element of comparison (e.g., “access”) for Lot 99 was “inferior,” “equal,” or “superior” to each of the comparable properties. Appellants provide no basis to find that the appraiser erred by failing to include additional levels of refinement, e.g., “significantly superior.” Therefore, we conclude that Appellants’ argument does not rise above disagreement with the Appraisal’s evaluation of the comparable sales, and is insufficient to establish that the Decision is in error or unreasonable. *See Hadley*, 59 IBIA at 157 (“disagreement with the appraisal’s selection and evaluation of the comparable sales . . . is not enough”).

### C. Neighborhood Foreclosures and Vacancies

In their appeal from the Superintendent’s decision, Appellants argued that two “house[s]” in the neighborhood had been on the market for an extended period of time. Statement of Reasons. In his Decision, the Regional Director rejected Appellants’ argument as “irrelevant” on the ground that the rental adjustment is based on the value of the unimproved land included in Lot 99. Decision at 5. The Regional Director explained that “[a]ny sale of property in the Hermosa Point neighborhood is only for the improvements located on the property,” and not the underlying land. *Id.*

On appeal to the Board, Appellants argue that the Appraisal failed to take into account that “[f]oreclosures have increased since the last rate adjustment,” and that “[h]ouses are sitting vacant [and] devaluing the property.” Opening Br. at 2 (unnumbered). In making this argument, Appellants cite the two properties that they previously identified in their appeal to the Regional Director, as well as four additional “foreclosed house[s]” or home listings within a 1 mile radius of Lot 99. *Compare id.* at 2-3 (unnumbered) *with* Statement of Reasons. Appellants acknowledge that “the listing prices may be for the improvements on leased land and therefore not directly comparable to the fee value of [Lot 99].” Opening Br. at 3 (unnumbered). But they argue that “the long[-]term vacancies could have and should have been considered by the appraiser in his report,” and that a “key factor” to a potential buyer is the cost of the lease, and thus the length of time the houses are on the market “is evidence” that the rent for the land is too high. *Id.*

Because Appellants did not articulate this argument in their appeal to the Regional Director, we conclude that the Regional Director’s decision is not unreasonable for its lack of a response. Based on Appellants’ reference in their statement of reasons to two homes on the market, the Regional Director reasonably—as Appellants basically concede—distinguished such sales of improvements from the Appraisal’s analysis of sales of unimproved land. The Regional Director adequately responded to the issue that Appellants had raised and the Board will not consider Appellants’ expanded argument and evidence on appeal in the first instance. The Board ordinarily does not consider arguments or evidence

presented by an appellant for the first time on appeal, which could have been presented in the proceedings below. *See* 43 C.F.R. § 4.318; *Hicks*, 59 IBIA at 294. The purpose of requiring exhaustion before the BIA official is to “to enable the parties to develop a complete record, including the resolution of any factual disputes.” *Kamb*, 52 IBIA at 84 (quoting *Weinberger v. Rocky Mountain Regional Director*, 46 IBIA 167, 173 (2008)). Here, Appellants have not provided justification for us to depart from the normal scope of review.

For the same reason, we decline to consider Appellants’ four new allegations of error, to which the Regional Director objects as outside the scope of the appeal, with respect to utilities (sanitary sewer), the use of sales data from Whidbey and Camano Islands, the rate of return selected, and a potential for landslides. *See* Opening Br. at 2-3 (unnumbered) & Enclosure (GeoEngineers Report, Mar. 21, 1997); Answer Br. at 4.

### 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 February 26, 2014, decision.

I concur:

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// original signed  
Thomas A. Blaser  
Administrative Judge

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//original signed  
Steven K. Linscheid  
Chief Administrative Judge