INTERIOR BOARD OF INDIAN APPEALS

Maria McQueen v. Acting Northwest Regional Director, Bureau of Indian Affairs

63 IBIA 222 (07/18/2016)

Reconsideration Denied:
63 IBIA 320

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

MARIA McQUEEN,	)	Order Affirming Decision
Appellant,	)	
	)	
v.	)	
	)	Docket No. IBIA 15-050
ACTING NORTHWEST REGIONAL	)	
DIRECTOR, BUREAU OF INDIAN	)	
AFFAIRS,	)	
Appellee.	)	July 18, 2016

Maria McQueen (Appellant) appealed to the Board of Indian Appeals (Board) from a November 12, 2014, decision (Decision) of the Acting Northwest Regional Director (Regional Director), Bureau of Indian Affairs (BIA), affirming the decision of BIA's Puget Sound Agency Acting Superintendent (Superintendent) to increase the annual rent for the property that Appellant has leased since 2012 on the Hermosa Point Summer Home Sites. The Regional Director increased the rent from $9,000, which was negotiated by the prior lessee in 2009, to $20,600 based on a 2014 appraisal. Appellant argues that the 2014 appraisal is flawed. She argues that the appraiser relied on an inaccurate property survey; failed to consider the risk that a damaging storm could limit access to the property; erred in the selection of comparable properties for analysis; considered inappropriate financial instruments and failed to explain the reasoning for the chosen rate of return; and demonstrated bias in reviewing an appraisal that Appellant commissioned of the property. We conclude that Appellant fails to meet her burden to show that the Regional Director's decision is erroneous or unreasonable. We decline to consider several new arguments and evidence that Appellant could have but did not raise to BIA. Thus, we affirm the Decision.

Background

I. Lease and Rent History

On July 1, 2009, Appellant's predecessor-in-interest (Eberle) entered into a 50-year lease for Lots 22 and 23, Block 1, of the replat of the Hermosa Point Summer Home Sites, located on the Tulalip Reservation in western Washington (Property). Lease No. 123 2090100959, July 1, 2009, at 1 (Lease) (Administrative Record (AR) 5). The Property comprises two adjacent waterfront lots that offer panoramic views of Puget Sound

to the south and west, and a view of Tulalip Bay to the east. Appraisal Report, July 7, 2014, at 13, 15, 27 (2014 Appraisal) (AR 10). The Property contains approximately 0.15 acre or less. *See* Lease at 1 (stating that the Property is approximately 0.15 acre); 2014 Appraisal at 4, 13 (finding that the Property is 0.137 acre or 5,957 square feet (sq ft)). As discussed further below, although an appraisal estimated that the annual market rent in 2009 was $21,000, Appraisal Report, Mar. 12, 2009, at 17 (2009 Appraisal) (AR 1), Eberle's initial rent under the Lease was set at $9,000, in recognition of a former lessee's (Dawson) investment in a bulkhead to minimize erosion of the Property.[1] Decision, Nov. 12, 2014, at 3 (AR 19); Trust Asset Accounting Management System (TAAMS) Encoding Tracking Document, June 29, 2009 (AR 5) (stating that the rent was "[n]egotiated"). In 2011, Eberle's guardian assigned the Lease to Dawson, thus returning the Property to him, and in 2012, Dawson re-assigned the Lease to Appellant. *See* Assignment of Lease to Dawson, approved Nov. 16, 2011 (AR 6); Assignment of Lease to Appellant, approved June 14, 2012 (AR 8).

At the time of the assignment of the Lease to Appellant in 2012, the rent remained $9,000, until the next scheduled rental adjustment. The assignment expressly provided that "[t]his lease is subject to rental adjustment on July 1, 2014 per provision 7 of the Lease." Assignment of Lease to Appellant at 1; *see* Lease ¶ 7 (providing that the rent "shall be subject to review and adjustment . . . at not-less than five-year intervals in accordance with the regulations in 25 CFR [Part] 162").

