

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

CARL UNDERWOOD,

Plaintiff-Petitioner,

vs.

**No. 30, 751
Santa Fe County
CV-2008-1736**

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

SEP 22 2011

Ben M. Morales

**NEW MEXICO COMMISSIONER OF
PUBLIC LANDS, PATRICK LYONS,**

Defendant-Respondent

**CERTIORARI TO THE
FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO**

BRIEF-IN-CHIEF

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NOTICE OF COMPLIANCE PURSUANT TO RULE 12-312(F) NMRA

The body of this *Brief-in-Chief* exceeds the 35-page limit set forth in Rule 12-213(F)(3) NMRA.

I certify that this *Brief-in-Chief* is proportionally spaced and the body of the Brief contains 9448 words, less than the 11,000 maximum permitted by Rule 12-213.F(3) NMRA.


Lorraine Hollingsworth, Esq.

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I. SUMMARY OF PROCEEDINGS

A. Introduction

This case concerns the valuation of improvements made by Mrs. Earl Lee Anders to property leased from the State Land Office (SLO) under Business Lease No. BL-882. (Record Proper (RP) 863, Business Lease). Carl Underwood is the conservator and guardian for Mrs. Anders and acted on her behalf throughout the proceedings. The leased property is located in Albuquerque, New Mexico and was operated by Mrs. Anders as a mobile home park for a number of years. (RP 863-876, Business Lease; RP 934, Burman appraisal). The lease was terminated on December 31, 2005. (RP 702, Hearing Officer's Final Report). The property was divided into three parcels and the only parcel at issue is the Southeast or Back Parcel. (RP 706-707, Hearing Officer's Final Report).

Pursuant to the SLO lease, as well as the applicable statutory provision, when a lease is terminated, the lessee is to be compensated for the value of the improvements to the property and the value of the improvements is to be determined by an appraisal. (RP 864, Business Lease at ¶6). Pursuant to Section 19-7-14 NMSA, the value of the improvements is paid by either the next lessee or purchaser of the property, not by the SLO. Section 19-7-14 NMSA, referred to and incorporated by reference in the lease, requires that the determination of the value of permanent improvements to leased property be based on an appraisal.

The initial determination of the value of the improvements is made by the SLO, which issues a final agency decision. If the lessee does not agree with the final decision of the SLO, he may initiate a contested proceeding before the Land Commissioner pursuant to Section 19.2.15.9 NMAC. The contested proceeding includes an administrative hearing conducted by a hearing officer appointed by the State Land Commissioner. §19.2.15.11 NMAC. At the conclusion of the hearing, the hearing officer is required to submit a final report, with a recommended decision, to the Commissioner. §19.2.15.17 NMAC. The Commissioner is then required, within a reasonable time, to issue an order adopting, modifying, or rejecting the hearing officer's report. *Id.*

B. The initial valuation by the SLO and the contested proceeding.

In September, 2005, Mr. Underwood notified the SLO that he would not be renewing Business Lease BL-882 and requested valuation and compensation for the improvements to the property. The lease states that, upon termination, the lessee "shall, pursuant to NMSA 1978, Sect. 19-7-14, be compensated for the improvements" to the property. The improvements are to be valued at "market value," which is defined as "the most probable price in cash that the improvements would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all the uses and purposes to which the improvements as well as the property on which they are located are

adapted and for which they are capable of being used.” (RP 864, Business Lease at ¶6). The SLO, based on an appraisal by certified appraiser John Howden, issued a final agency decision stating that the value of the improvements was \$10,000. (RP 51-55).

Mr. Underwood then initiated a contested proceeding under Section 19.2.15 NMAC. Former Court of Appeals Judge Thomas Donnelly was appointed as hearing officer and was assigned to conduct the contest proceeding, hold an administrative hearing, and make a recommended decision. (RP 162). A five-day evidentiary hearing was held in May, 2007. (RP 703, Hearing Officer’s Final Report). Both the SLO and Mr. Underwood presented testimony by certified real estate appraisers. Four appraisers testified at the hearing- Gareth Burman and John Donnell were called by Mr. Underwood and John Howden and Bryan Godfrey were called by the SLO. (RP 704, Hearing Officer’s Final Report). The appraisers offered expert testimony supporting improvement values between \$285,000 to \$388,000. (RP 707-708, Hearing Officer’s Final Report at ¶¶14, 16, 18).

Mr. Burman, Mr. Donnell, and Mr. Howden gave extensive testimony at the hearing as to how they reached their opinions as to the value of the improvements and they were each subject to cross-examination. Each of the appraisers had the requisite expertise to appraise the value of the improvements. (Burman, TR, Vol I, 42:12-43:9; Donnell, TR, Vol III, 491:19-493:3; Howden, TR, Vol. III, 546:4-

548:1; Godfrey, TR, Vol IV, 727:12-728:9). The appraisals of Mr. Burman, Mr. Donnell and Mr. Howden were based on the same accepted industry methods and practices and considered the definition of market value included in the lease or a comparable industry accepted definition. (Burman testimony, TR, Vol I, 43:17-44:7; TR, Vol I, 45:12-52:5). Mr. Godfrey only did a limited appraisal. (TR, Vol. IV, 728:10-22). At the hearing, Mr. Burman valued the improvements at \$388,000 (TR, Vol. I, 110:23-111:4), Mr. Donnell valued the improvements at \$335,000 (TR, Vol. III, 503:1-3), and Mr. Howden valued the improvements at \$285,000 (TR, Vol III, 582:13-19).

Although Mr. Howden originally valued the improvements at \$10,000, during his testimony at the hearing, in response to a question from counsel for Mr. Underwood, Mr. Howden acknowledged that he had made an error in his calculations. (TR, Vol III, 579:23-583:6). Following the identification of the error, Mr. Howden recalculated the value of the improvements and testified that the improvement value was \$285,000. (*Id.*).

The SLO also called two lay witnesses, John Daugherty and Ted Garcia, to testify as to their opinions about the value of the improvements to the property. Mr. Daugherty, who is a businessman and the owner of several mobile home parks and was interested in purchasing the property, testified that he did not believe that the improvements had any value. (RP 836, ¶4 and RP 846, Commissioner's Final

Decision; TR, Vol II, 232:18-25; 237:9-12). Ted Garcia, who also owns a number of mobile home parks and is the current lessee of the SLO property on an open-ended development lease of \$500.00 per year, testified that he believed the improvements were less than \$10,000. (RP 836, ¶8, RP 846; RP 882, Petitioner's Exhibit 2; TR, Vol III, 640:15-20; 647:8-12; 650:17 to 652:20).

