



INTERIOR BOARD OF INDIAN APPEALS

Susan Hawkey v. Acting Northwest Regional Director, Bureau of Indian Affairs

52 IBIA 86 (09/17/2010)



United States Department of the Interior

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

SUSAN HAWKEY,)	Order Affirming Decision in Part and
Appellant,)	Reversing in Part
)	
v.)	
)	
ACTING NORTHWEST REGIONAL)	Docket No. IBIA 08-132-A
DIRECTOR, BUREAU OF)	
INDIAN AFFAIRS,)	
Appellee.)	September 17, 2010

Appellant Susan Hawkey appeals from a July 10, 2008, decision of the Acting Northwest Regional Director (Regional Director), Bureau of Indian Affairs (BIA), that affirmed in part and modified in part the April 22, 2008, decision of the Acting Superintendent of BIA’s Puget Sound Agency concerning an adjustment to Appellant’s annual rent for land located on the Tulalip Reservation in the State of Washington. The Superintendent had increased Appellant’s rent and sought the increased amount for lease years 2006 and 2007. In his decision, the Regional Director affirmed the Superintendent’s decision to increase Appellant’s annual rent and modified the decision to require Appellant to pay the increased amount for lease year 2008 in addition to 2006 and 2007. We affirm the Regional Director’s decision as to the amount of adjustment in Appellant’s annual rent. But, based on our decision in *Mize v. Northwest Regional Director*, 50 IBIA 61, 65-67 (2009), we reverse that portion of the Regional Director’s decision in which he makes the increase retroactive to 2006, and hold that the increase in Appellant’s rent is effective from the date of her receipt of the Superintendent’s notice of her rent increase.

Background

On or about March 21, 2001, Appellant and two other individuals entered into a 25-year lease, Lease No. 8585, to commence April 1, 2001, for unimproved trust land,¹ Lot 5, Block 1, of the Hermosa Point Summer Homesites, on the Tulalip Reservation in

¹ As used herein, “unimproved” refers only to the subject of the lease. The property apparently has a single family dwelling and related site improvements, but these improvements are independent of the lease, which is essentially a ground only lease.

Washington State (Snohomish County). Lease No. 8585 at 1 (Administrative Record (AR), Tab 2). The lease also includes an option to renew the lease for an additional 25 years. The terms of the lease provide that the annual rental amount, initially set at \$3,600,

shall be subject to review and adjustment . . . at not less than five-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 contract or the contribution value of such improvements.

Id. at ¶ 7 (AR, Tab 2). Therefore, the rental amount was subject to its first review and adjustment on or after April 1, 2006.

In October 2005, BIA requested a real estate appraisal for Appellant's leased land to determine the land's rental value, as of April 1, 2006. The instructions for the appraisal noted that the parcel was 0.07 acre in size; that utilities (water, sewer, electricity, and telephone) were available at the site; and that improvements on the land should not be included in the appraisal. The request was provided to the Office of Special Trustee for American Indians (OST), which then contracted with GPA Valuation (GPA) in Tacoma, Washington, to perform the appraisal. GPA inspected the property on March 17, 2006, and observed that "[t]he topography of the site is gently sloping upward from the street. There is a limited, but desirable view amenity of portions of Tulalip Bay and the Cascade Mountains." Appraisal Report at 8 (AR, Tab 4). The property was appraised as of April 1, 2006, and the appraisal report was transmitted to OST on April 7, 2006. The appraisal recites that it was completed in accordance with the standards and reporting requirements of the Uniform Standards of Professional Appraisal Practice, and that the land was appraised as though title were held in fee simple.

Because there were no comparable rentals in the property's market area, GPA utilized a two-step method to determine the annual market rent value for the leased land by first estimating the market value of the land and then applying a reasonable rate of return to that value. GPA used the Sales Comparison Approach to value the land, and then applied a 6% rate of return to the estimated land value.

The Sales Comparison Approach "is based on the principle of substitution, which assumes that a potential purchaser will pay no more for a property than would be expended in acquiring an existing property offering similar amenities and utility." Appraisal Report at 14 (AR, Tab 4). GPA considered the sales of six comparable properties in Island and Snohomish Counties that had sold within the previous year. All of the comparables were

sales of vacant fee lands, ranging in size from 1.1 acres down to 0.14 acre and ranging in sale price between \$50,700 to \$92,500. Two had a marine view amenity, one had a territorial view amenity, and three had no view amenity; Appellant's leasehold had both a marine and mountain view amenity. GPA considered the views from Appellant's leasehold to offset the small size of the lot and the low quality of the improvements in the area around Appellant's leasehold. *Id.* at 31. After making adjustments to the comparables to account for differences in such factors as location, views, size, and topography, GPA estimated the value of Appellant's land to be \$80,000.

