IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

CARL UNDERWOOD, Conservator and Guardian for Mrs. Earl Lee Anders,

Appellant-Petitioner,

COURT OF APPEALS OF NEW MEXICO
FILED
NOV 30 2011
Wendy F. Jones

v. **No. 30,751**

NEW MEXICO COMMISSIONER OF PUBLIC LANDS, PATRICK LYONS,

Appellee-Respondent.

On Writ of Certiorari to the First Judicial District Court, Santa Fe County
No. D-101-CV-2008-1736

ANSWER BRIEF

John L. Sullivan
Associate Counsel
New Mexico State Land Office
310 Old Santa Fe Trail
P.O. Box 1148
Santa Fe, New Mexico 87504-1148
(505) 827-5713
Attorney for Substituted Appellee-Respondent Ray Powell, Commissioner of Public Lands of the State of New Mexico

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

SUMMARY OF PROCEEDINGS 3

I. The Commissioner's Contest Decision Was Based on a Variety of Evidence in the Contest Record. 4

II. The Hearing Officer's Report Relied on Appraisal Testimony Shown on the Record to be Clearly Erroneous. 8

III. Petitioner Obtained a Remedy as to Commissioner Lyons' Effort to Re-open the Contest Record. 10

ARGUMENT 11

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE COMMISSIONER IS THE FINDER OF FACT REGARDING THE VALUE OF IMPROVEMENTS. 11

A. Standard of Review: The Court Reviews Legal Conclusions *De Novo*, But Should Give Deference to the Commissioner's Interpretation of the Appraisal and Contest Statutes and State Land Office Rules. 11

B. The Commissioner Determines the Value of Improvements in the First Instance and Does Not Use an Appellate Standard in Evaluating the Hearing Officer's Report. 13

II. THE DISTRICT COURT CORRECTLY CONCLUDED THAT COMMISSIONER LYONS BASED HIS CONTEST DECISION ON SUBSTANTIAL EVIDENCE IN THE CONTEST RECORD AND DID NOT ACT ARBITRARILY OR CAPRICIOUSLY. 21

A. Standard of Review. 21

B. Commissioner Lyons Reasonably Relied On Record Evidence Showing That a Knowledgeable Buyer Paying True Value for a State Land Office Ground Lease Would Not Pay for Dilapidated Infrastructure That Could Only Be Used for the Purpose of Operating a Money-Losing Mobile Home Park. 22

III. PETITIONER'S DUE PROCESS ARGUMENT WAS NOT PRESENTED TO COMMISSIONER LYONS AND IS WITHOUT MERIT. 28

A. Preservation and Standard of Review. 28

B. Commissioner Lyons Properly Performed His Statutorily-Mandated Role and Based His Decision on Evidence in the Record. 30

CONCLUSION 34

STATEMENT REGARDING CITATIONS TO THE RECORD PROPER AND TRANSCRIPT OF PROCEEDINGS

This statement is included pursuant to Rule 12-213(A) NMRA. References to the Record Proper shall be by page number; *e.g.*, "RP ____." The transcript of the agency hearing (RP 1575-2621) and the exhibits (RP 863-1574) are part of the Record Proper and will be cited by page of the Record Proper or page of the transcript; *e.g.*, "Tr. at __."

TABLE OF AUTHORITIES

NEW MEXICO CASES

Atlixco Coaltion v. Maggiore, 1998-NMCA-134, 125 N.M. 786, 965 P.2d 370 19

Bass Enterprises Prod. Co. v. Mosaic Potash Carlsbad Inc., 2010-NMCA-065, 148 N.M. 516, 238 P.3d 885, *cert. denied*, 2010-NMCERT-6, 148 N.M. 583, 241 P.3d 181 28-30

Bd. of Educ. of Melrose Mun. Schools v. New Mexico State Bd. of Educ., 106 N.M. 129, 740 P.2d 123 (Ct. App. 1987) 17

City of Santa Fe v. Komis, 114 N.M. 659, 845 P.2d 753 (1992) 25

Dona Ana Mut. Domestic Water Consumers Ass'n v. New Mexico PRC, 2006-NMSC-032, 140 N.M. 6, 139 P.3d 166 18

ERICA, Inc. v. New Mexico Regulation and Licensing Dept., Alcohol and Gaming Div., 2008-NMCA-065, 144 N.M. 132, 184 P.3d 444 . . . . . 12, 18, 33

Forest Guardians v. Powell, 2001-NMCA-028, 130 N.M. 368, 24 P.3d 803, *cert. denied*, 130 N.M. 459, 26 P.3d 103 (2001) 27

Gallup Westside Dev., LLC v. City of Gallup, 2004-NMCA-10, 135 N.M. 30, 84 P.3d 78 21

Heimann v. Adee 122 N.M. 340, 924 P.2d 1352 (1996) 13

In re Bristol, 2006-NMSC-041, 140 N.M. 317, 142 P.3d 905 . . . . . 18, 19

In re Estrada, 2006-NMSC-047, 140 N.M. 492, 143 P.3d 731 18

In re Louisiana Energy Services, LP, 2010 WL 3969642 (N.M. App.) 31

Lake Arthur Drainage Dist. v. Field, 27 N.M. 183, 199 P. 112 (1921) 32

Littlefield v. State ex rel. Taxation and Revenue Dept., Motor Vehicle Div., 114 N.M. 390, 839 P.2d 134 (Ct. App.), *cert. denied*, 114 N.M. 123, 835 P.2d 839 (1992) 17

Maso v. New Mexico Tax. & Rev. Dept., 2004-NMCA-025, 135 N.M. 152, 85 P.3d 276 29

Montano v. NM Real Estate Appraiser's Bd., 2009-NMCA-009, 145 N.M. 494, 200 P.3d 544 12

Morningstar Water Users Ass'n v. New Mexico Public Utility Comm'n, 120 N.M. 579, 904 P.2d 28 (1995) 12, 13

Old Abe Co. v. New Mexico Mining Comm'n, 121 N.M. 83, 908 P.2d 776 (Ct. App. 1995) 29

Paule v. Santa Fe County Bd. of County Comm'rs, 2005-NMSC-021, 138 N.M. 82, 117 P.3d 240, 248 12

Phelps Dodge Tyrone, Inc. v. New Mexico Water Quality Control Comm'n, 2006-NMCA-115, 140 N.M. 464, 143 P.3d 502, *cert. denied*, 2006-NMCERT-9, 140 N.M. 542, 144 P.3d 101 . . . . 31, 33

Reid v. N.M. Bd. of Exam'rs in Optometry, 92 N.M. 414, 589 P.2d 198 (1979) . 33

Rio Grande Chapter of Sierra Club v. New Mexico Mining Comm'n, 2003-NMCA-005, 133 N.M. 97, 61 P.3d 806 . . . . 11, 12

Rodriguez v. Permian Drilling Corp., 2011-NMSC-032, 150 N.M. 164, 258 P.3d 443 13

Romero v. Rio Arriba County Comm'rs, 2007-NMCA-004, 140 N.M. 848, 149 P.3d 945, *cert. quashed*, 2007-NMCERT-9, 142 N.M. 716, 169 P.3d 409 21

Santa Fe Pub. Schs. v. Romero, 2001-NMCA-103, 131 N.M. 383, 37 P.3d 100 20

Selmeczki v. N.M. Dep't of Corrections, 2006-NMCA-024, 139 N.M. 122, 129 P.3d 158 21