The hearing concluded without objection on May 14, 2007. Both parties filed written closing arguments and proposed findings of fact and conclusions of law. (RP 649-700).

C. Judge Donnelly's Final Report

On August 1, 2007, Judge Donnelly issued the "Hearing Officer's Findings of Fact and Conclusions of Law and Recommended Determination of Contest," as required by 19.2.15.17 NMAC. (RP 702-712). After hearing the testimony and weighing the evidence, Judge Donnelly found that Mr. Burman, Mr. Donnell and Mr. Howden "are each expert appraisers knowledgeable and experienced in the appraisal of commercial property." (RP 708, ¶20). Judge Donnelly found that Mr. Howden's valuation of the improvements at \$285,000 "falls within the reasonable range of appraisal values of the Southeast Parcel improvements determined by Gareth Burman who valued them in the amount of \$388,000, and the valuation of the Petitioner's improvements of the three tracts made by John Donnell, before

Petitioner abandoned his claims to the North and Community Center Parcels.” (*Id.* at ¶19).

Judge Donnelly concluded that, as a matter of law, “John Howden, Gareth Burman and John T. Donnell, are each expert and experienced appraisers, and each conducted their appraisals of the improvements on the subject property, utilizing well recognized principles and practices normally used in their profession to determine the fair market value of improvements on real property, including improvements located on state lease land.” (RP 710, ¶3). Based on the record before him, Judge Donnelly concluded that Mr. Underwood “successfully established by a preponderance of the evidence that the fair market value of the improvements located on the Southeast Parcel or Back Parcel of the former leased premises, BL-882, is in the amount of \$285,000.” (RP 711, ¶7). Judge Donnelly’s recommended decision was that Mr. Underwood should be compensated for the fair market value of the improvements in the amount of \$285,000.

D. SLO motions brought after Judge Donnelly’s decision was issued.

On August 13, 2007, three months after the end of the hearing and the close of the evidence, and after Judge Donnelly issued his recommended decision, the SLO filed a motion requesting that the hearing be re-opened to allow additional testimony by John Howden and attached an affidavit allegedly explaining why his testimony during the hearing was inaccurate. (RP 718-727). Mr. Howden had

originally testified that the value of the improvements was \$10,000 but during his testimony at the hearing, in response to a question from counsel for Mr.

Underwood, Mr. Howden acknowledged that he had made an error in his calculations. (TR, Vol III, 579:23-583:6). Following the identification of the error, Mr. Howden recalculated the value of the improvements and testified that the improvement value was \$285,000. (*Id.*). In its motion, the SLO argued that the questioning of Mr. Howden was confusing or inappropriate. (RP 718-722). Mr. Underwood moved to strike the affidavit as inadmissible and as testimony offered outside of the hearing, submitted ninety-one (91) days after the hearing was concluded, not subject to cross examination, and only after Judge Donnelly had rendered a decision in the matter. (RP 729-736). After a hearing on the motions, Judge Donnelly granted the motion to strike Mr. Howden's affidavit and denied the SLO's motion to reconsider or re-open the hearing. (RP 818-823).

On December 7, 2007, the Commissioner, sua sponte, issued an interim order staying the entry of his final decision and an interim order overturning Judge Donnelly's order striking the affidavit of John Howden. (RP 827-831). The Commissioner proposed to appoint a new hearing officer (due to Judge Donnelly's unavailability) and to re-open the hearing "to receive additional information concerning the value of the improvements." (*Id.*). The Commissioner, through his interim orders, granted the SLO the relief already denied by Judge Donnelly. Mr.

Underwood successfully challenged the interim orders in the First Judicial District Court, *Carl Underwood v. New Mexico Commissioner of Public Lands*, D-101-CV-2007-03154. The Court entered an order finding that the Commissioners two interim orders were void and directing the Commissioner to comply with Section 19.2.15.17(E) and issue his decision adopting, modifying or rejecting Judge Donnelly's report within a reasonable time. Mr. Underwood requests that the Court take judicial notice of the First Judicial District Court's Order.

E. The Commissioner's Final Decision

The Commissioner finally issued a decision on June 18, 2008. (RP 833-861). The Commissioner rejected Judge Donnelly's recommended decision as to the value of the improvements and instead found that they did not have any value. (RP 857). The Commissioner stated that it was his role to determine what a "knowledgeable buyer" be willing to pay for the improvements. (RP 834). He further stated that he was to decide whether to accept, modify or reject the Hearing Officer's recommended decision based on a de novo review of "the hearing record as a whole, giving due weight to any assessment the hearing officer might make about a witness's demeanor." (RP 856 at ¶A).

Based on his "de novo" review, the Commissioner conducted his own factual analysis of the testimony and evidence, made determinations about witness credibility, reweighed the evidence, and conducted his own independent evaluation

to determine the value of the improvements. (RP 838848). The Commissioner specifically rejected all of the expert appraisal testimony presented at to the hearing and based his decision, instead, on the lay testimony of John Daugherty and Ted Garcia, both of whom had an interest in the property. (RP 839-846). The Commissioner stated that he rejected the appraisal testimony because of the “subjective nature of real estate appraisals.” (RP 839-840). The Commissioner spent considerable time pointing out what he considered “problems” with Mr. Burman’s and Mr. Donnell’s appraisal opinions. (RP 840-845). The Commissioner concluded that Mr. Burman and Mr. Donnell were not credible witnesses and that they did not provide competent evidence upon which he could base his decision. (*Id.*).

The Commissioner also conducted his own factual analysis of Mr. Howden’s appraisal and testimony, concluding that there was an error in Mr. Howden’s testimony. (RP 845-846, 853 at ¶¶18, 19, 856-857 at ¶¶C, D). In order to reach his determination that there was an error in Mr. Howden’s testimony, the Commissioner introduced new evidence into the record, despite the fact that Judge Donnelly had already entered an order denying the SLO’s attempt to introduction the very same evidence into the record.

After rejecting all of the appraisal testimony, the Commissioner then relied on the lay testimony of John Daugherty and Ted Garcia, stating that “they are

‘knowledgeable buyers’ within the meaning of paragraph 6 of the lease, and because of their knowledge, I find their testimony to be the most credible concerning the value of the improvements.” (RP 846-848). Neither Mr. Daugherty nor Mr. Garcia are certified real estate appraisers. The Commissioner acknowledged that Mr. Garcia was not an unbiased witness because of his Planning and Development lease on the property. (RP 847). Mr. Daugherty testified that the improvements to the property did not have any value and Mr. Garcia testified that they were worth less than \$10,000. (RP 846).

