



INTERIOR BOARD OF INDIAN APPEALS

Buena Vista Homes, Inc. v. Acting Pacific Regional Director, Bureau of Indian Affairs

36 IBIA 194 (06/26/2001)

Reconsideration denied:

36 IBIA 257



# United States Department of the Interior

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

BUENA VISTA HOMES, INC., : Order Vacating Decision and  
Appellant : Remanding Case  
v. :  
ACTING PACIFIC REGIONAL DIRECTOR, :  
BUREAU OF INDIAN AFFAIRS, : Docket No. IBIA 01-19-A  
Appellee :  
: June 26, 2001

This is an appeal from a September 20, 2000, decision of the Acting Pacific Regional Director, Bureau of Indian Affairs (Acting Regional Director; BIA), finding Buena Vista Homes, Inc. (Appellant) in default under Business Lease 500208-93-18 (the lease) between the Cabazon Band of Mission Indians (Tribe) as lessor and Appellant as lessee. The Acting Regional Director's decision also stated that BIA or the Tribe would exercise remedies for default. For the reasons discussed below, the Board vacates the Acting Regional Director's decision and remands this matter for such further action as may be necessary following completion of arbitration.

The lease, in its original form, was approved by the Sacramento Area Director, BIA, 1/ on October 13, 1993, with the Ocotillo Development Corporation as lessee. Following breach of the lease by Ocotillo, Appellant was substituted as lessee and the lease was amended. An "Amendment and Substitution Agreement" was approved by the Acting Sacramento Area Director on January 25, 1996. 2/

The lease covers approximately 220 acres on the Cabazon Reservation. Its purpose is "to provide for the construction of a residential housing development on the Demised Land consisting of approximately nine hundred fifty (950) moderately priced housing units, together with appurtenant landscaping, infrastructure, site improvements and parking to be developed by Lessee in ten (10) phases." Lease, Section 2.0.

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1/ This is the title by which the Pacific Regional Director was formerly known.

2/ Unless otherwise indicated, all further references to "the lease" are to the lease as amended and all quotations from the lease are from the lease as amended.

On March 19, 1998, the Tribe notified Appellant that it intended to assess construction rent under section 5.2 of the lease. <sup>3/</sup> The Tribe sent Appellant a similar notice on August 6, 1999. On October 21, 1999, the Tribe asked BIA to begin lease termination proceedings, stating that, "[a]s of this date, no substantial performance has been initiated by [Appellant]."

On December 2, 1999, the Regional Director wrote to Appellant, demanding that Appellant pay construction rent to the Tribe under section 5.2. The Regional Director also stated that Appellant was in violation of several provisions of the lease and described the corrective action required as to these violations. Further, he stated that "failure to complete such corrective action within thirty (30) days of this letter shall constitute an Event of Default." Regional Director's Dec. 2, 1999, Letter at 5.

Appellant responded to the Regional Director's letter on December 23, 1999, contending that no default existed that would justify the assessment of construction rent. Appellant's letter also included responses concerning the other violations identified by the Regional Director. Appellant provided a supplemental response on January 11, 2000.

On January 16, 2000, the Tribe wrote to BIA, stating that no construction rent had been received within the cure period and contending that the other lease violations identified by the Regional Director had not been sufficiently cured. The Tribe further stated:

At this time, the [Tribe] desires to keep the master lease in effect, and request[s] that the lessee be removed, in order that the [Tribe] may seek an additional developer to perform under the terms of the master lease. Therefore the [Tribe] is not requesting termination of the lease, but only the removal of the current lessee.

In two subsequent letters, dated March 2 and March 14, 2000, the Tribe emphasized its wish to keep the lease in place but to remove Appellant as lessee.

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<sup>3/</sup> Section 5.2, **Failure to Commence and or Complete Construction in a Timely Manner**, provides:

"Should lessee fail to commence and/or substantially complete construction of any Phase of the Project within the time frame set forth in Section 5.1 above, and such failure is not caused by a breach of this Lease by Lessor, Lessor may, in its sole and absolute discretion, with respect to such Phase and all subsequent Phases upon written notice to Lessee:

"(a) **Assess Construction Rent.** Assess rent in the amount of Four Thousand and no/100 Dollars (\$4,000) per year, per acre ("**Construction Rent**") with respect to such Phase. Construction Rent shall be payable monthly, in advance, without further notice, demand, abatement, deduction or offset. Construction Rent shall be effective thirty (30) days after delivery from Lessor to Lessee stating Lessor's intent to assess Construction Rent, unless construction shall commence prior to the expiration of such thirty (30) day period, \* \* \*."

On March 31, 2000, the Regional Director wrote to Appellant, accepting some of the responses in Appellant's December 23, 1999, and January 11, 2000, letters. He also stated, however, that Appellant's failure to pay construction rent was deemed an event of default and that under subsection 15.1(a) of the lease, Appellant was required to pay all construction rent due within ten days from receipt of the letter. <sup>4/</sup>

Appellant responded to the Regional Director's March 31, 2000, letter on April 11, 2000, again disputing that any construction rent was due.