Smyers v. City of Albuquerque, 2006-NMCA-095, 140 N.M. 198, 141 P.3d 542 21

State ex rel. King v. Lyons, 2011-NMSC-004, 149 N.M. 330, 248 P.3d 878 . . 13, 23, 27

State ex rel. New Mexico Judicial Standards Comm'n v. Espinosa, 2003-NMSC-017, 134 N.M. 59, 73 P.3d 197 18

State ex rel. Reynolds v. Aamodt, 111 N.M. 4, 800 P.2d 1061 (1990) 29

State ex rel. State Hwy. Comm'n v. Chavez, 80 N.M. 394, 456 P.2d 868 (1969) 25

State v. Dominguez, 2005-NMSC-001, 137 N.M. 1, 106 P.3d 563 10

US West Communications Inc. v. N.M. State Corp. Comm'n, 1999-NMSC-016, 127 N.M. 254, 980 P.2d 37 30

FEDERAL CASES

Chapman v. U.S., 169 F.2d 641 (10th Cir. 1948) 24, 25

Mester Mfg. Co. v. I.N.S., 900 F.2d 201 (9th Cir. 1990) 16

United States v. 77,819.10 Acres of Land, More or Less, Situate in Socorro and Catron Counties, N. M., 647 F.2d 104 (10th Cir. 1981) 25

CASES FROM OTHER JURISDICTIONS

Arizona Dept. of Economic Sec. v. Redlon, 2009 WL 1156737 (Ariz. App.) . . . 16

Chiloupek v. Arizona Medical Bd., 2009 WL 690612 (Ariz. App.) 16

Lebanon Properties I v. North, 66 S.W.3d 765 (Mo. App. 2002) 15

Ritland v. Arizona State Bd. Of Medical Examiners, 140 P.3d 970 (Ariz. App. 2006) 16

Ryan v. Kansas Power & Light Co., 815 P.2d 528 (Kan. 1991) 25

Smith v. Arizona Long Term Care System, 84 P.3d 482 (Ariz. App. 2004) 16

Tire Disposal Facilitators, Inc. v. State ex rel. Harder, 919 P.2d 362 (Kan. App. 1996) 16

NEW MEXICO STATUTES

N.M. Laws 1968, ch. 237, § 4, repealed by N.M. Laws 1998, ch. 55, § 27 26

NMSA 1978, § 12-8-12(A) (1969) 17

NMSA 1978, § 12-8-2(A) (1969) 16

NMSA 1978, § 19-10-14 (1929) 23

NMSA 1978, § 19-7-1 (1912) 23

NMSA 1978, § 19-7-9 (2009) 27

NMSA 1978, § 19-7-14 (1963) 1, 2, 12, 13, 23, 26, 29, 30

NMSA 1978, § 19-7-15 (1963) 1

NMSA 1978, § 19-7-17 (1999) 2, 11, 26, 30

NMSA 1978, § 19-7-34 (1912) 6

NMSA 1978, § 19-7-51 (1912) 1

NMSA 1978, § 19-7-64 (1912) 2, 12, 13, 15, 28, 29, 31

NMSA 1978, § 19-7-65 (1912) 3

NMSA 1978, § 19-7-67 (1999) 11

NMSA 1978, § 22-10A-25(D) (2003) 20

NMSA 1978, § 39-3-1.1 (1999) 2, 12, 26

NMSA 1978 § 39-3-1.1(D) (1999) 11

NMSA 1978, § 39-3-1.1(E) 2

NMSA 1978, § 61-30-3(A) (2003) 23

NMSA 1978, § 74-9-29(A)(7) (1990) 19

FEDERAL STATUTES

Enabling Act of 1910, Act of June 20, 1910, Pub. L. 61-219, ch. 310, 36 Stat. 557 (1910) 6, 23, 27, 32

NEW MEXICO COURT RULES

Rule 1-074(R) NMRA 11

Rule 12-213(B) NMRA 3

Rule 12-213(C) NMRA 1

Rule 12-301(C) NMRA 1

Rule 12-505 NMRA 2

Rule 13-213 NMRA 24

Rule 13-715 NMRA 24

NEW MEXICO REGULATIONS

19.2.3.9 NMAC 23

19.2.4.9 NMAC 23

19.2.7.10(A) NMAC 23

19.2.8.9(B) NMAC 23

19.2.9.12(E)(2) NMAC 6

19.2.9.18 NMAC 30

19.2.9.18(C)(2) NMAC 24

19.2.9.7(H)(1) NMAC 1

19.2.9.9(B) NMAC 23

19.2.10.7(A) NMAC 24

19.2.11.10(E) NMAC 23

19.2.14.9(C) NMAC 23

19.2.15 NMAC 31

19.2.15.11 NMAC 14, 32

19.2.15.11(B) NMAC 3, 14

19.2.15.17 NMAC 3, 14, 32

19.2.15.17(D) NMAC 14

19.2.15.17(E) NMAC 12, 15

19.2.21.8(C) NMAC 24

OTHER AUTHORITIES

2 Am. Jur. 2d *Administrative Law* § 365 15

Charles H. Koch, Jr., *Administrative Law and Practice* § 11.10 [3](a) (2d ed. 1997) 16

N.M. Att'y Gen. Op. 08-02 1

Substituted Appellee-Respondent Ray Powell, in his capacity as Commissioner of Public Lands of the State of New Mexico, *see* Rule 12-301(C) NMRA, submits this Answer Brief pursuant to Rule 12-213(C) NMRA.

INTRODUCTION

When State trust land is leased to a person other than the existing lessee and there are improvements on the land belonging to the existing lessee, the value of the improvements is "determined by an appraisal made by the commissioner of public lands." NMSA 1978, § 19-7-14 (1963).[1] The new lessee then pays that amount to the Commissioner for the benefit of the former lessee. *Id.* In this case, former Commissioner of Public Lands Patrick Lyons commissioned an appraisal of decades-old and dilapidated mobile home park infrastructure and then

[1] The statutes do not define the term "improvements" beyond stating that improvements include appurtenant water rights and are limited to those made in compliance with NMSA 1978, § 19-7-51 (1912), which, for the most part, requires that the Commissioner consent to the placement of improvements on State trust land. *See* NMSA 1978, § 19-7-15 (1963); *cf.* N.M. Att'y Gen. Op. 08-02 (discussing permissible scope of compensation for improvements to State trust land). The State Land Office rule governing business leases defines "improvements," in relevant part, as "any item of tangible property developed, placed, created or constructed on trust lands including, but not limited to, buildings, roadways, equipment and fixtures." *See* 19.2.9.7(H)(1) NMAC. Here, the relevant lease noted the Commissioner's consent to certain specified improvements and providing for compensation of the lessee pursuant to Section 19-7-14. RP 864 (Exh. 1 at 2).

conducted an administrative contest proceeding initiated by Petitioner, whose ward is a former lessee of the State trust land. RP 833-861. After Commissioner Lyons determined that the mobile home park infrastructure had no market value, Petitioner appealed to the District Court, pursuant to NMSA 1978, § 19-7-17 (1999) and NMSA 1978, § 39-3-1.1 (1999), and the District Court affirmed Commissioner Lyons' decision. RP 2858-2859. Petitioner seeks reversal of the District Court's decision, pursuant to NMSA 1978, § 39-3-1.1(E) and Rule 12-505 NMRA.