The Commissioner rejected the majority Judge Donnelly’s factual findings, including those on the qualifications of the appraisers; on the accepted method for determining the value of the improvements, on which all three appraisers agreed; on the best and highest use of the property as a mobile home park, even though two experts and one lay witness testified that it could continue to be used as a viable mobile home park; and on the expert testimony of the appraisers and lay testimony that supported Judge Donnelly’s recommended decision. (RP 849; *See* RP 707-709, Hearing Officer’s Final Report, Findings of Fact 14, 15, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28; RP 710, Conclusion of Law 3;). The Commissioner substituted his own findings of fact and conclusions of law, concluded that he was modifying the Hearing Officer’s report, and determined “that the improvements on the south side of the former Ponderosa Mobile Home Park Haven have no market value and

that the subsequent lessee shall not be required to pay any compensation for those improvements. I further declare that because Petitioner did not prevail in his claims, he is not entitled to reimbursement for his costs in bringing this contest proceeding.” (RP 849-857).

F. The District Court decision.

Mr. Underwood appealed the Commissioner’s decision to the First Judicial District Court. After full briefing and oral argument, the District Court upheld the Commissioner’s decision. (RP 2749-2750). The District Court found that the Commissioner acted properly in relying on the lay testimony of John Daugherty, and in rejecting the testimony of the certified appraisers, to reach his determination that the improvements had no value. (*Id.*). The District Court found that the Commissioner acted in accordance with the law, that the testimony of John Daugherty constituted substantial evidence in the record and that the Commissioner’s decision was not arbitrary and capricious. (*Id.*). Mr. Underwood filed a Petition for Writ of Certiorari, which was granted by the Court on December 2, 2010. (RP 2751-2767).

The decision of the Commissioner, as affirmed by the District Court, cannot be upheld because 1) it was not based on an appraisal as required by the applicable statutory provisions; 2) the Commissioner acted outside the scope of his authority by conducting a de novo review, by failing to give deference to Judge Donnelly as

the fact finder, by reweighing the evidence, by making factual determinations and by determining matters of witness credibility; 3) the Commissioner's rejection of a majority of Judge Donnelly's final report, including Judge Donnelly's recommended decision and the Commissioner's reliance on the lay testimony of John Daugherty to reach his final decision, instead of on the expert testimony of the appraisers, was arbitrary and capricious and not supported by substantial evidence in the record; and 4) the Commissioner, by his actions throughout the course of the proceedings, including his attempts to re-open the record after Judge Donnelly's final report was issued, demonstrated that he was not a neutral and unbiased decision maker.

II. ARGUMENT

A. **The District Court erred in affirming the Commissioner's valuation of the improvements because the valuation was not based on an appraisal as required by the New Mexico Enabling Act and Section 19-7-14 NMSA 1978.**

The value of the improvements to the property were required to be determined by an appraisal. Business Lease BL-882 states that, upon termination of the lease, the lessee "shall, pursuant to NMSA 1978, Sect. 19-7-14, be compensated for the improvements" to the property. (RP 864, Business Lease at ¶ 6). Section 19-7-14 NMSA, incorporated by reference in the lease, requires that the determination of the value of permanent improvements to leased property be based on an appraisal. In addition, the New Mexico Enabling Act, which sets forth

specific conditions that the Land Commissioner must meet in regard to state trust land, such as that at issue in this case, requires appraisals for all transactions involving state trust land.

An administrative decision that is not in accordance with the law “should be reversed if the agency unreasonably or unlawfully misinterprets or misapplies the law.” *Bass Enterprises, et al. v. Mosaic Potash Carlsbad, Inc.* 2010-NMCA-065, ¶11, 148 N.M. 516 (internal quotations and citations omitted). The Court gives some deference to an agency’s interpretation of a statute that governs it but the Court is not bound by the agency’s interpretation because it is a matter of law that is reviewed de novo. *Id.* Under basic principles of statutory construction, the plain language of the statute governs and is given full effect. *Id.*; *New Mexico Board of Veterinary Medicine v. Riegger*, 2007-NMSC-044, ¶11, 142 N.M. 248.

It is undisputed that the Commissioner’s decision was not based on an appraisal. The Commissioner rejected all of the appraisals and appraisal testimony and relied on the lay testimony of John Daugherty and Ted Garcia. The District Court, in affirming the decision of the Commissioner, acknowledged that the value of the improvements was based on the lay testimony of John Daugherty and not on an appraisal or the testimony of a certified appraiser. The decision of the Commissioner is not in accordance with the provisions of the New Mexico Enabling Act governing state trust land, which requires appraisals for all

transactions involving state trust land. Nor is it in accordance with the specific provisions of Section 19-7-14 NMSA, which requires that the value of the improvements to leased property be determined by an appraisal. The Commissioner's decision should have been reversed by the District Court.

i. The New Mexico Enabling Act requires appraisals for all transaction involving state trust lands, including leases.

The 1910 New Mexico Enabling Act, which provided for New Mexico's admission as a state, requires an appraisal for all transactions involving state trust lands, including sales and leases. "All lands, leaseholds, timber and other products of land before being offered **shall be appraised at their true value**, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained..." (quoting Section 10 of the Enabling Act; emphasis added). The New Mexico Supreme Court and the Land Commissioner both recognize that the Enabling Act requires appraisals for all transactions involving state trust lands, including leases. *Id.* at ¶36. ("The Land Commissioner is correct to interpret this passage [in the Enabling Act] as requiring an appraisal before *any* transaction involving state trust land, not only for sales but also for leases")(emphasis added).

Section 10 of the Enabling Act establishes "conditions and restrictions upon the Land Commissioner's authority to dispose of public lands" and the Commissioner is required to comply with the provisions of the Enabling Act. *Id.* at ¶7. The purpose of the conditions and restrictions on the Commissioner's authority

is to prevent corruption and exploitation of the public trust and were “written to preclude any license of construction or liberties of inference.” *Id.* at ¶¶7, 38. The Land Commissioner’s authority to manage state trust lands is subject to the terms of the Enabling Act, the New Mexico Constitution, and applicable statutory provisions. *Id.* at ¶5 (The authority of the Land Commissioner “is, of course, subject to the restrictions imposed by the Enabling Act, the Constitution, and the statutes, and the manner of its exercise is subject to review by the courts. *Burguete v. Del Curto*, 49 N.M. 292, 295-96, 163 P.2d 257, 259 (1945)”).