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) (2009). 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." *Id.* § 162.101. Under the Lease terms and Part 162, the rental "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).

II. 2014 Rental Adjustment

For the 2014 rental adjustment, an appraisal of the annual market rent for the Property was conducted by an appraiser in the Office of Appraisal Services (OAS), Office of the Special Trustee for American Indians. 2014 Appraisal (AR 10). The 2014 Appraisal

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[1] In 2009, Dawson wrote to landowners of the Property, explaining that he was "in the process of selling the lease," presumably to Eberle, and requesting "fairness" in setting the rent. Letter from Dawson to Fryberg Estate, June 9, 2009 (AR 3).

was reviewed and approved by an OAS review appraiser. Appraisal Review Report, July 9, 2014 (AR 10). In sum, the 2014 Appraisal estimated that as of July 1, 2014, the annual market rent was $20,600.[2] 2014 Appraisal at 33.

The appraiser used the sales comparison method to first estimate the Property's market value, if sold as fee simple, unimproved land. 2014 Appraisal at 5, 7-8, 17; *see id.* at 14 ("The subject site is improved, but only the site is considered in this appraisal."). The appraiser visited the Property and, after reviewing sales in the Puget Sound market area, selected four comparable sales for review and comparison to the Property. *Id*. at 5, 18. The appraiser selected "the most recent sales of smaller lots with characteristics similar to the subject." *Id.* at 21. The comparable properties comprised 0.138 acre to 0.557 acre, and sold between 2012 and 2014 for prices ranging from $114,000 to $468,792. *Id*. As part of his analysis, the appraiser made adjustments for property-specific variables, such as site size, access, bank type, and view. *Id*. at 19-21, 27. He concluded that, qualitatively, three of the comparable properties were "inferior," and one was "superior" overall, to the Property. *Id*. at 27. After making the adjustments, the appraiser determined that the range of values for the Property was between $325,000 and $468,792. *Id*. at 28. In his final value opinion, after giving greater weight to the superior property, because it was the most recent sale and like the Property offered a panoramic view, the appraiser estimated that the market value of the fee simple interest in the Property was $425,000. *Id*.

The appraiser then analyzed the market rates of return for various financial instruments. *See id*. at 30-33. The appraiser considered the rates used for the master lease of the nearby Shelter Bay community; commercial real estate leases; high-yield corporate bonds; tax-free municipal bonds; Treasury securities; and the statutory 5% rate of return for recreational cabin sites in national forests. *Id*. Considering the risk versus return profiles, the appraiser concluded that a rate of 4.85% was the most appropriate to be applied to the Property. *Id*. at 33. Applying that rate of return to the appraised value of the Property made, in the appraiser's opinion, the annual market rent $20,600. *Id*.

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[2] For the 2009 Lease, an appraisal was also conducted by an OAS appraiser. The 2009 Appraisal valued the Property at $420,000 and, applying the statutory 5% rate of return used by the U.S. Forest Service for recreational cabin sites in national forests, *see* 16 U.S.C. § 6206(a), opined that the annual market rent was $21,000. 2009 Appraisal at 17. In the course of negotiating Eberle's rent of $9,000, BIA used a proposed 3% rate of return based on the 10-year Treasury note yield. *See* Appellant's Statement of Reasons to Regional Director, Aug. 28, 2014 (Statement of Reasons), Enclosure (Letter from Superintendent to Eberle, June 17, 2009, at 1-2 (unnumbered)) (AR 13).