The Court should affirm the District Court decision because Commissioner Lyons acted in accordance with his statutory authority and responsibility to appraise lessee improvements and the State Land Office's administrative contest rules, and he based his contest decision on substantial evidence in the contest record. In accepting certain parts of the contest hearing officer's report, rejecting others, and modifying the recommended determination of value, Commissioner Lyons acted in accordance with Section 19-7-14 (Commissioner's appraisal authority) and NMSA 1978, § 19-7-64 (1912) (Commissioner's authority to hear contests regarding claims of interest in state trust lands). Commissioner Lyons also acted in accordance with the State Land Office's contest rules, under which the appointment of a hearing officer constitutes a delegation of the

Commissioner's authority to administer oaths and compel the production of witnesses and documents (*see* 19.2.15.11(B) NMAC; NMSA 1978, § 19-7-65 (1912)) but reserves the Commissioner's authority to render a contest decision (*see* 19.2.15.17 NMAC). Commissioner Lyons conducted a detailed and searching review of the entire contest hearing record, including testimony of certified real estate appraisers and knowledgeable persons with experience buying and selling mobile home park properties, and abundant evidence concerning the dilapidated state of this particular park's infrastructure. RP 833-861. Commissioner Lyons then provided a reasoned basis for rejecting certain of the hearing officer's report and modifying the hearing officer's recommendation regarding the value of the mobile home park infrastructure. *Id.* Therefore, the District Court correctly concluded that the Commissioner's decision was in accordance with law, supported by substantial evidence and not arbitrary or capricious.

SUMMARY OF PROCEEDINGS

The Commissioner provides the following limited summary of the proceedings to address deficiencies in the summary provided by Petitioner. *See* Rule 12-213(B) NMRA (answer brief shall not include summary of proceedings unless deemed necessary).

I. The Commissioner's Contest Decision Was Based on a Variety of Evidence in the Contest Record.

From 1958 to 2005, Petitioner's ward entered into a series of leases with the State Land Office under which she operated a mobile home park located in the City of Albuquerque on Central Avenue near Eubank Boulevard. RP 1124-1125 (Exh. 47 at 3-4) (describing property ownership and history).[2] When the last mobile home park lease terminated and Commissioner Lyons issued a planning and development lease to provide for a higher and better use of the land (and a limited and temporary mobile home park operation to the extent necessary to avoid eviction of longterm residents), RP 877-896 (Exh. 2), Petitioner sought compensation for the value of infrastructure associated with the mobile home park. After abandoning his claim for compensation as to two of the three parcels of land covered by the former lease, *see* RP 646-647 (Partial Judgment re dismissal of claim re North Side and Community Center Tracts), Petitioner based his claim on the dilapidated and deteriorating infrastructure located on the "south parcel," which consisted of mobile home and recreational spaces, parking areas, yard

---

[2] Much of Petitioner's contest hearing evidence consisted of decades-old appraisals of the same mobile home park infrastructure and correspondence between the State Land Office and the lessee's legal counsel attempting to resolve disputes regarding its value. *See* RP 1016-1038 (Exhs. 15-19); 1050-1073 (Exhs. 25-33); 1078-1098 (Exhs. 35-45).

lighting, storage sheds, landscaping, yard walls, and water and sewer lines. RP 835.

Commissioner Lyons' 26-page contest decision surveyed the contest hearing record and cited a variety of evidence as to the proper valuation of the improvements. RP 833-861. Among other things, Commissioner Lyons noted that the gas lines to the south parcel ruptured in 2004 and were shut off, after which residents relied on propane tanks servicing their individual units. RP 839; Tr. at 175:4-9; 240:9-23; 241:5-18; 282:12-19; 616:1-617:2. Commissioner Lyons further noted that the City of Albuquerque had "red-tagged" the south parcel's electrical system, and the estimated cost of repair was $132,000. *Id.*

Commissioner Lyons' decision also noted various problems with the testimony given by the four certified real estate appraisers who testified at the final hearing, ultimately concluding that their valuations were not credible and in accordance with the other evidence. RP 839-846, 850-855. Among other things, Commissioner Lyons noted that:

- The appraisers' valuations varied widely and changed repeatedly in the lead up to and during the contest hearing.

- One of Petitioner's appraisers, Jack Donnell, relied entirely on data supplied by Petitioner's other appraiser, Gareth Burman, without verifying Mr.

Burman's data or compiling any of his own, and then did not update his valuation when Mr. Burman updated his data at the hearing.

- Neither of Petitioner's appraisers considered the unique factors associated with state trust lands, including laws prohibiting encumbrances on the land and giving the Commissioner a first lien on all improvements,[3] which one of the appraisers agreed can affect the value of the improvements.

- While the evidence showed that incentives would be needed to bring tenants into the mobile home park, neither of Petitioner's appraisers took that into account in their valuations.

- While the evidence showed that the mobile home park's electrical system was visibly falling apart, was not up to code, and constituted a fire hazard, Petitioner's appraisers assumed that the park's infrastructure was functional and did not consider the need for expensive repairs to the electrical system. (At the hearing, one of Petitioner's appraisers admitted this error under cross examination and modified some of his data accordingly, but the other did not update his

---

[3] *See* Enabling Act of 1910, Act of June 20, 1910, Pub. L. 61-219, ch. 310, 36 Stat. 557 (1910), at § 10 ("No mortgage or other encumbrance of the said lands, or any thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever."); NMSA 1978, § 19-7-34 (1912) (State's lien on improvements for unpaid rent); 19.2.9.12(E)(2) NMAC (SLO business lease rule referencing statutory rent lien).

valuation.)

- After Petitioner dropped his claim for compensation as to two of the three parcels, one of Petitioner's appraisers failed to provide a valuation that was limited to the south parcel.

Id.

In addition, Commissioner Lyons noted testimony from the current lessee (Ted Garcia) and a disinterested mobile home park operator named John Daugherty, who stated that, given the obligation to pay market rent for leasing the state trust land, he would not pay any value for the improvements. RP 846-848. Daugherty was familiar with the park and its financial performance. RP 847. He had inspected the infrastructure and had concluded that it all should be torn out. *Id.* He said that repairing the gas and electrical lines probably would require moving and repositioning the mobile homes, and that the danger associated with repairing the gas lines probably would require closing the park down. RP 847-848. Daugherty further testified regarding the infrastructure's functional obsolescence, including the fact that the dated, small pads do not accommodate the kinds of mobile homes that have been constructed in recent decades. RP 848.