Based on the specific language of Section 10 of the Enabling Act, the Commissioner was required to base his determination of the value of the improvements on an appraisal.

ii. Section 19-7-14, consistent with the Enabling Act, requires an appraisal to determine the value of improvements to leased state trust lands.

Section 19-7-14 NMSA implements, and is consistent with, the appraisal requirement in the Enabling Act as it applies to the determination of the value of improvements to leased state trust land. Section 19-7-14, NMSA 1978, which is applicable to the Commissioner’s decision in this matter and is incorporated into paragraph 6 of the lease (Petitioner Exhibit 1), specifically states that the value of the improvements are to be determined by an appraisal.

Whenever any state lands are sold or leased to a person other than the holder of an existing surface lease and upon which lands there are improvements

belonging to such lessee or to another person, the purchaser or subsequent lessee, as the case may be, shall pay to the commissioner of public lands for the benefit of the owner of the improvements the value thereof **as determined by an appraisal** made by the commissioner of public lands. (Emphasis added).

See also 19.2.9.18.C(2) NMAC (the value added to state trust lands by permanent improvements to leased property “shall be determined...by an appraisal conducted by a certified real estate appraiser”).

The New Mexico Legislature has defined an appraisal as “an analysis, opinion or conclusion by a real estate appraiser relating to the nature, quality, value or utility of specified interests in or aspects of identified real estate or real property, for or in expectation of compensation...” §61-30-3 NMSA (Real Estate Appraisal Act). An appraisal, therefore, is a specific type of analysis or opinion that can only be offered by a real estate appraiser. *See also City of Santa Fe v. Komis*, 114 N.M. 659, 668, 845 P.2d 753 (S.Ct. 1992)(“Non-expert witnesses are not qualified to testify concerning the value of the property”).

Based on the specific language of Section 19-7-14 and the definition of an appraisal, which requires that an appraisal be conducted by a real estate appraiser, the Commissioner was required to base his decision as to the value of the improvements to the property on an appraisal conducted by a real estate appraiser, such as Mr. Burman, Mr. Donnell and Mr. Howell.

- iii. **The Commissioner, by rejecting the appraisals and appraisal testimony, and relying on lay testimony, failed to comply with the appraisal requirements of the Enabling Act and Section 19-7-14.**

The Commissioner's determination of the value of the improvements fails to meet the appraisal requirements of the Enabling Act and Section 19-7-14. Because the method for determining the value of the improvements is established by statute, the Commissioner does not have the authority to use another means for determining the value. The New Mexico Supreme Court has "repeatedly recognized that where authority is given to do a particular thing and a mode of doing it is prescribed, it is limited to be done in that mode; all other modes are excluded." *State ex rel. King v. Lyons*, 2011-NMSC-004, ¶36 (internal quotation marks and citations omitted). Just as the Enabling Act places limits on the Commissioner's actions, so does Section 19-7-14. Based on the general appraisal requirement under the Enabling Act and the specific appraisal language in Section 19-7-14, the Commissioner did not have the discretion to determine the value of the improvements based anything other than an appraisal conducted by a real estate appraiser.

The Commissioner is the only one in the entire proceeding who did not rely on an appraisal or testimony by a real estate appraiser. The SLO's final agency decision, which was the subject of the contest hearing, was based on John Howden's appraisal, undertaken on behalf of the SLO. (RP 505-513). At the

hearing, the SLO presented testimony by two expert appraisers, Mr. Howden and Mr. Godfrey. (TR Vol. III, 545-597; TR Vol. IV, 726-776). The Petitioner also presented testimony by two expert appraisers, Mr. Burman and Mr. Donnell. (TR Vol. 1, 41-231; Vol. II, 392-477; TR Vol. II, 491-540). Judge Donnelly's determination of the value of the improvements and his recommended decision were based on a appraisal, as required by Section 19-7-14. (RP 707-709, Findings of Fact Nos. 15-25; RP 710-711, Conclusions of Law 3, 7).

The Commissioner attempted to justify his rejection of the appraisal testimony by claiming that real estate appraisals are subjective and not reliable. (RP 839-840; RP 849, ¶¶1, 2). Regardless of the Commissioner's opinion about appraisals, the statute and the regulation require him to base his determination of the value of the improvements on an appraisal. The Commissioner cannot ignore the requirements of the statute simply because he believes that appraisals are subjective.

The Commissioner attempts to justify his reliance on the lay testimony of Mr. Daugherty and Mr. Garcia by stating that, in his opinion, "they are 'knowledgeable buyers' within the meaning of paragraph 6 of the lease, and because of their knowledge, I find their testimony to be the most credible concerning the value of the improvements." (RP 846). The definition of market value contained in paragraph 6 of the lease does not give the Commissioner the

authority to ignore the specific appraisal requirements of the Enabling Act or Section 19-7-14. In fact, paragraph 6 explicitly incorporates the statutory requirement by referencing Section 19-7-14. (RP 864). The language in paragraph 6 states the factors to be considered as part of the appraisal, which, as found by Judge Donnelly, were considered by both Mr. Underwood's appraisers and the SLO's appraiser.

The problems associated with the Commissioner's reliance on the lay testimony of Mr. Daugherty and Mr. Garcia demonstrate why Congress, in the Enabling Act, and the New Mexico Legislature, in Section 19-7-14, require an appraisal by a certified real estate appraiser. Mr. Garcia and Mr. Daugherty were not disinterested witnesses. Mr. Daugherty owns two mobile home parks which bookend the subject property and had previously sought to acquire the mobile home park. (RP 836 at ¶4; TR, Vol II, 232:18-25; 237:9-12). Mr. Garcia is the current tenant on a sweetheart, open-ended development lease of \$500.00 per year. (RP 882, Petitioner's Exhibit 2; TR, Vol III, 640:15-20; 647:8-12; 650:17 to 652:20). The Commissioner acknowledges that Mr. Garcia is not an unbiased witness because he has a Planning and Development lease on the property. (RP 847). Because the value of the improvements is paid by a subsequent lessee or purchaser, it was in the best interests of both Mr. Daugherty and Mr. Garcia for the improvements to have no value. Because the value of the improvements also

potentially impacts future lease or sale prices, the Commissioner also has an interest in the value being low. In this case, the Commissioner clearly did not like the result of the hearing. In order to reach the result he wanted, he rejected the appraisals, the expert appraisal testimony, and the recommendations of the unbiased, experienced Judge Donnelly, who had the opportunity to hear the witnesses and weigh their testimony, in favor of the testimony of two lay witnesses who were clearly not disinterested parties. This is exactly the type of decision that the Enabling Act and Section 19-7-14 are intended to avoid.

