



INTERIOR BOARD OF INDIAN APPEALS

American Indian Land Development Corp. v. Sacramento Area Director,
Bureau of Indian Affairs

23 IBIA 208 (02/25/1993)

Related Board case:
26 IBIA 137



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

AMERICAN INDIAN LAND DEVELOPMENT CORP.

v.

SACRAMENTO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 92-219-A

Decided February 25, 1993

Appeal from cancellation of a development lease.

Vacated and remanded.

1. Indians: Leases and Permits: Arbitration

Parties to a lease of trust or restricted property may contract to use arbitration to resolve disputes arising under the lease. Under such circumstances, the use of arbitration is a matter of contract between the parties and will be enforced in accordance with the apparent intent of the parties.

2. Bureau of Indian Affairs: Generally--Indians: Leases and Permits: Generally

The Bureau of Indian Affairs is bound by the terms of leases it has approved, when the leases are not in conflict with governing regulations.

APPEARANCES: James G. Brewer, its Vice-President, Finance, for appellant.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant American Indian Land Development Corporation seeks review of a July 27, 1992, decision of the Sacramento Area Director, Bureau of Indian Affairs (Area Director; BIA), cancelling Lease No. 5001319015, between appellant and the Morongo Band of Mission Indians (Band). For the reasons discussed below, the Board of Indian Appeals (Board) vacates and remands that decision.

Background

The lease, which was approved by the Area Director on August 7, 1990, provided for phased development of approximately 296 acres of tribal land in sec. 8, T. 3 S., R. 2 E., Riverside County, California. The purpose of the lease was to construct, develop, operate, and maintain a fully self-contained residential and resort recreational vehicle park, with associated services. The term of the lease was 25 years, commencing on the date of approval by BIA, with an option to renew for an additional 25 years.

Section 9 of the lease provided that, within 30 days of approval of the lease,

the Lessee shall submit to the Tribal Council for review and approval, two sets of a general plan and architect's design for the complete development of the Leased Premises, together with a phased program, by specific area, of the developments included as a part of the general plan. If the general Plan and Design are approved by the Tribal Council, they shall be submitted to the Secretary. * * * If the general plan and design are approved by the Secretary, one set will be returned to the Lessee with evidence of approval noted thereon. * * * In any * * * disapproval, the Secretary or the Tribal Council will give reasonably detailed reasons for disapproval so that Lessee may use this information as the basis for changing the plan and design for prompt resubmission to the Secretary and the Tribal Council.

The Area Director approved appellant's general development plan on October 31, 1990. Approval was conditioned upon appellant's acceptance of certain conditions which are not relevant here.

By letter dated April 24, 1991, the Band informed the Superintendent, Southern California Agency, BIA (Superintendent), that under the lease,

“reasonably detailed plans and specifications” for the improvements were due to the Band on April 19, 1991. [Appellant] did not furnish these plans to us. Instead they requested (on April 8, in accordance with the lease terms) an extension of 180 days.

After a lengthy and productive meeting between representatives of [appellant] and members of the Tribal Council on April 23rd, it was mutually agreed that an extension would not be granted. Technically, therefore, [appellant] is in default. However, the lease provides in section 29.1 (under DEFAULT) that “should the lessee default in payment . . . or should Lessee breach any other covenant of this Lease, and if such other breach shall continue uncured for a period of sixty (60) days after written notice thereof by the Secretary to Lessee, during which sixty (60) day period the Lessee shall have the privilege of curing such breach.”

[Appellant] thus has a sixty day period after notification of default by the Bureau of Indian Affairs to cure the default. It was clearly understood in the meeting of April 23rd that [appellant] would make a good faith effort to do this. The Band is therefore requesting that a letter be sent from your office to [appellant] notifying them of the default. In this way, the sixty day period can officially begin.

As requested by the Band, by letter dated May 29, 1991, the Superintendent notified appellant that it was in default and had 60 days in which to cure that default.

By letter dated June 20, 1991, appellant submitted detailed plans and specifications for Phase I of the development project to the Superintendent. The Superintendent approved the plans on July 11, 1991.