II. The Hearing Officer's Report Relied on Appraisal Testimony Shown on the Record to be Clearly Erroneous.

The State Land Office's contract appraiser (John Howden) prepared a report, admitted into evidence at the contest hearing, concluding that the value of the south parcel improvements was $10,000. RP 1115 (Exh. 47). During cross-examination, Howden extemporaneously described the projected gross revenue to be generated by the mobile home park, which, under an income capitalization valuation (*see* RP 1126, 1176) is then used to project net operating income and then multiplied by a capitalization rate[4] to determine the value of the land and improvements. Tr. at 579:18-582:24. In describing revenues, Howden referred to revenue in addition to resident rent as "gas," Tr. at 579:24-580:1, when (as is clear from his report and other evidence in the record) this mobile home park was not projected to collect money for gas. RP 1175 (Exh. 47 at 54) ("Tenants pay for their own use of electricity [and] natural gas."). This error was compounded when Howden agreed that this "additional income" (beyond resident rent) was *monthly*, Tr. at 580:7-12, when in fact (as is clear from his report) it was *annual revenue derived from "coin operated washer and dryer income, late charges, forfeited*

[4] The calculation actually involves dividing net operating income by a capitalization rate percentage (a number less than one; *e.g.*, .11), which results in a multiplication of the net operating income figure to arrive at value.

deposits, interest, etc." RP 1175.[5] Howden's error was compounded again when the erroneous gross income figure was used to calculate a new, drastically higher projection for net operating income, which was multiplied by the capitalization rate to arrive at a drastically higher value for the land and improvements, and a value for the improvements of $285,000, *28.5 times or 2850% greater* than the improvement value in his report. RP 1115; Tr. at 580:15-581:8. Without examining the error, the hearing officer viewed Howden's erroneously revised figure as being similar to that offered by Petitioner's appraisers and adopted it for purposes of his recommendation to Commissioner Lyons. RP 708, 711.

Seeing the error (which was clear on the face of the record and argued by State Land Office counsel, RP 695-696) and the manner in which it affected Howden's bottom line calculation of value for the improvements, Commissioner Lyons rejected Howden's revised improvement value and the hearing officer recommendation based on it. RP 845-846. Petitioner has attacked Commissioner

---

[5] As the text of the report explained:

> Additional income generated by properties such as this includes *coin operated washer and dryer income, late charges, forfeited deposits, interest, etc.* In lieu of accurate historical operating data, we have elected to stabilize additional income at *$50 annually per space.*

RP 1175 (Exh. 47 at 54) (emphasis added).

Lyons' findings as to Howden's erroneous adjustment of his appraisal, but has provided nothing to show that Howden was correct when he said that the park was projected to derive revenues from gas and that his "additional income" projection was properly multiplied by 12.

III. Petitioner Obtained a Remedy as to Commissioner Lyons' Effort to Re-open the Contest Record.

Under proper circumstances, the Court may take judicial notice of other cases which are, or have been, on its docket. *See State v. Dominguez*, 2005-NMSC-001, ¶ 9, 137 N.M. 1, 106 P.3d 563. Here, Petitioner has requested that the Court take judicial notice of proceedings in a prior district court action that did not come before this Court. *See* BIC at 7-8. While Petitioner's request for judicial notice is improper, the Commissioner agrees that Petitioner obtained a remedy as to Commissioner Lyons' effort to re-open the contest record. Commissioner Lyons' subsequent contest decision was based on the contest hearing record and each of his factual findings contains a citation to the contest hearing record.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE COMMISSIONER IS THE FINDER OF FACT REGARDING THE VALUE OF IMPROVEMENTS.

A. Standard of Review: The Court Reviews Legal Conclusions *De Novo*, But Should Give Deference to the Commissioner's Interpretation of the Appraisal and Contest Statutes and State Land Office Rules.

On certiorari from a District Court appeal from an agency administrative proceeding, the Court of Appeals applies the same appellate standard of review as the District Court. *Rio Grande Chapter of Sierra Club v. New Mexico Mining Comm'n*, 2003-NMCA-005, ¶ 16, 133 N.M. 97, 61 P.3d 806. Under NMSA 1978, §§ 19-7-17 and § 19-7-67, the appeal from the Commissioner's decision is governed by NMSA 1978 § 39-3-1.1(D) (1999), which provides that the Court may set aside, reverse or remand an agency's final decision if the Court determines that:

(1) the agency acted fraudulently, arbitrarily or capriciously;

(2) the final decision was not supported by substantial evidence; or

(3) the agency did not act in accordance with law.

Under Rule 1-074(R) NMRA, the District Court may reverse an agency decision on those grounds and also if the agency action was outside the scope of the

authority of the agency. *See Paule v. Santa Fe County Bd. of County Comm'rs*, 2005-NMSC-021, ¶ 26, 138 N.M. 82, 117 P.3d 240, 248 (discussing standard of review under § 39-3-1.1 and Rule 1-074).

The function of the Commissioner in appraising improvements pursuant to Section 19-7-14 and deciding contests pursuant to Section 19-7-64 and the State Land Office contest rules (specifically, 19.2.15.17(E) NMAC) is a legal issue, which generally would be reviewed *de novo*. *See Montano v. NM Real Estate Appraiser's Bd.*, 2009-NMCA-009, ¶ 8, 145 N.M. 494, 200 P.3d 544 (stating that agency's and district court's conclusions of law are reviewed *de novo*) (citing *Rio Grande Chapter of the Sierra Club*, 2003-NMSC-005, ¶ 17). However, to the extent that the Court is construing statutes that the Commissioner is entrusted to administer and State Land Office rules, the Court should give deference to the Commissioner's interpretation. *ERICA, Inc. v. New Mexico Regulation and Licensing Dept., Alcohol and Gaming Div.*, 2008-NMCA-065, ¶ 11, 144 N.M. 132, 184 P.3d 444; *Morningstar Water Users Ass'n v. New Mexico Public Utility Comm'n*, 120 N.M. 579, 583, 904 P.2d 28, 32 (1995) ("The court will confer a heightened degree of deference to legal questions that implicate special agency expertise or the determination of fundamental policies within the scope of the agency's statutory function.") (citation and internal quotation marks omitted).

Deference is further warranted by the Commissioner's plenary authority with respect to State trust lands. *See Heimann v. Adee* 122 N.M. 340, 349, 924 P.2d 1352, 1361 (1996) (stating that statutory right to initiate administrative contest as to claimed interest in state trust lands "recognizes the Commissioner's plenary authority" with respect to state trust lands); *State ex rel. King v. Lyons*, 2011-NMSC-004, ¶¶ 5, 149 N.M. 330, 248 P.3d 878 (describing the Commissioner's broad authority to manage State trust lands). As for interpretation of the statutes, the Court is not bound by the Commissioner's interpretation and may substitute its own independent judgment, because it is the function of the courts to interpret the law." *Rodriguez v. Permian Drilling Corp.*, 2011-NMSC-032, ¶ 8, 150 N.M. 164, 258 P.3d 443 (citing *Morningstar Water Users Ass'n*, 120 N.M. at 583, 904 P.2d at 32).

B. The Commissioner Determines the Value of Improvements in the First Instance and Does Not Use an Appellate Standard in Evaluating the Hearing Officer's Report.

The District Court correctly concluded that the Commissioner is the finder of fact regarding the value of improvements. RP 2749-2750. That conclusion is compelled by Section 19-7-14, under which the Commissioner appraises the value of improvements, and Section 19-7-64, under which the Commissioner adjudicates interests in state trust lands. That conclusion is also dictated by the State Land

Office's contest rules, under which the appointment of a hearing officer constitutes a delegation of the Commissioner's authority to administer oaths and compel the production of evidence but preserves the Commissioners authority to render a contest decision. *See* 19.2.15.11(B) and 19.2.15.17 NMAC. Indeed, the contest rules require that the hearing officer issue a "report" (not findings of fact or a recommended decision), but state that the Commissioner shall issue an order granting or denying the relief sought in the contest petition and containing "a statement of the legal and factual basis for the order." *See* 19.2.15.17(D)-(E) NMAC.