Next, GPA determined that a 6% rate of return was appropriate. The "rate of return" is defined as "[t]he ratio of income or yield to the original investment; the ratio of the current annual net income generated from the operation of an enterprise to the capital investment, the net yield over the duration of the investment." *Id.* at 32. GPA noted that it had attempted unsuccessfully to research lease rates for vacant land, and found no leaseholds that were "directly comparable." *Id.* GPA found rates of return on vacant commercial/industrial land ranging from 7.1 to 10% with the higher rates usually found on waterfront properties. Ultimately, GPA concluded that the rate of return for commercial/industrial land was too high for a residential site, and selected a 6% rate of return after "considering existing leases on similar tribal properties located in the subject's immediate neighborhood." *Id.* at 35.

GPA then applied the rate of return (6%) to the land value (\$80,000) to arrive at its recommended annual market rental of \$4,800 ($\$80,000 \times 0.06$).

GPA submitted its appraisal report to OST, where an internal review was performed by an OST appraiser. The OST appraiser consulted work files available in OST's Office of Appraisal Services to confirm the rate of return applied by GPA, and approved the \$80,000 fair market value of the land, the 6% rate of return applied to the land's fair market value, and ultimately, the recommended \$4,800 annual rental value.²

Based upon the appraisal report and its approval by OST, the Superintendent issued a notice of rent adjustment on April 22, 2008, to Appellant and her co-lessees, informing them that their annual rent was increased to \$4,800, and that their bond must be increased accordingly. In addition, the Superintendent stated that the lessees, including Appellant,

² Apart from the GPA appraisal, the administrative record submitted for this appeal to the Board contains none of the documents on which the OST appraiser relied.

would be required to tender the difference between the rent that they paid for lease years 2006 and 2007 and the increased rental amount.³

Appellant appealed the rent adjustment to the Regional Director. Appellant challenged the effective date of the rent increase as impermissibly retroactive. She also expressed concern that the appraiser might not have taken into consideration a decrease in the view amenity resulting from new construction in front of Appellant's house and might have failed to omit from consideration certain improvements that Appellant had made to the property (a retaining wall and paving parking spaces).

On July 10, 2008, the Regional Director affirmed the Superintendent's decision. He reiterated that the rent increase was effective as of the fifth anniversary of Appellant's lease (April 1, 2006). He further explained that GPA specifically noted in its report that the view from the property was "limited but desirable," and he therefore concluded that GPA had considered Appellant's partial view. July 10 Decision at 4. He also noted that the property was appraised as "vacant land or unimproved land" and that the report expressly stated that site improvements and personal property were not considered. *Id.* The Regional Director did, however, modify the Superintendent's decision to require payment not only of the difference between the rent paid by Appellant for 2006 and 2007 and the adjusted rent, but also the difference between the amount paid for 2008 and the adjusted rent.

This appeal followed. Appellant submitted an opening brief to which the Regional Director responded. Appellant did not submit a reply brief.

Discussion

We affirm the Regional Director's decision to increase the annual rent for Appellant's leasehold to \$4,800. But, based on our decision in *Mize*, we reverse that portion of the Regional Director's decision that requires Appellant to pay the increase retroactively to April 1, 2006, and hold that the increase is effective from the date Appellant received notice of the increase, i.e., the date she received the Superintendent's April 22, 2008, notice of rent increase.

The parameters of our review of the Regional Director's decision in a residential rent adjustment matter are well established. We will not substitute our judgment in place of

³ Nothing in the record or the Regional Director's brief explains why there was nearly a two-year delay between OST's approval of the appraisal report and the Superintendent's notice to the lessees of the increase in their rent.

BIA's, but we will review the Regional Director's decision to determine whether it is in accordance with applicable law, is supported by the record, and is not arbitrary or capricious. *Strain v. Portland Area Director*, 23 IBIA 114, 118 (1992). The burden of proving that a rental adjustment fails to comport with this standard rests with Appellant. *Id.*

With certain exceptions not relevant here, the rental amount for properties leased through BIA shall be the fair annual rental, 25 C.F.R. § 162.604(b), taking into consideration the economic conditions at the time of the lease or subsequent adjustment, as appropriate, *id.* § 162.607.