Based on the 2014 Appraisal, the Superintendent informed Appellant that the annual rent would be increased to $20,600, effective July 1, 2014. Superintendent's Decision, July 9, 2014, at 1 (unnumbered) (AR 11). Appellant appealed to the Regional Director. Notice of Appeal to Regional Director, Aug. 4, 2014 (AR 12). Appellant argued that the 2014 Appraisal was flawed and that the rent should be reduced from $9,000 to $8,256. Related to her arguments in the present appeal, Appellant argued that the appraiser (1) used an inaccurate site size of 5,957 sq ft, because Appellant obtained a surveyor sketch that calculated the Property's size as 3,504 sq ft; (2) should consider, based on a 2012 inspection and stability evaluation report, that a damaging storm could limit road access to the Property; (3) failed to include comparable properties on the Tulalip Reservation or in Snohomish County; and (4) should value the Property at $320,000, based on a 2014 appraisal that Appellant commissioned from McMillan Appraisal Service (McMillan Appraisal), and should apply a 2.58% rate of return based on 10-year Treasury securities, for an annual market rent of $8,256. Statement of Reasons at 1-2 (unnumbered) and Enclosures (Surveyor Sketch, July 29, 2014; Inspection and Stability Evaluation Report, June 4, 2012; McMillan Appraisal, Aug. 27, 2014) (AR 13). Appellant asserted that "the leases are based off of [T]reasury 10 year notes" and she questioned why the OAS appraiser was "using a . . . table of varying rates of return" to estimate the rate of return.[3] *Id.* at 2 (unnumbered).

The OAS appraiser who conducted the 2014 Appraisal reviewed the McMillan Appraisal and provided BIA with a report. Appraisal Review Report of McMillan Appraisal, Oct. 6, 2014 (AR 17). In addition, the OAS review appraiser for the 2014 Appraisal considered Appellant's notice of appeal and statement of reasons, and provided BIA with responses. Memorandum (Memo) from Acting Northwest Regional Appraiser to Northwest Regional Realty Officer, undated (AR 18).

In his Decision affirming the rental adjustment, the Regional Director addressed Appellant's arguments, except for her argument that a storm could limit access to the Property. *See* Decision at 4-9.

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[3] Appellant also argued, but does not maintain on appeal, that the rental rate for the Property exceeds the average price *per square foot* of local waterfront properties, and that based on a purchase offer Appellant received for the Property *and its improvements*, the total market value has declined since 2009 by 39%. *See* Statement of Reasons at 1-2 (unnumbered).

III. Arguments on Appeal

In this appeal, Appellant argues that the 2014 Appraisal and the Decision are flawed because the OAS appraiser (1) relied on an inaccurate property survey; (2) failed to consider the risk that a damaging storm could limit access to the Property; (3) erred in the selection of comparable properties for analysis; and (4) considered inappropriate financial instruments and failed to explain the reasoning for the chosen rate of return. For the first time on appeal, Appellant also alleges bias by the OAS appraiser in his review of the McMillan Appraisal, which, contrary to the Regional Director's position, is an issue that Appellant could not have raised until now. On the other hand, Appellant does raise new arguments and evidence that could have been, but were not, presented to the Regional Director. We reject Appellant's arguments as either lacking merit[4] or as newly raised and thus outside the scope of the appeal.

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 Appellant. *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.

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[4] On appeal, the Regional Director responds to Appellant's argument that a storm could limit access to the Property.

Discussion

I. Appellant Does Not Show That the Regional Director Failed to Adequately Consider the Alleged Difference in Lot Size

Appellant argues that the 2014 Appraisal is flawed because it relies on an inaccurate survey of the Property. Opening Brief (Br.), Feb. 27, 2015, at 16-17; Reply Br., May 14, 2015, at 6-8. As noted above, the Lease identifies the size of the leasehold as 0.15 acre or 6,534 sq ft. Lease at 1. Based on an October 21, 2005, survey (2005 Survey) recorded in Snohomish County, the 2014 Appraisal identifies the size of the Property as 0.137 acre or 5,957 sq ft.[5] 2014 Appraisal at 4, 13; Email from OAS appraiser to Northwest Regional Realty Officer, Sept. 12, 2014, Attachment (2005 Survey) (AR 15). After the 2014 Appraisal was completed, Appellant commissioned a July 29, 2014, survey sketch, which describes the Property as 0.08 acre or 3,504 sq ft. Statement of Reasons, Enclosure (Survey Sketch). The McMillan Appraisal relies on the sketch alone. McMillan Appraisal at 17 (AR 16).[6]