Contrary to Petitioner's mistaken interpretation of the contest rules (*see* BIC at 21-22), the hearing officer does not serve as the finder of fact. Section 19.2.15.11 of the contest rules states that the hearing officer shall "preside over the administrative hearing," but does not state or suggest that the hearing officer is the fact finder. Similarly, Section 19.2.15.17(D) requires that the hearing officer issue a report, but contrary to Petitioner's assertion it does not say or suggest that the report should "includ[e] findings of fact, conclusions of law and a recommended decision." *See* BIC at 21. Instead, the rule clearly states that the Commissioner's order accepting, rejecting or modifying the report "shall contain a grant or denial of the relief requested and a statement of the legal and factual basis for the order."

19.2.15.17(E) NMAC. Thus, the rule preserves the Commissioner's "power to hear and determine" contests as conferred by the legislature under Section 19-7-64.

The Commissioner's *de novo* review of the contest record (which includes the hearing officer's report) is consistent with the general principle that an agency charged with making an adjudicatory decision may engage in *de novo* review of the record. The general principle is well stated in a legal encyclopedia as follows:

> The standard of review by an agency of a hearing officer's initial decision is *de novo*, and the extent of that review extends to credibility as well as to questions of fact. Therefore, even though a hearing officer has the advantage of hearing and seeing witnesses testify, an agency may reject the examiner's decision even on a question involving the credibility of contradictory witnesses. On the other hand, while an agency need not defer to the administrative law judge's (ALJ) findings, it should give substantial deference to the ALJ's credibility determinations to the extent they are critical to the outcome of the case and they are demeanor based, that is, they are the product of observing the behavior of the witnesses and not of drawing inferences from and weighing nontestimonial evidence. Nonetheless, an ALJ's recommendation is not entitled to the same deference an appellate court must accord the findings of a trial court. If an agency rejects the fact-finding of an ALJ, it should keep in mind that, on appellate review, courts are entitled to expect, at a minimum, that the agency will provide a rational exposition of how other facts or circumstances justify its course of action.

2 Am. Jur. 2d *Administrative Law* § 365 (footnotes omitted); *see also Lebanon Properties I v. North*, 66 S.W.3d 765, 770 (Mo. App. 2002) (citing, *inter alia*,

Charles H. Koch, Jr., *Administrative Law and Practice* § 11.10 [3](a) (2d ed. 1997)); *Tire Disposal Facilitators, Inc. v. State ex rel. Harder*, 919 P.2d 362, 363 (Kan. App. 1996) (holding that statute that reserves agency decision-making power upon review of hearing record developed by designee "allow[s] the agency to exercise de novo review on the record"); *Chiloupek v. Arizona Medical Bd.*, 2009 WL 690612 at *7 (Ariz. App.) (where statute allowed medical board to "accept, reject or modify" ALJ's decision, the question for reviewing court is "whether substantial evidence supports the Board's final decision, not the ALJ's decision.") (citing *Smith v. Arizona Long Term Care System*, 84 P.3d 482, 485 (Ariz. App. 2004)); *Ritland v. Arizona State Bd. Of Medical Examiners*, 140 P.3d 970, 974 (Ariz. App. 2006) (stating that board may reject administrative law judge's credibility determinations based on substantial evidence); *Arizona Dept. of Economic Sec. v. Redlon*, 2009 WL 1156737 at *5-6 (Ariz. App. 2009) (stating that no deference is required as to findings by hearing officer whose appointment is not statutorily mandated); *Mester Mfg. Co. v. I.N.S.*, 900 F.2d 201, 203 (9th Cir. 1990) (stating that agency review of initial determination pursuant to Section 557 of federal APA permits *de novo* review). Significantly, while the New Mexico Administrative Procedures Act does not apply here, because the Commissioner has not specifically been directed to comply with it, *see* NMSA 1978, § 12-8-2(A)

(1969), it states a general principle that an agency or member thereof may participate in a final adjudicatory decision where he or she "has heard the evidence *or* read the record." NMSA 1978, § 12-8-12(A) (1969) (emphasis added).

Similarly, this Court has held that the State Board of Education's appointment of a hearing officer in an adjudicatory proceeding did not require deference to the hearing officer's findings and conclusions, including witness credibility determinations, so long as the Board conducts a review of the hearing transcript. *See Bd. of Educ. of Melrose Mun. Schools v. New Mexico State Bd. of Educ.*, 106 N.M. 129, 129-130, 740 P.2d 123, 124-125 (Ct. App. 1987); *accord, Littlefield v. State ex rel. Taxation and Revenue Dept., Motor Vehicle Div.*, 114 N.M. 390, 395, 839 P.2d 134, 139 (Ct. App.) (re-stating, with approval, *Melrose Mun. Schools* court's holding that State Board of Education reversal of hearing officer's fact findings requires review of the hearing transcript), *cert. denied*, 114 N.M. 123, 835 P.2d 839 (1992). Indeed, the Court said that "the State Board can reverse the decision of its hearing officer, without taking new evidence, even on points turning on the credibility of witnesses." *Bd. of Educ. of Melrose Mun. Schools*, 106 N.M. at 130, 740 P.2d at 125. An agency decision-maker's rejection of a hearing officer's recommendation is particularly appropriate where the decision involves "*reports and opinions submitted by experts whose credibility is*

based on their credentials and the strength of their analyses, rather than their demeanor as witnesses." *Dona Ana Mut. Domestic Water Consumers Ass'n v. New Mexico PRC*, 2006-NMSC-032, ¶ 27, 140 N.M. 6, 139 P.3d 166 (emphasis added).

In addition, because the Commissioner has reasonably interpreted the statutes and contest rules as providing for *de novo* review of the contest record, the Court should defer to the Commissioner's interpretation. *See ERICA, Inc.*, 2008-NMCA-065, ¶ 11.

Petitioner relies on precedent pertaining to appellate review of judicial adjudications or administrative adjudication schemes very different from the one in this case. *See* BIC at 22-24. For example, in *In re Bristol*, 2006-NMSC-041, 140 N.M. 317, 142 P.3d 905, the Supreme Court overruled a long line of cases and adopted a new, deferential standard for its review of attorney disciplinary committee factual findings. *Id.* at ¶¶ 26-28; *accord*, *In re Estrada*, 2006-NMSC-047, ¶ 7, 140 N.M. 492, 143 P.3d 731; *but see State ex rel. New Mexico Judicial Standards Comm'n v. Espinosa*, 2003-NMSC-017, ¶ 39, 134 N.M. 59, 73 P.3d 197 (Serna, J., specially concurring) ("[U]nlike appellate review of a district court's judgment, which envisions significant deference on factual matters, this Court may accept, reject, or modify both the [Judicial Standards] Commission's findings and

its conclusions. While we may give weight to evidentiary findings and credibility assessments by the Commission or its appointed masters, we are not bound to do so."). In reaching that result, the *Bristol* court relied on a series of cases from other jurisdictions pertaining to court review of attorney disciplinary committee findings. *Id.* at ¶¶ 15-16. That standard befits the Supreme Court's usual role as an appellate tribunal, and it befits the kind of witness credibility determinations often made in attorney disciplinary proceedings. As the above-cited cases (*infra* at 15-18) show, that standard need not, and generally does not, apply to administrative agency evaluations of hearing officer reports, particularly where the decision involves reports and opinions submitted by witnesses whose credibility is based on their credentials and the strength of their analyses, rather than their demeanor as witnesses.