The Commissioner's decision does not comply with the requirements of the New Mexico Enabling Act and Section 19-7-14, is contrary to the law, and should be overturned.

- B. The District Court erred in affirming the Commissioner's final decision because he acted outside the scope of his authority under §19.2.15.17.E NMAC, which only allows him to adopt, modify or reject the Hearing Officer's report, by conducting a de novo review of the hearing record and by failing to give the proper deference to the Hearing Officer, who was the finder of fact.**

The District Court should not have affirmed the Commissioner's final decision because the Commissioner, instead of reviewing the record to determine if the hearing officer's report should be adopted, modified or rejected, undertook a de novo review of the record in order to reach his own, independent determination as to the value of the property. The Commissioner did not cite to any legal or regulatory authority for conducting a de novo review. In reaching his final

decision, the Commissioner failed to give the factual findings of the hearing officer the proper deference. Instead, he substituted his own factual determinations for those of the hearing officer. The Commissioner's actions were beyond his authority and his final decision should not have been affirmed by the District Court.

- i. In a contested matter, the hearing officer is the fact finder and the Commissioner only has the authority to decide whether to adopt, modify or reject the hearing officer's final report.**

In a contested matter, the Commissioner is required to appoint a hearing officer "to preside over the administrative hearing" and act as the finder of fact. §19.2.15.11 NMAC. The hearing officer conducts the hearing, and has the authority to require post-hearing pleadings and submissions. §19.2.15.14 NMAC. At the conclusion of the hearing, and after post-hearing submissions, the Hearing Officer is required to issue a final report, based on the evidence and testimony presented at the hearing, including findings of fact, conclusions of law and a recommended decision. §19.2.15.17 NMAC. It is the duty of the Hearing Officer, as the finder of fact, to hear the testimony and evidence, to determine issues of credibility, and to determine the proper weight to give to the testimony and evidence.

After the receipt of the hearing officer's final report, the Commissioner is required to "issue an order adopting, modifying, or rejecting that report. This order

shall be the decision of the commissioner, and as such, it 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. The Commissioner makes his decision on the record created before the hearing officer and the regulations do not allow for an additional evidentiary presentation in front of the Commissioner. *Id.* Once the Commissioner has issued his decision, the administrative process is complete and the only recourse is an appeal to the District Court. 19.2.15.18 NMAC.

ii. The Commissioner did not have the authority to conduct a de novo review of the record to reach an independent determination as to the value of the improvements.

The Commissioner, in issuing his decision, erroneously stated that the scope of his review was de novo and, based on a de novo review, reached his own independent conclusion as to the value of the property. (RP 856). The Commissioner does not cite to any legal authority for his conclusion that his review was de novo. Instead of conducting a de novo review, the Commissioner should have deferred to the hearing officer on matters of weight and credibility, viewing the evidence in the light most favorable to the hearing officer’s decision and resolving all conflicts and reasonable inferences in favor of the decision recommended by the hearing officer. *In re Bristol*, 2006-NMSC-04, ¶¶15, 16, 140 N.M. 317.

The Courts generally recognize two standards of review—a de novo review and a substantial evidence review. Under a de novo review, the reviewing entity, whether it is a court or an agency final decision maker, undertakes an independent assessment of the record, separate from that of the original fact finder, is not required to give deference to the original fact finder, and has the authority to conduct an additional evidentiary hearing beyond the record created below. *Aken v. Plains Elec. Generation & Transmission Coop., Inc.*, 2002-NMSC-021, ¶19, 132 N.M. 401; *Clayton v. Farmington City Council*, 120 N.M. 448, 453, 902 P.2d 1051 (Ct.App. 1995).

A substantial evidence review, on the other hand, requires the evidence to be viewed in the light most favorable to the prevailing party and requires all inferences arising from the factual findings of the trial court or hearing officer to be indulged in. *Aken v. Plains Elec. Generation & Transmission Coop., Inc.*, 2002-NMSC-021, ¶19. A fact finder in an administrative hearing serves the same role as any other fact finder and should be given the same deference on factual questions. *Bristol*, 2006-NMSC-04, ¶16; *see also Atlixco Coalition v. Maggiore*, 1998-NMCA-134, ¶22, 125 N.M. 786 (a “hearing officer is not an interested party who submits proposed findings to a trial court but rather an impartial official who presides at a formal, adjudicatory hearing, where he or she is in a position to assess the credibility of witnesses and rule on evidentiary motions”). As explained by the

New Mexico Supreme Court, when the results of an evidentiary hearing are being reviewed by a final agency decision maker, the reviewer, in this case the Commissioner, should defer to the hearing officer “on matters of weight and credibility, viewing the evidence in the light most favorable to the hearing [officer’s] decision and resolving all conflicts and reasonable inferences in favor of the decision reached” by the hearing officer. *In re Bristol*, 2006-NMSC-04, ¶16.

Although the regulations do not specifically refer to a substantial evidence review, the action contemplated by the regulations is similar to such a review. The Hearing Officer acts as the fact finder and the Commissioner reviews his report in order to make a final decision. 19.2.15.11 NMAC; 19.2.15.17 NMAC. The only authority that the Commissioner had was to accept, modify, or reject Judge Donnelly’s final report and recommendation as to the value of the improvements, based on the record created before Judge Donnelly. 19.2.15.17.E. NMAC. The Commissioner did not have the authority to conduct a de novo review of the record. He did not have the authority to conduct his own independent evaluation of the evidence to determine the value of the improvements. Therefore, instead of conducting a de novo review, the Commissioner should have applied a substantial evidence review, with deference given to the hearing officer and his recommended decision because the Hearing Officer heard the testimony and was in the best position to determine the proper weight to give to the testimony and evidence that

was submitted at the hearing. The result of a de novo review, such as that undertaken by the Commissioner, is much broader than the acceptance, modification, or rejection of the Hearing Officer's final report required by the regulations.

iii. The Commissioner failed to give the proper deference to the factual findings of Judge Donnelly.