In the Decision, the Regional Director noted that the McMillan Appraisal did not mention the 2005 Survey, and stated that the sketch "is not a recorded document and does not indicate the official square footage." Decision at 5. The Regional Director also found, assuming that the sketch is accurate, that the difference in the site size, "while not meaningless, is not a significant factor in the value of this very desirable residential waterfront property." *Id.* at 5-6. He explained that the Property is highly desirable because it is within a reasonable driving distance of the Everett-Seattle metro area, has a panoramic view, and has "adequate utility as a home site" because it supports typical residential improvements including a house and garage. *Id.* at 6. The Regional Director found that "any additional land not used for those purposes contribute[s] only marginally to the value." *Id.* The Regional Director's findings in the Decision regarding the site size, and the effect of the difference (assuming the sketch is accurate) for the appraised value, are consistent with the opinions given by the OAS appraiser and the OAS review appraiser. *See* Appraisal Review Report of McMillan Appraisal at 4, 7 (AR 17); Memo from Acting Northwest Regional Appraiser to Northwest Regional Realty Officer at 2 (unnumbered) (AR 18).

On appeal, Appellant submits both a copy of the survey sketch that was recorded, post-Decision, in Snohomish County on December 5, 2014 (2014 Survey), and a 2010

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[5] The 2009 Appraisal relied on the same survey. *See* 2009 Appraisal at 7.

[6] The McMillan Appraisal is included in the record as an enclosure to Appellant's statement of reasons to the Regional Director at AR 13 and independently at AR 16.

appraisal by the OAS appraiser of the adjacent Lot 24. Opening Br., Exhibits (Ex.) A (2014 Survey) and B (Summary Appraisal Report for Lot 24, Feb. 28, 2011[7]). The 2010 appraisal describes Lot 24 as 0.067 acre or 2,930 sq ft. *Id.*, Ex. B at 6. Appellant argues that Lot 24 is "substantially similar" to the Property yet BIA adjusted the Property's rent several thousand dollars higher than the annual rental rate for Lot 24. Opening Br. at 16. The Regional Director objects to Appellant's introduction of the new evidence for the first time on appeal. Answer Br., Apr. 17, 2015, at 13, 18-19. We agree that the evidence is not properly before the Board because it was not presented to the Regional Director for consideration. *See* 43 C.F.R. § 4.318; *Hicks*, 59 IBIA at 294.

In the alternative, if the Board were to consider the new evidence, the Regional Director argues on appeal that the parcels are "not comparable in any material respect," in part because Lot 24 (2,930 sq ft) is "much smaller" than the Property (assuming it is 5,957 sq ft). Answer Br. at 19. Appellant seizes on this language as demonstrating a contradiction in the Regional Director's position, arguing that "lot size either matters or it does not." Reply Br. at 7-8. Appellant ignores the fact that the Regional Director also asserted that "[m]ore importantly," Lot 24 is "at least half as narrow" as Appellant's property, and has "83% less water frontage," and that Appellant's property has a much better view. Answer Br. at 19. The Regional Director explained that Lot 24 fronts Tulalip Bay and has a "good" water view, while the Appellant's property offers a view of Tulalip Bay plus "beautiful panoramic views" of Puget Sound. *Id.* The Regional Director's language on appeal characterizing Lot 24 as "much smaller" based on square footage, when considered in the context of other "more important[]" factors distinguishing the properties, is not sufficient, in our view, to demonstrate a flaw in his Decision.