In *Atlixco Coaltion v. Maggiore*, 1998-NMCA-134, 125 N.M. 786, 965 P.2d 370, where the Court applied a statute requiring the designation of a hearing officer to make a report and recommendation in NMED administrative adjudications, *see* NMSA 1978, § 74-9-29(A)(7) (1990), the Court found that the Secretary may set aside the hearing officer's suggested finding if he or she provides a reasoned basis for doing so. *Id.* at ¶¶ 24-25. Here, the Commissioner is not statutorily required to appoint a hearing officer. Rather, the legislature

requires that the Commissioner determine the value of improvements and hear and determine contests. Moreover, Commissioner Lyons' decision provides a detailed, reasoned basis for accepting, rejecting and modifying various aspects of the hearing officer's report.

In *Santa Fe Pub. Schs. v. Romero*, 2001-NMCA-103, 131 N.M. 383, 37 P.3d 100, where the applicable statute required an arbitrator to conduct a "*de novo* hearing" regarding a school board's discharge decision, see *id.* at ¶ 13 (citing statute currently compiled at NMSA 1978, § 22-10A-25(D) (2003)) the Court held that the arbitrator must do more than review the school board's hearing record. *Id.* at ¶ 19. *Romero* does not stand for the proposition that an agency must conduct an entirely new hearing when engaging in *de novo* review of a hearing record which includes a hearing officer's report. Here, consistent with general administrative law principles, the relevant statutes, and the State Land Office contest rules, the Commissioner engages in *de novo* review of the hearing record developed by the hearing officer, and does not conduct an entirely new "*de novo* hearing."

II. THE DISTRICT COURT CORRECTLY CONCLUDED THAT COMMISSIONER LYONS BASED HIS CONTEST DECISION ON SUBSTANTIAL EVIDENCE IN THE CONTEST RECORD AND DID NOT ACT ARBITRARILY OR CAPRICIOUSLY.

A. Standard of Review.

See discussion *infra* at 11-12 (re statutes and court rules governing appeals from Commissioner appraisal of improvements and contest decisions). In reviewing an agency decision, the Court applies a whole-record standard of review. *See Smyers v. City of Albuquerque*, 2006-NMCA-095, ¶ 5, 140 N.M. 198, 141 P.3d 542 (citing *Selmeczki v. N.M. Dep't of Corrections*, 2006-NMCA-024, ¶ 13, 139 N.M. 122, 129 P.3d 158). Thus, the Court must independently review the entire record of the administrative hearing to determine whether Commissioner Lyons' contest decision was arbitrary and capricious, not supported by substantial evidence, or otherwise not in accordance with law. *Id.* Petitioner bears the burden to demonstrate grounds for reversal. *Id.* In determining whether the decision was arbitrary and capricious, the Court must view the evidence in the light most favorable to Commissioner Lyons and avoid substituting its own judgment for that of Commissioner Lyons. *Id.*; *Romero v. Rio Arriba County Comm'rs*, 2007-NMCA-004, ¶ 12, 140 N.M. 848, 149 P.3d 945 (citing *Gallup Westside Dev., LLC v. City of Gallup*, 2004-NMCA-10, ¶ 11, 135 N.M. 30, 84 P.3d 78)), *cert.*

quashed, 2007-NMCERT-9, 142 N.M. 716, 169 P.3d 409. Even if the Court would have come to a different conclusion had it been the fact finder, it must only evaluate whether the record supports the result reached, not whether a different result could have been reached. *Romero* at ¶ 12.

B. Commissioner Lyons Reasonably Relied On Record Evidence Showing That a Knowledgeable Buyer Paying True Value for a State Land Office Ground Lease Would Not Pay for Dilapidated Infrastructure That Could Only Be Used for the Purpose of Operating a Money-Losing Mobile Home Park.

In affirming Commissioner Lyons' contest decision, the District Court concluded that Commissioner Lyons based his determination that the south parcel infrastructure had no compensable value on substantial evidence and that Commissioner Lyons did not act arbitrarily or capriciously, pointing specifically to the testimony of John Daugherty, a knowledgeable mobile home park operator who said that the south parcel infrastructure was worthless. RP 2749-2750. In fact, as discussed *infra* at 4-7, Commissioner Lyons relied on a variety of evidence indicating that the mobile home park infrastructure had no compensable market value. Therefore, while the District Court did not discuss all of the contest evidence indicating that the infrastructure lacked compensable value, its conclusion was correct and should be affirmed.

Putting aside Petitioner's mistaken interpretation of what kind of appraisal

the Enabling Act requires in order for the Commissioner to lease or sell trust land, *see* BIC at 14-16,[6] the contest here concerned the value of improvements belonging to the lessee, not trust land. Thus, the Enabling Act simply does not apply. *Cf. State ex rel. King v. Lyons*, 2011-NMSC-004, ¶¶ 5-7, 149 N.M. 330, 248 P.3d 878 (describing Enabling Act § 10 restrictions on lease and sale of state trust land as part of decision invalidating land exchanges because the exchange auction did not comply with the Enabling Act). Similarly, the definition of "appraisal" in the Real Estate Appraisal Act, NMSA 1978, § 61-30-3(A) (2003), applies neither to the Enabling Act (enacted by Congress more than 80 years earlier) nor to Section 19-7-14; it simply defines the kind of appraisal practice that requires a license. In addition, Section 19-7-14 belies Petitioner's contention that the Commissioner must simply adopt a value offered by a certified real estate appraiser; it says that the value of improvements is to be "determined by an appraisal made by the commissioner of public lands." Under the State Land Office's business lease rule, when a lease entitles the lessee to an "improvement

---

[6] Historically, and as a matter of certain aspects of current practice, the Commissioner has relied on appraisals or "appraisements" (including appraisals of improvements) by any "disinterested party," not necessarily a certified real estate appraiser. *See* NMSA 1978, §§ 19-7-1 (1912) and 19-10-14 (1929); 19.2.3.9, 19.2.4.9, 19.2.7.10(A), 19.2.8.9(B), 19.2.9.9(B) (business lease appraisement must be made "by a disinterested and credible person"), 19.2.11.10(E), and 19.2.14.9(C) NMAC.

value credit" for permanent improvements that the lease requires the lessee to leave behind (a situation not present here) and is based on the amount that the improvements add to the land itself, the credit must be supported by an appraisal conducted by a certified real estate appraiser, but ultimately is determined by the Commissioner. *See* 19.2.9.18(C)(2) NMAC; *see also* 19.2.10.7(A) (requiring that certain appraisals of rights-of-ways and easements be conducted by a certified real estate appraiser) and 19.2.21.8(C) (requiring appraisal by certified appraiser for land exchanges).