The District Court, in affirming the Commissioner's decision, correctly stated that the fact finder "is the ultimate determiner of credibility of the witnesses" but incorrectly viewed the Commissioner as the fact finder. (RP 2749). Under the SLO rules, Judge Donnelly, acting as the hearing officer, was the finder of fact. 19.2.15.11 NMAC. He was the only person, under the regulations, designated to take evidence during the course of the administrative hearing. 19.2.15.14 NMAC; *In re Bristol*, 2006-NMSC-04, ¶15. The regulations do not give the Commissioner the authority to take additional evidence or to hold another hearing. Because Judge Donnelly directly observed the testimony of the witnesses, he was in the best position to weigh the evidence, resolve matters of credibility and choose between conflicting inferences that could have been drawn from the testimony. *Id.* A fact finder in an administrative hearing serves the same role as any other fact finder and should be given the same deference on factual questions. *Id.*; *see also Atlixco Coalition v. Maggiore*, 1998-NMCA-134, ¶22, 125 N.M. 786 (a "hearing officer is not an interested party who submits proposed findings to a trial court but rather an

impartial official who presides at a formal, adjudicatory hearing, where he or she is in a position to assess the credibility of witnesses and rule on evidentiary motions”).

Instead of giving deference to Judge Donnelly on factual matters, and either accepting, modifying or rejecting Judge Donnelly’s report based on that deferential standard, the Commissioner undertook to write his own report that was clearly based on his own analysis and interpretation of the testimony and evidence. Throughout his Final Decision, the Commissioner reweighed the evidence and substituted his own judgment for that of the Hearing Officer. (RP 838-848). To the extent that the Commissioner addressed Judge Donnelly’s final report, it was to explain why he did not agree with Judge Donnelly’s factual determinations, which he then rejected and substituted with 29 “additional findings of fact,” which were clearly the result of the Commissioner’s re-weighing of the testimony and evidence. (RP 849-855). The Commissioner even went so far as to re-evaluate the testimony of the appraiser, John Howden and determine, based on evidence outside the record, that his testimony correcting his earlier valuation of the property was incorrect. (RP 845-846). Then, based on his own findings of fact, the Commissioner wrote his own conclusions of law. (RP 856-857).

There are no provisions within the regulations governing contested proceedings that give the Commissioner the authority to undertake an independent

review of the evidence and to create an entirely new report separate from the Hearing Officer's final report. In reviewing the Hearing Officer's report, the Commissioner erroneously applied a de novo standard of review instead of the deferential standard required by the New Mexico Supreme Court and acted beyond his authority by entering his own findings of fact. *In re Bristol*, 2006-NMSC-04, ¶¶16, 17. The Commissioner clearly substituted his own judgment for that of the Hearing Officer on critical issues of fact and witness credibility. He did not review the evidence in the light most favorable to the Hearing Officer's decision. *Id.* And he did not resolve all conflicts and reasonable inferences in favor of the Hearing Officer's decision. *Id.* Instead, the Commissioner reweighed the evidence and made his own findings of fact. Such reweighing of the evidence and substitution of his judgment was an error on the part of the Commissioner. The Commissioner's authority to reweigh the evidence and make his own factual findings should have been "limited to factual issues not considered by the [hearing officer] or to situations where the [hearing officer's] findings are not supported by substantial evidence." *Id.* at 17. Just as the hearing panel in *Bristol* improperly reweighed the evidence and issued its own finding of fact, so too did the Commissioner. *Id.* at ¶25. Those improper findings of fact cannot then serve as the basis for the Commissioner's decision. *Id.*

The Commissioner's improper reweighing of the evidence and testimony clearly formed the basis of his final decision that the improvements do not have any value. Because the Commissioner adopted the wrong standard of review and failed to give the required deference to Judge Donnelly, and because his decision that the improvements do not have any value was based on the improper reweighing of the credibility of the testimony and evidence presented at the hearing, the District Court should have overturned the Commissioner's final decision. *See Bristol*, 2006-NMSC-04, ¶25 (rejecting the hearing panel's conclusions of law because they were based on the panel's improper findings of fact).

C. The District Court erred in determining that the Commissioner's decision was not arbitrary and capricious and that the testimony of John Daugherty was substantial evidence supporting the decision of the Commissioner.

An agency's decision is arbitrary and capricious "if it is unreasonable or without a rational basis when viewed in light of the whole record. An arbitrary and capricious action by an administrative agency is the result of an unconsidered, willful, and irrational choice of conduct and not the result of the winnowing and sifting process. An action will be considered arbitrary if there is no rational connection between the facts found and choices made, or necessary aspects of consideration or relevant facts are omitted." *Bass Enterprises. Prod. Co. v. Mosaic*

Potash Carlsbad, Inc., 2010-NMCA-065, 148 N.M. 516, ¶45. (internal quotation marks and citations omitted).

On appeal from an administrative decision, both the district court and the Court of Appeals “consider whether the administrative body’s decision is substantially supported by the record.” *Id.* at ¶28. Additionally, the Court of Appeals determines “whether the district court was correct in its assessment of whether substantial evidence supported the administrative body’s order.” *Id.* Substantial evidence is “evidence that is credible in light of the whole record and that is sufficient for a reasonable mind to accept as adequate to support the conclusion reached by the agency.” *Id.* While the evidence is viewed in a light most favorable to the final decision, “favorable evidence is not viewed in a vacuum that disregards contravening evidence.” *Id.* Additionally, because the hearing officer is “an impartial official who presides at a formal adjudicatory hearing, where he or she is in a position to assess the credibility of witnesses and rule on evidentiary motions,” the District Court, in reviewing the final agency decision, may not ignore the hearing officer’s report and recommendations if they are contrary to the final agency decision. *Atlixco.*, 1998-NMCA-134, ¶22.

- i. **There is no rational basis for the Commissioner to reject the testimony of the expert appraisers, the majority of Judge Donnelly's findings of fact, Judge Donnelly's recommended decision and to then determine that the improvements did not have any value.**

The District Court erred in holding that the Commissioner's final decision was not arbitrary and capricious. The District Court also did not take into consideration Judge Donnelly's findings of fact and final report in confirming the Commissioner's decision. The Commissioner's final decision, in which he rejected many of Judge Donnelly's findings of fact and conclusions of law and also rejected his final recommendation, was arbitrary and capricious. There was no rational basis for the Commissioner to reject all of the appraisal testimony, to replace Judge Donnelly's findings of fact with the Commissioner's findings of fact and to conclude that the improvements did not have any value.