Under section 10.6 of the lease, “[c]onstruction of improvements * * * shall begin within six (6) months from the approval of the plans and specifications detailed by the Secretary.” Construction did not begin in accordance with this provision. On April 7, 1992, counsel for the Band wrote to appellant, stating:

I am writing to you on behalf of the [Band] in regard to your failure to comply with the terms of your lease of land at the Morongo Indian Reservation. As you should be aware, Paragraph 10.6 of that lease required that you commence construction of the improvements within six months of approval of your plans and specifications by the Secretary of Interior. Those six months expired in early January, 1992. And, you were required to complete construction within twenty four months of said approval, so you are now nine months into your construction schedule and no work has been completed. The [Band] questions whether the required construction can or will be done within the next fifteen months. The [Band] has requested that the Secretary of Interior give you the requisite notice of your breach and the Band’s intention to terminate the lease based on that breach.

I felt it would be worthwhile to explore with you the possibility of your voluntarily terminating the lease. It appears to the [Band] that you may have lost interest in this project inasmuch as the Band has heard nothing from you since the plans were submitted nearly 11 months ago. If so, they would be willing to release you from your obligations under the terms of the lease in return for your likewise releasing them from the obligation to lease to you. Doing so would save both you and the [Band] substantial time and legal fees which would otherwise be incurred in lease termination procedures.

On April 13, 1992, the Tribal Council passed a resolution requesting that BIA “take all steps necessary to terminate the lease.”

On April 14, 1992, appellant wrote to the Band, in response to the letter from counsel for the Band:

When [appellant] executed the referenced lease on portions of the Morongo Indian Reservation, we understood that the Band’s Bingo parlor was to be upgraded and made into a first class Gaming center. Based on that, [appellant] believed that an up-scale Recreational Vehicle (RV) park would complement the Bingo parlor making each a more attractive project. Since that time nothing

has been done to the Bingo facility, and in fact the hours of operation have been significantly decreased. We believe that until some very aggressive action is taken to upgrade the Bingo facility, there is not and will not be any potential for an up-scale RV park. We understand that our lease has no requirement that the Band make any changes in the Bingo operations.

For the above reasons, we would be pleased to explore with you the voluntary termination of the referenced lease as suggested by [counsel's] letter. [1/]

After reviewing the lease and its requirements, by letter dated July 9, 1992, the Superintendent informed appellant of its breach of the lease:

It has been brought to our attention by the [Band] that you are in noncompliance of Lease No. 5001319015. Listed below are the Articles that have not been met.

Article 10.6 has not been met. This Article requires the lessee to commence construction of the improvements within six months from the Bureau of Indian Affairs July 11, 1991, approval of the plans and specifications for the development. The construction did not commence on or before the date of January 11, 1992 the six month period from approval.

Article 16.1 has not been met. This Article requires evidence of public liability insurance in the amounts of \$1,000,000

1/ Appellant' Apr. 14, 1992, letter was included in the administrative record transmitted to the Board by the Area Director. Appellant sent a copy of this letter to the Superintendent on July 17, 1992. Appellant' cover letter to the Superintendent repeated appellant's interest in voluntarily terminating the lease.

By order dated Dec. 21, 1992, the Board requested that the parties explore the possibility of settlement. Counsel for the Band responded:

"In the Board's Order, the Chief Judge correctly states that this firm suggested to appellant that voluntary termination of the lease might be an acceptable alternative to litigation of the default. However, without any basis that we are aware of, the Judge continues by saying that 'Appellant responded favorably to this suggestion.' Neither this firm, nor the [Band], received any reply whatsoever to the letter suggesting voluntary lease termination. We have, in fact, had no communication from [appellant], although we had heard that [appellant] had been attempting to sell the lease.

"* * * [T]here is no reason [for the Board] to delay its decision."

From the Band's response, it appears that it did not receive appellant's Apr. 14, 1992, letter either from appellant or from BIA.

On Feb. 22, 1993, the Board received a letter dated Jan. 27, 1993, from appellant in which appellant stated that "our offer to discuss a mutually acceptable termination with the [Band] remains."

personal injury and \$150, 000 property damage to be submitted to this office.

Article 20.1 has not been met. This Article requires a Performance Bond prior to construction to provide security to guarantee completion of improvements and payment in full of claims of all persons for work performed.

The [Band] has requested termination of the lease for non-compliance in regard to construction as outlined in the lease.