On September 20, 2000, the Acting Regional Director issued the decision on appeal here. She found Appellant in default for failure to pay construction rent. Although it is not entirely clear, she also appears to have found Appellant in default for failure to provide fire and casualty insurance and failure to provide public liability insurance. She stated:

At this time, **notice is given** that the Lessor and/or the Secretary **will proceed to exercise** the remedies available to them under Lease **Section 15.2(b)**, together with any other remedies authorized under Lease No. 500208-93-18, which include but are not limited to the provisions of the Act of August 9, 1955 (69 Stat. 539), as amended (25 U.S.C. § 415), as supplemented by Part 162, Leasing and Permitting, of the Code of Federal Regulations, Title 25, INDIANS.

Acting Regional Director's Decision at 3.

Appellant then appealed to the Board. After the appeal was docketed, but before any briefs were filed, Appellant informed the Board that it had invoked the arbitration clause of the lease. It requested that the Board stay proceedings in this appeal pending completion of arbitration. The Tribe objected to a stay, contending that, by appealing the Acting Regional Director's decision to the Board, Appellant had waived any arbitration right it may have had. In light of the Tribe's objection, the Board declined to stay proceedings.

Briefs on the merits have been filed by Appellant and the Tribe. Throughout these proceedings, however, Appellant has continued to press for arbitration under the lease. By order of May 22, 2001, the Board granted expedited consideration.

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<sup>4/</sup> Section 15.1, **Lessee's Default**, provides:

"An Event of Default shall be deemed to have occurred upon the occurrence of any of the following:

"(a) **Failure to Pay Rent.** The failure of Lessee to pay any Rent, Additional Rent or any other sum payable by Lessee to Lessor, which failure is not fully cured within ten (10) days after receipt by Lessee of written notice from the Secretary setting forth such failure."

The Board's rules of decision concerning arbitration clauses in leases of Indian land were summarized in American Indian Land Development Corp. v. Sacramento Area Director, 23 IBIA 208, 213 (1993):

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. [5/]

After stating these general rules, the Board found that the matter in dispute in American Indian Land Development Corp. (the lessee's breach of its lease) did not fall under the arbitration clause in the lease. Therefore, the Board rejected the lessee's argument that the matter should have been submitted to arbitration.

However, in Pittsburg & Midway Coal Mining Co., the Board found that the matter in dispute there (rent for the renewal period of the lease) did fall under the arbitration clause in the lease concerned. The Board also found that, under that clause, arbitration was mandatory, rather than permissive. Based upon those findings, and the Federal policy favoring arbitration and alternative dispute resolution (discussed at 21 IBIA 49-50), the Board held that BIA erred in refusing a lessee's request for arbitration.

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5/ The Supreme Court's recent decision in C & L Enterprises v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 121 S.Ct. 1589 (2001), indicates that arbitration clauses in at least some tribal contracts will also be enforced in the courts. In C & L Enterprises, the Court held that a tribe had waived its sovereign immunity against suit in state court by including an arbitration clause in a construction contract. The Court stated: "The [arbitration] clause no doubt memorializes the Tribe's commitment to adhere to the contract's dispute resolution regime. That regime has a real world objective; it is not designed for regulation of a game lacking practical consequences." 121 S.Ct. at 1596.

The contract at issue in C & L Enterprises was not a lease of trust land. Rather, it was a contract concerning a building on off-reservation, non-trust property. Even so, the Supreme Court's decision is relevant here in that it recognized an arbitration clause as binding on a tribe.

Turning to the lease at issue here, the Board considers its arbitration clause in light of the principles discussed in American Indian Land Development Corp. and Pittsburg & Midway Coal Mining Co. The clause is found in section 15.4, **Default and Dispute Resolution**, and provides in relevant part:

(b) **Arbitration.**

(1) Whenever during the Lease Term, any disagreement or dispute arises between Lessor and Lessee as to the interpretation of this Lease or any rights, remedies or obligations arising hereunder, or any claims relating to the subject matter of this Lease, the matter shall be resolved by arbitration.

\* \* \* \* \*

(E) The decision of the arbitrator(s) shall be binding on the parties and may be judicially enforced subject to and in accordance with the procedures set forth in Section 15.4(c) below [(describing the Tribe's limited waiver of sovereign immunity)].

This provision is a broad one and clearly covers the matter in dispute here, i.e., whether Appellant is obligated to pay construction rent. Further, the language of the provision is mandatory, not permissive.

In Franks, supra, the Board held that an arbitration provision may not be enforced once the lease has been cancelled. The lease at issue here, however, has not been cancelled. Rather, the Acting Regional Director, following the request of the Tribe, notified Appellant of an intent to exercise a remedy under which the lease would not be cancelled, i.e., the remedy in subsection 15.2(b). 6/ Accordingly, Franks does not apply here.