The Commissioner rejected Judge Donnelly's findings of fact and conclusions of law as to the qualifications of appraisers; the accepted method for determining the value of the improvements, on which all three appraisers agreed; the best and highest use of the property as a mobile home park, even though two experts and one lay witness testified that it could continue to be used as a viable mobile home park; and the expert testimony of the appraisers and lay testimony that supported Judge Donnelly's recommended decision. (RP 849; *see* RP 707-709)

at Findings of Fact 14, 15, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28; RP 710-711 at Conclusion of Law 3).

The Commissioner did not identify specific errors in Judge Donnelly's findings of fact and conclusions of law that would support their rejection. Instead, he undertook his own analysis of the evidence and chose the facts that supported the outcome that he wanted and rejected or ignored the facts that would support Judge Donnelly's recommended decision. For example, he states that appraisals are too subjective to be relied on, despite the fact that the expert appraisers testified that there are acceptable methodologies that are used to determine fair market value and despite the fact that the statutory provision and the lease language require the use of an appraisal to determine valuation. (RP 839; RP 707-709). The Commissioner went to great lengths to point out what he considers "problems" with Mr. Burman's and Mr. Donnell's appraisal opinions. (RP 840-845). The alleged problems are based on a selective reading of the record and ignore the fact that the Hearing Officer heard and weighed all of the testimony in reaching his conclusions.

Additionally, as part of his analysis, the Commissioner includes his own interpretation of what a "knowledgeable buyer" should consider based on various statutory provisions regarding State Trust Lands. (RP 841-842). His conclusions are not supported by substantial evidence in the record. It is simply unreasonable

for the Commissioner to reject the testimony of competent expert appraisers, particularly when the conclusions of all three experts as to the value of the improvements are within a reasonable range of values.

The Commissioner, even though he did not attend the hearings and did not hear the testimony of each witness, determined that Mr. Burman and Mr. Donnell were not credible witnesses and that they did not provide competent evidence upon which he could base his decision. (RP 840-845). The Commissioner rejected the testimony of all of the expert appraisers and, instead, relied on the testimony of two lay witnesses, John Daugherty and Ted Garcia. (RP 846-848). Mr. Daugherty and Mr. Garcia are business owners, are not expert appraisers and do not have any expertise in property appraisals and each had a personal interest in establishing a low improvement value. (*Id.*). The Commissioner improperly determined that the testimony of Mr. Daugherty and Mr. Garcia as to the value of the improvements was more credible than the testimony relied on by Judge Donnelly. The evaluation of credibility and competence were within the purview of Judge Donnelly acting as the hearing officer and such determinations are beyond the Commissioner's regulatory scope of review, which only allows the Commissioner to accept, modify or reject the Hearing Officer's report.

The Commissioner ignored the qualifications of the appraisers, ignored their testimony as to the proper methods for conducting an appraisal and, without

support in the record, rejected all of the expert testimony and rejected Judge Donnelly's evaluation of the proper weight and credibility to give to the evidence and testimony. Instead, the Commissioner relied on his own interpretation of the evidence, even though he was not at the hearings and was not in a position to evaluate the demeanor of the witnesses and to weigh the numerous factors that are involved in determining credibility and the proper weight to give to testimony heard over the course of a multiple day hearing.

Although the Commissioner makes much of the fact that appraisals are "subjective," the three expert appraisers reached a range of values that were comparable. As the experts testified, there are generally accepted methods for conducting appraisals and there is no evidence in the record that the accepted methods were not followed. In fact, the testimony demonstrated that each of the appraisers followed accepted appraisal methods. There was no basis for rejecting their conclusions, and Judge Donnelly's findings of fact and conclusions of law based on their testimony, other than the fact that the SLO did not like the result of the testimony and did not like Judge Donnelly's recommended decision.

- ii. The testimony of John Daugherty is not substantial evidence supporting the Commissioner's decision because it is lay testimony and lay testimony cannot be used to establish property valuations.**

The District Court held that the lay testimony of John Daugherty was substantial evidence that the improvements had no value. (RP 2749-2750).

However, based on the applicable statutory provisions and case law, Mr. Daugherty did not have the necessary expertise or qualification to offer testimony about the value of the improvements and therefore his testimony does not constitute substantial evidence supporting the Commissioner's decision.

As already discussed above, Section 19-7-14 NMSA requires an appraisal to determine the value of the improvements to the leased property and Section 61-30-3 NMSA defines an appraisal as an analysis, opinion or conclusion prepared by a real estate appraiser. In addition, New Mexico case law holds that non-expert witnesses cannot testify concerning the value of property because they are not qualified to offer such opinions. *City of Santa Fe v. Komis*, 114 N.M. 659, 665, 845 P.2d 753 (S.Ct. 1992) (“Non-expert witnesses are not qualified to testify concerning the value of property”). Although the Court in *Komis* found that “a non-expert qualified witness may corroborate and provide foundation testimony for the expert testimony on damages,” the Court still required expert opinion to establish value. In *Komis*, which dealt with the effect of public perceptions on property values, the Court allowed evidence of public opinion to be introduced because the expert relied in part on the information to “corroborate and provide a foundation for reaching his opinion.” *Id.* at 665.

One exception to the requirement for expert testimony is that, in some situations, a property owner may testify concerning the value of his land because

of his knowledge of the property. *State ex rel. State Highway Commission v. Chavez*, 80 N.M. 394, 396, 456 P.2d 868 (S.Ct. 1969)(holding that a property owner may testify concerning the value of his land in a condemnation proceeding); *City of Albuquerque v. Ackerman*, 82 N.M. 360, 362, 482 P.2d 63 (S.Ct. 1971)(“An owner of real property is presumed to have special knowledge as to its value by reason of ownership and is therefore competent to testify to value”); *Leigh v. Village of Los Lunas*, 108 P.2d 525, ¶25, 137 N.M. 119 (N.M.App. 2004)(in a condemnation proceeding, a landowner may offer testimony as to the fair market value of the property). Mr. Daugherty is not the owner of the leased property and his testimony does not fall within the exception.

The Commissioner completely rejected all of the expert testimony and relied solely on non-expert testimony to establish the value of the improvements. In his final decision, the Commissioner states that he relied on the testimony of Mr. Daugherty as a business man and “knowledgeable buyer,” not as an expert in property valuation. (RP 846). Mr. Daugherty did not offer expert testimony. Nor did any of the expert witnesses rely on the testimony of Mr. Daugherty to corroborate or provide a foundation for the expert opinions offered. Because Mr. Daugherty was not an expert witness and was not the owner of the property, his testimony did not provide substantial evidence as to the value of the property upon

which the Commissioner could rely in reaching his decision or on which the District Court could rely to confirm the Commissioner's decision.