You are hereby notified that upon receipt of this letter, steps will be taken to terminate this lease within ten (10) days for noncompliance.

It appears that appellant's response to the Superintendent's letter was to forward to the Superintendent a copy of its April 14, 1992, letter to counsel for the Band. See note 2, supra. A cover letter states:

We are in receipt of your [July 9, 1992] letter. Please find enclosed a copy of our letter to the [Band] * * * . To date we have had no response to this letter. As indicated in our letter, we are prepared to voluntarily terminate the * * * lease. Please advise us as to how this may be accomplished.

The Superintendent forwarded these materials to the Area Director, who, by letter dated July 27, 1992, upheld the cancellation of the lease:

By Certified Letter dated July 9, 1992 * * * you were given ten days from date of receipt of said letter to show cause why your lease Number 5001319015 with the [Band] should not be cancelled. The defaults cited in the July 9, 1992 letter involved ARTICLE 10, IMPROVEMENTS AND COMPLETION OF DEVELOPMENT, SUBARTICLE 10.6; ARTICLE 16, INSURANCE, SUBARTICLE 16.1 AND ARTICLE 20, PERFORMANCE BOND, SUBARTICLE 20.1. Postal records indicate that you received this Certified Letter on July 10, 1992. You did not respond to said letter by July 20, 1992, which date was the end of the Ten-Day Show Cause period.

Since you did not respond to our Ten-Day Show Cause letter within the requisite time period outlined in 25 CFR §162.14, Violation of Lease, your lease is cancelled effective the date of this letter. [2/]

2/ The Area Director's statement that appellant did not respond to the show-cause notice suggests that he did not consider appellant's submission of the copy of its Apr. 14, 1992, letter to constitute a notice of appeal, or that he had not yet received the materials appellant submitted to the Superintendent.

The Board received appellant's notice of appeal on September 9, 1992. The postmark on the envelope shows that the notice was mailed on August 26, 1992. No briefs were filed.

Discussion and Conclusions

Appellant does not dispute that it failed to begin construction timely, failed to obtain liability insurance, or failed to post a performance bond. Appellant's failure to meet these lease requirements constituted a breach of contract for which the lease might properly be cancelled. See French v. Aberdeen Area Director, 22 IBIA 211 (1992); U.S. Fish Corp. v. Eastern Area Director, 20 IBIA 93 (1991).

Appellant argues, instead, that BIA committed two procedural errors in cancelling the lease. Appellant contends that the question of breach should have been submitted to arbitration under section 28 of the lease and that the Superintendent improperly provided only a 10-day period for curing the breach when section 29.1 of the lease provides 30 days for curing a monetary breach and a minimum of 60 days for curing any other breach.

There is no evidence that appellant raised these arguments to the Area Director. The Board has held that it is not required to consider arguments raised for the first time on appeal. See, e.g., Joint Board of Control v. Acting Portland Area Director, 22 IBIA 22, 28 (1992), and cases cited therein. However, in this case, it appears probable that appellant did not intend to dispute its breach, but rather was seeking a way to terminate the lease on terms satisfactory to both itself and the Band. Appellant had a reasonable expectation that, once it had informed BIA that both it and the Band were interested in voluntarily terminating the lease, BIA would address that issue. Although appellant should have ensured that it protected its appeal rights, under these circumstances, the Board declines to invoke its general rule regarding arguments raised for the first time on appeal.

[1] The Board has upheld arbitration clauses in leases of trust and restricted property. See, e.g., Pittsburg & Midway Coal Mining Co. v. Acting Navajo Area Director, 21 IBIA 45 (1991); Racquet Drive Estates, Inc. v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 184, 90 I.D. 243 (1983). It has also held, however, that arbitration clauses will not be enforced under all circumstances. For example, arbitration must be requested before a lease is cancelled, Franks v. Acting Assistant Secretary--Indian Affairs (Operations), 13 IBIA 231 (1985), and the arbitration clause must be mandatory, rather than permissive, Pima Country Club, Inc. v. Acting Phoenix Area Director, 21 IBIA 33 (1991). The Board's cases can be summarized as holding that parties to a lease of trust or restricted property may agree to use arbitration to resolve disputes arising under the lease. When an arbitration clause is included in a lease, the use of arbitration is a matter of contract between the parties and will be enforced in accordance with the apparent intent of the parties.