II. Appellant Does Not Support Her Claim Regarding Possible Loss of Access and Its Effect on the Market Value of the Property

Appellant next faults the 2014 Appraisal for not taking into account the "risk of loss" that a damaging storm could limit road access to the Property. Opening Br. at 11-12; Reply Br. at 8. Initially, in her appeal to the Regional Director, Appellant stated that "the road to the property is not guaranteed by the lease. So [a] big storm could wipe out access to the property." Statement of Reasons at 1-2 (unnumbered) (AR 13). In support of her statement, Appellant referred to the 2012 inspection and stability evaluation report. *Id.* at 2 (unnumbered). Although the Regional Director did not respond to Appellant's assertion in his Decision, he does so in his answer brief. He states that the risk of loss was "properly not considered" in the 2014 Appraisal because the risk is "hypothetical" and there is "no

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[7] Because the appraisal for Lot 24 has an effective date in 2010, we refer to it as a 2010 appraisal.

evidence of a diminution of current market value" based on the risk. Answer Br. at 11. He also notes that the McMillan Appraisal commissioned by Appellant likewise did not consider the purported risk of loss of access. *Id.*

Appellant does not show that the Regional Director's response is insufficient. Appellant replies that the loss is not hypothetical because she "has lost access previously," but she does not provide support for that assertion. Reply Br. at 8. Nor does the 2012 inspection and stability evaluation report discuss road access, and Appellant cites nothing to support an effect of the hypothetical loss on the current market value of the Property. An appellant's bare assertions, standing alone, are not sufficient to meet an appellant's burden of showing that a regional director's decision is unreasonable. *Pitts v. Northwest Regional Director*, 62 IBIA 238, 242 (2016) (citations omitted). Because Appellant's assertions are speculative and unsupported, we reject them.

III. Appellant Does Not Show That the Analysis of Comparable Sales Is Erroneous or Unreasonable

Appellant further challenges the 2014 Appraisal's analysis of four comparable sales. Appellant asserts that the Regional Director "brush[ed] aside" a "truly comparable sale" that was included in the McMillan Appraisal; considered other comparable sales that were mostly (3 out of 4) "inferior" to the Property, allegedly skewing the value of the Property higher; and failed to consider any sales in Snohomish County.[8] Opening Br. at 12-13.

In his Decision, the Regional Director concluded that the McMillan Appraisal was not reliable because it used three property listings and three property sales, and only one of the sales was for unimproved property. Decision at 8. On appeal, the Regional Director further explains that the property that Appellant describes as "truly comparable," which the Regional Director agrees was comparable, was sold weeks *after* the 2014 Appraisal, and thus could not have been considered in the 2014 Appraisal with the four comparable sales on which he did rely. Answer Br. at 15. The Regional Director also responds that both the OAS appraiser and the McMillan appraiser showed difficulty finding comparable sales of unimproved waterfront property; the four sales used in the 2014 Appraisal were "comparable, as adjusted, to [Appellant's] property"; and "Appellant does not offer any comparable sales that the appraisal ignored," including in Snohomish County. *Id.* at 15-16. Additionally, with respect to Appellant's claim that the 2014 Appraisal is flawed as based on mostly "inferior" comparable properties, the appraisal itself explains that greater weight was

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[8] On appeal, Appellant does not dispute the Regional Director's rationale for not relying on the rental rates of other lots within the Hermosa Point neighborhood. Opening Br. at 12 (quoting Decision at 7).

given to the "superior" comparable property because it was the most recent sale and offered a panoramic view like the Property. 2014 Appraisal at 28.

Appellant has not shown that the Regional Director erred or was unreasonable in his consideration of the comparable sales. Appellant does not reply to the Regional Director's explanations given on appeal, and mere disagreement with an appraisal's selection and evaluation of comparable sales is not enough to establish that the rental adjustment is in error or unreasonable. *Hadley v. Northwest Regional Director*, 59 IBIA 150, 157 (2014).

IV. Appellant Does Not Show That the Rate of Return Is Unreasonable or Lacks Explanation

Next, Appellant opposes the 2014 Appraisal's consideration of long-term financial instruments, for example 20- and 30-year Treasury securities, in estimating the market rate of return. Opening Br. at 13-14; Reply Br. at 5-6. She also argues that while the OAS appraiser provided data, he did not support his final opinion of a 4.85% rate of return with sufficient explanation and analysis of the data. Opening Br. at 6-8; Reply Br. at 4-5. BIA is required "to determine a reasonable market rate of return . . . and to provide a sufficient explanation for how it arrived at its conclusion." *Drew v. Acting Northwest Regional Director*, 56 IBIA 132, 140 (2013). Appellant does not show that the Regional Director failed to do either.