In addition, the Commissioner's reliance on the lay testimony of Mr. Daugherty is directly contrary to the statutory requirement that the value of improvements be "determined by an appraisal made by the commissioner of public lands." §19-7-14 NMSA. In fact, the State Land Office, acting on behalf of the Commissioner, hired an appraiser who prepared an appraisal and testified at trial. Not only did the Commissioner reject the expert opinions offered by Mr. Underwood's appraisers, he rejected the testimony of his own expert.

The regulations governing contested proceedings do not authorize the Commissioner to make decisions that are not based on substantial evidence in the record, that are contrary to the specific provision in the statute requiring that the value of improvements be determined by an appraisal, and that are based on non-expert testimony. Because his decision was not supported by substantial evidence in the record, his decision on the valuation cannot be upheld.

Judge Donnelly, acting as the Hearing Officer, properly relied on expert testimony to reach his determination as to the value of the improvements and the Commissioner should have accepted Judge Donnelly's recommendation. Because the Commissioner's decision was not supported by substantial evidence in the record, the District Court should have overturned his decision.

D. The Commissioner did not act as a neutral and unbiased decision maker and his actions in this matter violate the due process rights of the Appellant and were not in accordance with the law.

Procedural due process “requires a fair and impartial hearing before a trier of fact who is disinterested and free from any form of bias or predisposition regarding the outcome of the case.” *N.M. Board of Veterinary Medicine v. Riegger*, 2007-NMSC-044, ¶27, 142 N.M. 248. An adjudicatory proceeding conducted by an administrative agency, like a court proceeding, is required to be fair and unbiased. Once Judge Donnelly issued his final report and recommended that the Commissioner find that the value of the improvements was \$285,000, the process followed by the Commissioner was not fair and unbiased. The Commissioner is supposed to be a neutral final decision maker whose determination is based on the report and recommendation of the Hearing Officer. However, in this case there was clear bias on the part of the Commissioner.

Three months after the end of the hearing and the close of the evidence, and after Judge Donnelly issued his recommended decision, the SLO attempted to re-open the hearing to allow additional testimony to “fix” the alleged problems with John Howden’s testimony, despite the fact that they had ample opportunity to question him at the hearing after he corrected the mistake in his original appraisal. (RP 718-727). Judge Donnelly, in his role as hearing officer, held a hearing on both the SLO’s motion to re-open the hearing and Mr. Underwood motion to strike

the affidavit and issued an order denying the SLO's motion and granting Mr. Underwood's. (RP 818-823).

Instead of recognizing the authority of Judge Donnelly, the Commissioner, sua sponte, issued an interim order overturning Judge Donnelly's order striking the affidavit of John Howden and ordering the hearing to be re-opened "to receive additional information concerning the value of the improvements." in what was a clear effort to give the SLO the relief denied by Judge Donnelly. (RP 827-831). Mr. Underwood was forced to take the matter to District Court, which ruled against the Commissioner. After being prevented from re-opening the hearing and entering Mr. Howden's affidavit into the record, the Commissioner conducted his own factual analysis of Mr. Howden's appraisal and testimony, concluding that there was an error in Mr. Howden's testimony. (RP 845-846; RP 855 at ¶¶18, 19; RP 856-857 at ¶¶C, D). In order to reach his determination that there was an error in Mr. Howden's testimony, the Commissioner introduced new evidence into the record, despite the fact that Judge Donnelly had already entered an order denying the SLO's attempt to introduction the very same evidence into the record.

It is evident from the actions taken by the Commissioner that he wished to reach a certain outcome, that is the conclusion that the improvements were valueless, and structured his actions and decision to reach that outcome. After Judge Donnelly's decision was issued, the Commissioner tried to re-open the

hearing and allow the SLO to introduce new evidence concerning the testimony of John Howden. Both Judge Donnelly and the First Judicial District Court held that such new evidence could not be introduced. Despite two clear rulings, the Commissioner himself undertook to introduce evidence into the record concerning the alleged “error” in John Howden’s testimony. The clear purpose of introducing such evidence was to provide a pretext for rejecting Judge Donnelly’s conclusion that the value of the improvements is \$285,000.

In addition, in the District Court action, the Commissioner was represented by the same counsel who represented the SLO during the contest proceeding. The Commissioner was represented by the same attorney who argued at the hearing that the improvements did not have any value and who worked vigorously to present his client’s position, as is to be expected. But when the same counsel also represents the final decision maker, who is supposed to be neutral and unbiased, the process ceases to be fair and unbiased. Based on his decision, it is clear that the Commissioner was not a neutral and unbiased decision maker and he should have recused himself as the decision maker. Because the Commissioner was not an unbiased decision maker, his final decision cannot be upheld.

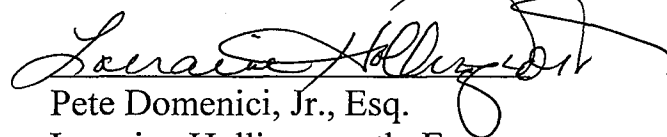
III. CONCLUSION

Based on a review of the evidence in the case in the light most favorable to the Hearing Officer’s findings of fact, which demonstrate that there is

substantial evidence to support the Hearing Officer's decision, the Petitioner respectfully requests that the Court adopt the Hearing Officer's Recommended Decision and find that the fair market value of the improvements located on the Southeast Parcel or Back Parcel of former Business Lease, No. BL-882, is \$285,000 and uphold the award of costs to the Petitioner by the Hearing Officer.

In the alternative, the Petitioner respectfully requests that the matter be remanded to the District Court with instructions that the District Court shall overturn the Commissioner's final decision and adopt the Hearing Officer's final report and recommended decision and find that the value of the improvements was \$285,000.

Respectfully submitted,



Pete Domenici, Jr., Esq.

Lorraine Hollingsworth, Esq.

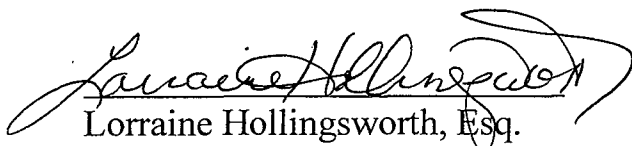
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I certify that a copy of the foregoing was sent to counsel of record on this 22nd day of September, 2011.



Lorraine Hollingsworth, Esq.