Section 28.1 of the present lease provides for the use of arbitration "[w]henever during the original term of this lease or any option period, the Lessee, the Lessor, and the Secretary are unable to reach an agreement

as required by this Lease." In context, the arbitration clause appears designed to address those situations under which the parties must agree in order to proceed under the lease, such as approval of specific development plans. The clause does not appear to be intended to apply to those situations under which one party fails to perform a required, non-negotiable action, such as beginning construction, acquiring liability insurance, or posting a performance bond. The Board finds that appellant's specific breaches of the lease were not matters falling under the lease's arbitration clause. Therefore, the Board rejects appellant's argument that this matter should have been submitted to arbitration.

Appellant's second argument is that it was not given notice of its default as was required under the lease. Section 29.1 of the lease provides:

Time is declared to be of the essence of this Lease. Should Lessee default in payment of monies or fail to post bond, as required by the terms of this Lease, and if such default shall continue uncured for a period of thirty (30) days after written notice thereof by the Lessor or the Secretary to Lessee, during which thirty (30) day period Lessee shall have the privilege of curing such default, or should Lessee breach any other covenant of this lease, and if such other breach shall continue uncured for a period of sixty (60) days after written notice thereof by the Secretary to Lessee, during which sixty (60) day period Lessee shall have the privilege of curing such breach. If more than sixty (60) days is reasonably required by Lessee to cure a breach of a covenant of this Lease other than a failure to pay monies or post bonds, then Lessee shall have such additional time as Lessee may reasonably require to cure such default, provided that Lessee commences such cure within said sixty (60) day period and diligently thereafter prosecutes such cure to completion.

The Area Director based his decision on 25 CFR 162.14, which provides only a 10-day period in which either to cure the breach or show cause why the lease should not be cancelled. Clearly, the lease provision differs from the regulation.

The Board has held that leases of trust and restricted property are contracts that can be tailored to the desires of the parties. White Sands Forest Products, Inc. v. Acting Deputy Assistant Secretary--Indian Affairs, 11 IBIA 299, 90 I.D. 396 (1983). The Board has upheld provisions in leases that were not in the regulations, when the lease provision did not conflict with the governing regulations. See, e.g., Abbott v. Billings Area Director, 20 IBIA 268 (1991) (lease provision requiring lessee consent for a communitization agreement); Pittsburg & Midway Coal Mining Co., supra (lease provision requiring that rental disputes be submitted to arbitration).

[2] The lease under review requires either a 30- or 60-day notification and cure period, while 25 CFR 162.14 requires only a 10-day period. The regulations establish that lessees must be given notice of, and an

opportunity to cure, a breach. In the absence of a specific provision in a lease, the 10-day period established in 25 CFR 162.14 is applied. See, e.g., Mast v. Aberdeen Area Director, 19 IBIA 96 (1990). However, no regulation prevents the parties from changing the length of the notification and cure period to meet their specific needs. The parties here did change the period, providing either a 30- or 60-day period. BIA reviewed and approved the lease, including the extended notification and cure period. The Board holds that although there is a difference between the governing regulations and the lease provisions, there is no conflict between them. See also Tiger Outdoor Advertising, Inc. v. Eastern Area Director, 22 IBIA 280, 285-87 (1992). Therefore, BIA is bound by the terms of the lease, and erred in cancelling the lease without giving appellant the notice and opportunity to cure that it was entitled to receive under the lease. 4/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the July 27, 1992, decision of the Sacramento Area Director is vacated. This matter is remanded to the Area Director for further consideration in accordance with this decision. 5/

//original signed

Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed

Anita Vogt
Administrative Judge

3/ In May 1991, when BIA notified appellant of a breach of the lease, appellant was given 60 days in which to cure the breach.

4/ The fact that BIA never properly notified appellant of its breach as was required by the lease distinguishes this case from other cases in which the Board has upheld lease cancellations despite an argument by the lessee that it was not given time to cure its breach. See, e.g., Tiger Outdoor Advertising, supra; French supra; Mast, supra.

5/ This decision does not preclude appellant and the Band from exploring voluntary termination of the lease. It appears most likely that they were prevented from doing so earlier only by a failure of communication.