In her appeal to the Regional Director, Appellant initially questioned why the appraiser considered various instruments producing different rates of return and she argued for a 10-year Treasury note yield of 2.58%. Statement of Reasons at 2 (unnumbered). Appellant argued that, according to the Superintendent's June 17, 2009, letter to Eberle, "the leases are based off of [T]reasury 10 year notes." *Id.* But that letter was a "[c]ounteroffer" made in the course of negotiating Eberle's rent, and it expressly described the proposed 3% rate of return, based on 10-year Treasury notes, as "very conservative." *Id.*, Enclosure (Letter from Superintendent to Eberle at 2 (unnumbered)); *see also supra* note 2.

Nor do we find convincing Appellant's argument on appeal that, in light of the 5-year rental adjustment provision included in the Lease, long-term financial instruments having higher rates of return are not comparable and should not have been considered. Opening Br. at 13; Reply Br. at 6. In his Decision, the Regional Director responded that the OAS appraiser considered the risk versus return profiles of various investments, and that the 4.85% rate is reasonable "because it is bracketed between alternative market based investments with less and more risk." Decision at 8. Indeed, the appraiser explained in the 2014 Appraisal, with respect to 20- and 30-year Treasury securities for example, that these

securities are backed by the United States and are "less risky than a lease on the subject property, and thus the risk premium is significantly lower." 2014 Appraisal at 30, 33.

Appellant argues that the appraiser's approach "fails to acknowledge that powerful forces like inflation and long-term market drivers can affect long-term investments in ways that five-year investments typically do not experience." Opening Br. at 13. But the distinction that Appellant makes between 5- or 10-year versus longer-term investments does not refute—and arguably supports—the Regional Director's position that because the Lease "is for 50 years and not 5, long-term instruments were properly used for comparison." Answer Br. at 9. Appellant replies that she is being required to pay a premium for the certainty of a long-term lease, "without actually receiving a locked-in rate, which is a key benefit of entering such a deal." Reply Br. at 6. However, nothing in the Lease affords Appellant that "key benefit."

Finally, Appellant acknowledges that the Regional Director provided "his own lay analysis" in the Decision, and "had the appraiser undertaken such an analysis, his work may have been sufficient under the law." Opening Br. at 8. She contends that the Regional Director's analysis is "post-hoc" and cannot save the allegedly deficient appraisal. Reply Br. at 5. Even were we to assume that the 2014 Appraisal does not sufficiently analyze or explain the rate of return, Appellant errs in asserting that the Regional Director cannot independently consider the appraisal and provide additional analysis or explanation. Indeed, elsewhere, Appellant approvingly quotes Board precedent holding that although a regional director "may rely on an appraiser's opinions, a regional director has an independent obligation to consider each issue, and if an appraiser's explanation is inadequate, to obtain more information or clarification." Opening Br. at 11 (quoting *Morris v. Northwest Regional Director*, 59 IBIA 266, 271 (2014)). Thus, we reject Appellant's arguments concerning the selected rate of return.

V. Appellant Does Not Demonstrate That the Appraiser Was Biased, Much Less That Bias Tainted the Decision

On appeal, Appellant and the Regional Director trade accusations that the OAS appraiser was biased in his review of the McMillan Appraisal because he used "unusually harsh language," Opening Br. at 10-11; Reply Br. at 2-3, and that the McMillan Appraisal was biased because Appellant argued that she commissioned it to "discredit" the 2014 Appraisal, Answer Br. at 18. Not only are we unconvinced that the language employed by the OAS appraiser in his critique (e.g., "many potential errors," "analysis was flawed," etc.) demonstrates bias on the part of the appraiser, Appellant does not allege that the review appraiser for the 2014 Appraisal or the Regional Director was biased. In fact, Appellant describes the Regional Director's decision as "polite." Opening Br. at 10.