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6/ Section 15.2, **Remedies When an Event of Default Exists**, provides:

"Subject to the rights of any Sublessees and Leasehold Mortgagees, if an Event of Default exists, Lessor and/or the Secretary may exercise any remedy available under applicable law as well as one or more of the remedies set forth below:

\* \* \* \* \*

"(b) re-enter the Premises, and at Lessor's and/or the Secretary's option, without declaring this Lease to be terminated, relet the Premises or any part thereof for the account of Lessee, on such terms and conditions and at such rent as Lessor and/or the Secretary may then deem desirable, collecting such rent and applying it to the amount due from Lessee hereunder, to the expenses of reletting and to any other damages or expenses sustained by Lessor and/or the Secretary, recovering from Lessee the difference between the proceeds of such reletting and the amount of the Rent reserved and to be paid by Lessee hereunder, which sum Lessee shall pay upon demand."

As noted above, the Tribe argues that Appellant has waived any right to arbitration by filing this appeal. The Tribe's argument is clearly refuted by section 15.6 of the lease, which provides in part:

Any right or remedy of a party specified in this Lease, and any other right or remedy that Lessee, Lessor and/or the Secretary may have at law, in equity or otherwise upon breach of any covenant, agreement, term, provision or condition in this Lease, shall be distinct, separate, and cumulative rights or remedies, and no one of them, whether exercised by such party or not, shall be deemed to be in exclusion of any other.

Moreover, Appellant's right to appeal the Acting Regional Director's decision arose under BIA regulations, not the lease. The Board declines to hold that a party must abandon its right to appeal a BIA decision in order to exercise a contractual right.

The Tribe also suggests that Appellant should have invoked the arbitration clause earlier. In response, Appellant states that it hoped to resolve the dispute without incurring the costs of arbitration and believed its responses to the Regional Director's December 2, 1999, and March 31, 2000, letters would lead to a resolution.

The arbitration clause calls for arbitration "[w]henver during the Lease Term, any dispute or disagreement arises between Lessor and Lessee." It is perhaps arguable that the clause requires arbitration to be invoked at the moment a dispute arises. However, it is highly unlikely that the parties intended to commit themselves to such a rigid requirement. It is more likely that the parties intended to allow for the possibility of resolving disputes informally prior to resorting to arbitration. The Board declines to interpret the arbitration clause as requiring that arbitration be invoked immediately upon the arising of a dispute.

Unless it is limited in the manner just discussed and rejected, subsection 15.4(b) must be read to authorize arbitration at any time during the lease term. Not only is this interpretation supported by the language of subsection 15.4(b) itself, it is also bolstered by section 15.6, which indicates that a party's right to arbitration may be invoked even after the other party or the Secretary has initiated another right or remedy. <sup>7/</sup>

The Board concludes that Appellant's right to invoke arbitration was still in effect on December 19, 2000, when Appellant invoked that right. Therefore, the Regional Director's September 20, 2000, decision must be vacated in order to allow arbitration to proceed.

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<sup>7/</sup> Indeed, given the broad language of section 15.6, it is conceivable that the right to invoke arbitration would survive cancellation of this particular lease. However, it is not necessary to decide that question here, because the lease was not cancelled.

In a January 11, 2001, memorandum to the Board, the Acting Regional Director states: "We \* \* \* wish to clarify to the Appellant that the lease between [Appellant] and the [Tribe] does not bind the United States to participate in arbitration proceedings."

The arbitration clause calls for arbitration between Appellant and the Tribe. There is no requirement in the lease that BIA participate in arbitration. Further, nothing in the materials before the Board suggests that Appellant has sought to involve BIA in arbitration.

It does not appear that the lease presently contains any provision addressing BIA's role following completion of arbitration. Subsection 15.4(b)(3) of the original lease included the following provision: "Lessor and Lessee acknowledge and agree that the Secretary may be expected to accept any reasonable decisions reached by the arbitration board, but the Secretary cannot be legally bound by any decision which might be in conflict with the interests of the Indians or the United States Government." <sup>8/</sup> However, that provision was deleted when the lease was amended. See Amendment and Substitution Agreement at 10.

It is possible that the question of BIA's role following completion of arbitration will have to be addressed at a later time. However, it would be premature to address the question at this point.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Acting Regional Director's September 20, 2000, decision is vacated, and this matter is remanded to the Regional Director. The Regional Director shall await completion of arbitration proceedings, and any judicial review thereof, before taking any further action in this matter.

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//original signed  
Anita Vogt  
Administrative Judge

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//original signed  
Kathryn A. Lynn  
Chief Administrative Judge

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<sup>8/</sup> The Board construed a similar provision in Swinomish Tribal Community v. Portland Area Director, 30 IBIA 13 (1996).