Regardless of whether the opinion of a certified real estate appraiser is required, the Commissioner, like any other finder of fact, determines the value based on the evidence. In judicial proceedings, a judge or jury as the finder of fact evaluates the weight to be given an expert's opinion, including opinions of appraisers, and may reject the opinion entirely if it concludes that the opinion is unsound. *See* Rule 13-213 NMRA (general uniform jury instruction re expert testimony); Rule 13-715 NMRA (UJI re expert testimony in condemnation cases); *Chapman v. U.S.*, 169 F.2d 641, 645 (10th Cir. 1948) (stating, in condemnation case, that "the qualifications of witnesses to testify as experts and the weight to be given their testimony are matters peculiarly for the trial court, and are reviewable only for an abuse of judicial discretion"). Moreover, in judicial condemnation

proceedings, the court has wide discretion in passing on matters relating to expert testimony. *United States v. 77,819.10 Acres of Land, More or Less, Situate in Socorro and Catron Counties, N. M.*, 647 F.2d 104, 106 (10th Cir. 1981). In judicial condemnation proceedings, one need not be qualified as an expert to offer testimony corroborating or providing a foundation for an expert's opinion. *See City of Santa Fe v. Komis*, 114 N.M. 659, 665, 845 P.2d 753, 759 (1992) (citing *Ryan v. Kansas Power & Light Co.*, 815 P.2d 528, 535 (Kan. 1991)). Further, in judicial condemnation proceedings, one need not be a certified real estate appraiser to qualify as an expert for purposes of giving an opinion on value. *See 77,819.10 Acres of Land*, 647 F.2d at 108; *Chapman*, 169 F.2d at 645; *State ex rel. State Hwy. Comm'n v. Chavez*, 80 N.M. 394, 396-97, 456 P.2d 868, 870-71 (1969). In *77,819.10 Acres*, which involved the value of a leasehold interest in State trust land, the court approved reliance upon the testimony of a witness who had been involved in numerous sales of similar ranch property, who was familiar with the property from past business experience, and who owned a ranch nearby. *Id.*, 647 F.2d at 108.

Unlike judicial condemnation proceedings, the Commissioner's valuation of lessee improvements arises from a consensual relationship where the lessee who places improvements upon State trust land knows that the Commissioner will be

valuing the improvements if the land is subsequently leased or sold to someone else. Unlike a general jurisdiction court, the Commissioner has substantial expertise regarding State trust lands and the unique issues that pertain to those lands. Thus, the Commissioner is uniquely well situated to make a determination of value based on specific factors arising in the State trust land context. Significantly, the legislature recently removed the right of one appealing the Commissioner's appraisal to seek a *de novo* valuation by the District Court with the right to introduce additional evidence. *See* N.M. Laws 1968, ch. 237, § 4, repealed by N.M. Laws 1998, ch. 55, § 27; N.M. Laws 1999, ch. 265, § 28 (codified at NMSA 1978, § 19-7-17). Thus, the Commissioner appraises the value and determines any contest, and the District Court's role is to review the Commissioner's decision using § 39-3-1.1 standards.

Here, Commissioner Lyons provided a detailed analysis of the evidence, including the testimony given by certified appraisers, and made his own determination of value, in accordance with Section 19-7-14. As the person with plenary authority over state trust lands and statutory authority to appraise lessee improvements, Commissioner Lyons acted in accordance with law. Commissioner Lyons' 26-page decision belies the contention that he relied on evidence other than that presented in the contest hearing. Each factual finding contains a citation

to the contest hearing record which supports the finding. Cumulatively, those factual findings logically and reasonably support the ultimate conclusion that the mobile home park infrastructure had no compensable value.

In this regard, it is important to note that the State Land Office lessee must pay true value for the land. *See* Enabling Act § 10; NMSA 1978, § 19-7-9 (2009) (providing that lease of state trust land for commercial development must comply with Enabling Act true value requirement); *State ex rel. King v. Lyons*, 2011-NMSC-004, ¶ 43 (stating that purpose of Enabling Act restrictions on lease and sale of trust land is to "assure that the trust received in full fair compensation for trust lands") (internal quotation marks and citations omitted). In order for the lessee's improvements to have value to a subsequent lessee, they must have value to a lessee who pays true value for the State Land Office lease. If the highest and best use of the land does not involve use of that infrastructure (or use of the infrastructure does not yield value), the infrastructure has no compensable value. That conclusion is consistent with Section 19-7-14 and the terms of the lease at issue here. If the Commissioner overvalues the improvements and thus requires a subsequent lessee to pay more than they are worth, the lessee will not be willing to pay true value for the lease, and thus the Commissioner would potentially be breaching his fiduciary duty to the trust. *See Forest Guardians v. Powell*,

2001-NMCA-028, ¶¶ 6-9, 130 N.M. 368, 24 P.3d 803 (describing nature of the Commissioner's trust obligations), *cert. denied*, 130 N.M. 459, 26 P.3d 103 (2001). By the same token, the Commissioner has a countervailing concern to appraise the improvements fairly (and indeed has an incentive to overvalue them) so that existing and future lessees making improvements are assured that they will be valued fairly and that future leases that contemplate such lessee improvements are attractive to potential lessees.

III. PETITIONER'S DUE PROCESS ARGUMENT WAS NOT PRESENTED TO COMMISSIONER LYONS AND IS WITHOUT MERIT.

A. Preservation and Standard of Review.

Where an agency lacks jurisdiction to address a due process claim administratively, a due process claim may be raised for the first time on appeal from an agency decision. *See Bass Enterprises Prod. Co. v. Mosaic Potash Carlsbad Inc.*, 2010-NMCA-065, ¶ 49, 148 N.M. 516, 238 P.3d 885, *cert. denied*, 2010-NMCERT-6, 148 N.M. 583, 241 P.3d 181. To the extent that Petitioner argues that Commissioner Lyons' conduct of the contest here demonstrated a lack of impartiality that violates his due process rights, he failed to preserve the claim by presenting it to Commissioner Lyons or seeking Commissioner Lyons' recusal. To the extent that Section 19-7-64 did not permit Commissioner Lyons to recuse

himself or Petitioner is making a facial attack on Section 19-7-64 or 19-7-14 as unconstitutional on the grounds that the Commissioner cannot be impartial in appraising the value of lessee improvements, Petitioner likely is able to raise that issue for the first time on appeal, because Commissioner Lyons' contest jurisdiction probably does not extend to such a claim. Whether due process rights were violated presents a question of law that the Court reviews de novo. *See Bass Enterprises*, 2010-NMCA-065, ¶ 49 (citing *Maso v. New Mexico Tax. & Rev. Dept.*, 2004-NMCA-025, ¶ 18, 135 N.M. 152, 85 P.3d 276). To the extent that Commissioner Lyons acted in accordance with his statutory authority to appraise improvements and make contest decisions, the Court must strongly presume that his actions were constitutional. *See State ex rel. Reynolds v. Aamodt*, 111 N.M. 4, 5-6, 800 P.2d 1061, 1062-63 (1990) (citing cases). A party raising a constitutional issue bears the burden of establishing that the Constitution as been violated, and the Court must resolve all doubts in favor of a finding of constitutionality. *See Old Abe Co. v. New Mexico Mining Comm'n*, 121 N.M. 83, 96-97, 908 P.2d 776, 789-90 (Ct. App. 1995).

B. Commissioner Lyons Properly Performed His Statutorily-Mandated Role and Based His Decision on Evidence in the Record.

In administrative proceedings, due process is flexible and requires only the procedural protections that the particular situation demands. *See Bass Enterprises*, 2010-NMCA-065, ¶ 51 (citing cases). In determining what process is due, the Court must balance (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional procedural safeguards; and (3) the government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail. *Id.* (citing cases). In balancing those factors, the Court considers the proceedings as a whole. *Id.* (citing *US West Communications Inc. v. N.M. State Corp. Comm'n*, 1999-NMSC-016, ¶ 26, 127 N.M. 254, 980 P.2d 37).