An appellant must offer actual evidence of bias to overcome the presumption that an agency official discharged his duties properly. *Roberts County, South Dakota v. Acting Great Plains Regional Director*, 51 IBIA 35, 49 (2009), *aff'd sub nom. South Dakota v. U.S. Dep't of the Interior*, 775 F. Supp. 2d 1129, 1136-37 (D.S.D. 2011), *appeal dismissed*, 665 F.3d 986 (8th Cir. 2012). The alleged harsh tone of the OAS appraiser's comments, without more, does not demonstrate bias in his review of the McMillan Appraisal, nor in conducting the earlier 2014 Appraisal of the Property.[9] Appellant does not argue that the OAS appraiser's comments on the McMillan Appraisal were substantively erroneous. And Appellant does not allege that the other OAS review appraiser, who independently reviewed and approved the 2014 Appraisal and also furnished the Regional Director with responses to Appellant's notice of appeal and statement of reasons, was biased. Even if Appellant had shown possible bias by an appraiser, she has not shown that the Regional Director failed to conduct an independent review—indeed, as explained *supra*, Appellant contends that the Regional Director supplied too much independent analysis. Thus, Appellant has not met her burden to show that the Decision is the product of bias.

VI. We Decline to Consider Appellant's New Allegations of Error

Appellant's remaining arguments were not raised in her appeal to the Regional Director. To Appellant's credit, she acknowledges, Reply Br. at 10, that the Board ordinarily does not consider arguments or evidence that could have been but were not presented to the Regional Director. 43 C.F.R. § 4.318; *Pitts*, 62 IBIA at 244-45. Because Appellant has not provided justification for us to depart from the normal scope of review, we decline to consider Appellant's new arguments that: (1) the value of improvements is included in the adjusted rent, Opening Br. at 4; (2) the highest and best use of the Property is vacant land and the rental price does not reflect that market, *id.* at 5; (3) the 2014 Appraisal misidentifies the Property as waterfront and low bank, *id.* at 9-10; and (4) the Regional Director failed to reduce Appellant's rental rate based on the bulkhead repairs that were made by a prior lessee, thereby allowing the landowners to "unfairly reap a windfall," *id.* at 14-15.

Even were we to consider these arguments, we would reject them. The 2014 Appraisal properly did not include the value of the improvements. *See* 2014 Appraisal at 14. Residential use of the Property is legally permissible (as evidenced by Appellant's home on the premises) and thus the highest and best use is residential, not vacant land. *See id.* at 14, 16. The Regional Director concedes that in one place the 2014 Appraisal identifies the Property as high bank, but explains that this is a typographical error, as evidenced by other

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[9] We also note that the 2010 appraisal of adjacent Lot 24, on which Appellant relies, was conducted by the same OAS appraiser.

clear findings in the appraisal that the Property is low bank. *See* Answer Br. at 14-15. Appellant's attempt to characterize the record as demonstrating that the Property is high bank is unavailing—the photographs cited do not even conform to Appellant's descriptions. *See* Reply Br. at 9. Finally, Appellant is neither legally nor equitably entitled to a reduction in her rent based on improvements made by a prior lessee. As noted by the Regional Director, Appellant "has benefitted from a negotiated lease amount . . . since 2012 when she was assigned the lease." Answer Br. at 20; *see also Hicks*, 59 IBIA at 296 ("The fact that a rental adjustment results in a substantial increase does not prove that it is unreasonable. Instead, the Board has allowed that a significant increase could suggest that previous rental rates were unrealistically low, or reflect a market increase." (citation and internal quotation marks omitted)). And BIA's fiduciary responsibility is to determine the fair market rent, not to help Appellant as the lessee secure a lower rent. *See Drew*, 56 IBIA at 139.

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 November 12, 2014, decision.

I concur:

// original signed	//original signed
Thomas A. Blaser	Steven K. Linscheid
Administrative Judge	Chief Administrative Judge