Appellant continues to press the same arguments before the Board that she pressed before the Regional Director. We will not dwell long on the retroactivity of the rental increase as we understand that the Regional Director no longer maintains that he may impose rental increases retroactively. See Regional Director's brief in *Kamb v. Northwest Regional Director*, No. IBIA 08-87-A (filed Jan. 26, 2010) at 7-8.⁴

In short, as we explained in *Mize*, where the terms of the lease call for "a rental 'review' at not less than 5 year intervals, there is insufficient notice to the lessee either of *when* a rent adjustment will occur or *how* any adjustment might be calculated." 50 IBIA at 67. We then concluded that in such circumstances, "rental increases may not be implemented or collected prior to notice to the lessee." *Id.*

Here, as in *Mize*, Appellant's lease put Appellant on notice that her rental amount "shall be subject to review and adjustment . . . at not less than 5-year intervals." Lease No. 8585 at ¶ 7 (AR, Tab 2). Thus, there is insufficient notice to Appellant that an increase will ever take place, let alone when any such increase will occur or the amount thereof. Therefore, we reverse the Regional Director's decision as to the effective date of the rental increase, and hold that any rent adjustments for Appellant's leasehold commence on the date she receives notice of a rent adjustment from BIA.

Turning to Appellant's arguments on the merits of the rental increase itself, we first note that she raises several new arguments on appeal to the Board that she did not first raise before the Regional Director. She argues that the comparables used by the appraisers in the sales comparison portion of their analysis were not true comparables because the lot sizes of the comparables are more than twice the size of her lot and in more desirable

⁴ The Regional Director's brief in the present appeal was filed on December 22, 2008, prior to our decision in *Mize*, which issued on July 9, 2009.

neighborhoods. She also argues that the appraisers failed to consider the “monopoly” exercised by the Tulalip Tribe on water and sewer services to her leasehold and the “considerably higher” cost of these services. Notice of Appeal to the Board at unnumbered 2. Finally, she notes that, with the exception of two of the properties, the comparables all sold for considerably less than the value ultimately attached to the land she leases and the two properties that sold for slightly higher amounts command a view of Puget Sound whereas her property has only an obstructed view of Tulalip Bay.

We reject these arguments. Appellant requested and received a copy of the appraisal report in June 2008 prior to the Regional Director’s July 10, 2008 decision. Appellant did not raise these arguments while her appeal was pending before the Regional Director. Ordinarily, the Board does not consider arguments raised for the first time on appeal to the Board, and we see no reason to do so now. *Strom v. Northwest Regional Director*, 44 IBIA 153, 169-70 (2007).

Appellant also reiterates the arguments she made to the Regional Director: (1) That the appraisal did not take into consideration the reduction in Appellant’s water views that allegedly resulted from construction that occurred since she signed her lease in 2001, and (2) that the appraisal did not ignore the site improvements (retaining wall and paved parking spaces) made by Appellant. The Regional Director explained in his decision that the appraisers did consider Appellant’s limited view and did appraise the value of the land as vacant or unimproved. Regional Director’s July 10 Decision at 4. We have examined the appraisers’ report and find that it supports the Regional Director’s explanation. *See* Appraisal Report at 3 (“the subject property is to be appraised as though vacant land”), 4 (“the presence of tenant-owned site improvements or personal property on the subject property, if any, was not considered in this analysis”), 8 (the subject property has “a limited, but desirable view amenity of portions of Tulalip Bay and the Cascade Mountains”), 11 (subject property is appraised as vacant), 13, 15-25 (comparable properties are vacant lots).

Appellant has not met her burden of showing error in the Regional Director’s decision to affirm the adjustment in Appellant’s rent. BIA relied on an appraisal report performed by a private, non-governmental appraisal company that was reviewed and approved by OST’s appraisal staff. Although Appellant expresses concerns about whether appropriate adjustments were made between her leasehold and the comparables found by the appraisers, she fails to rebut the explanation provided by the Regional Director or otherwise show error in his decision. We thus affirm the Regional Director’s decision to the extent that it affirms the Superintendent’s decision to adjust Appellant’s annual rent to \$4,800.

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 Regional Director's July 10, 2010, decision is affirmed as to the adjustment of Appellant's annual rent to \$4,800 and is reversed as to the effective date of the adjustment. The effective date of the rent adjustment shall be the date on which Appellant received notice from the Superintendent of the adjustment.

I concur:

 // original signed
Debora G. Luther
Administrative Judge

 // original signed
Sara B. Greenberg
Administrative Judge*

*Interior Board of Land Appeals, sitting by designation.