Here, a lessee who places improvements on State trust land knows that the Commissioner will appraise their value for purposes of compensation. *See* NMSA 1978, § 19-7-14; 19.2.9.18 NMAC; RP 864 (Exh. 2 at 2). If the lessee is dissatisfied with that arrangement, they need not take the lease. Further, the lessee not only gets to appeal the Commissioner's appraisal to the District Court, *see* NMSA 1978, § 19-7-17, he may initiate a contest, which provides an opportunity

to develop an evidentiary record and obtain a decision setting forth the factual and legal basis upon that record. *See* NMSA 1978, § 19-7-64; 19.2.15 NMAC. The legislature's determination that this should be done administratively before the Commissioner reflects a concern with burdening both the State Land Office and the courts with a *de novo* judicial determination, a concern regarding the funding and additional administrative burdens associated with some other tribunal, and an appreciation of the Commissioner's expertise and policymaking role as it pertains to value improvements have for someone leasing or purchasing State trust land. *Cf. Phelps Dodge Tyrone, Inc. v. New Mexico Water Quality Control Comm'n*, 2006-NMCA-115, ¶¶ 41-42, 140 N.M. 464, 143 P.3d 502 (rejecting due process challenge as to alleged bias of Water Quality Control Commission member, and noting that statutory composition of the Commission contemplates members "who have been politically and publicly active, people from industry, and people who have expressed their views and who have been engaged in the regulatory process. It is unrealistic to expect that the public members will be people who have not taken positions, or people who come 'with a clean slate'"), *cert. denied*, 2006-NMCERT-9, 140 N.M. 542, 144 P.3d 101; *accord*, *In re Louisiana Energy Services, LP*, 2010 WL 3969642, *10 (N.M. App.). Therefore, the regime providing for the Commissioner to determine the value of lessee improvements

complies with due process.

The Commissioner appoints a hearing officer, which can be a person from within the State Land Office, to administer the contest proceeding, conduct the hearing, and issue a report, *see* 19.2.15.11 through 19.2.15.17 NMAC, not for the purpose of having a supposedly more neutral and disinterested decision-maker whose findings and recommendations require deference. As discussed above, the Commissioner decides the contest based on facts he sets forth in his decision. *See* discussion *infra* at 12-19. Contrary to Petitioner's contention that the Commissioner has a motive to minimize the former lessee's improvement compensation in order to maximize the value of a subsequent lease, the Commissioner must take care to value improvements fairly so that existing and future lessees making improvements are assured that they will be valued fairly and that future leases that contemplate such lessee improvements are attractive to potential lessees.[7] This is not a one-off situation where the Commissioner lacks

---

[7] The Enabling Act requires that State trust land proceeds be used only for trust purposes, Enabling Act § 10, and has been construed as prohibiting use of State trust land proceeds to make improvement to the land. *See Lake Arthur Drainage Dist. v. Field*, 27 N.M. 183, 199 P. 112 (1921) (holding that state has no power to improve the granted lands and charge the expense of the improvements against said lands, or funds derived from lands belonging to the class benefitted). Therefore, to the extent that the most valuable use of the land (*i.e.*, that which will bring the most return to the trust) requires improvements, the Commissioner must, in the absence of a legislative appropriation of general funds, rely on lessees to

other competing concerns.

Petitioner's argument notably lacks any evidence that Commissioner Lyons was predisposed against this particular lessee. *Compare Erica, Inc.*, 2008-NMCA-065, ¶ 43, 144 N.M. 132, 184 P.3d 444 (rejecting a claim that a hearing officer was biased based on pre-hearing rulings that went against the appellant because there was no demonstration that the hearing officer prejudged the case) *with Reid v. N.M. Bd. of Exam'rs in Optometry*, 92 N.M. 414, 415-16, 589 P.2d 198, 199-200 (1979) (finding that a board member's statement that a licensee would lose his license before hearing any evidence or testimony demonstrated that the board member prejudged the case). Instead, he points to Commissioner Lyons' effort to re-open the proceedings after the hearing officer's report, a matter which Petitioner concedes was remedied in an earlier District Court proceeding. *See* BIC at 7-8, 37-38. Petitioner is simply pointing to adverse rulings, as opposed to evidence showing predisposition and bias. Similarly, Petitioner attacks Commissioner Lyons' reliance upon his general knowledge of the conditions and restrictions that exist as to State trust land, when that is the kind of expertise that usually attends to and is accepted in administrative proceedings. *See, e.g., Phelps Dodge Tyrone*, 2006-NMCA-115, ¶¶ 47-51 (rejecting due process challenge to

---

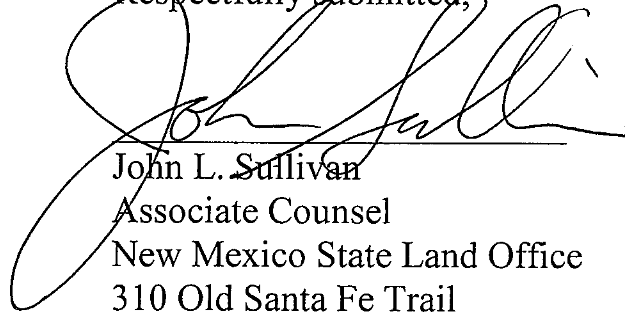
make those improvements.

participation in decision by Water Quality Control Commission member who had worked for NMED and had some prior familiarity with the facility at issue). Commissioner Lyons' conduct is not such that proves that he was predisposed against Petitioner.

CONCLUSION

For the foregoing reasons, the Court should affirm the District Court's Order Affirming Decision of the Commissioner.

Respectfully submitted,

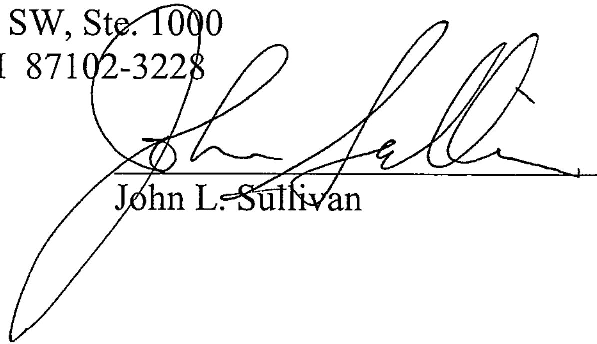


John L. Sullivan
Associate Counsel
New Mexico State Land Office
310 Old Santa Fe Trail
P.O. Box 1148
Santa Fe, New Mexico 87504-1148
(505) 827-5713
Attorney for Substituted Appellee-Respondent Ray Powell, Commissioner of Public Lands of the State of New Mexico

CERTIFICATE OF SERVICE

I certify that on this 30th day of November, 2011, I caused a true and correct copy of the foregoing Answer Brief to be served by causing the same to be deposited in the U.S. mail, first-class, postage pre-paid, addressed to:

Pete V. Domenici, Jr., Esq.
Lorraine Hollingsworth, Esq.
Domenici Law Firm, P.C.
320 Gold Avenue SW, Ste. 1000
Albuquerque, NM 87102-3228



John L. Sullivan