

BRISTOL BAY HOUSING AUTHORITY

IBLA 85-348

Decided December 12, 1986

Appeal from a decision of Townsite Trustee, Alaska State Office, Bureau of Land Management, rejecting applications for trustee deeds to townsite lots. USS 4992.

Affirmed.

1. Alaska: Townsites--Townsites

The occupants of townsite lots at the time of approval of subdivisional survey are entitled to deeds to those lots from the townsite trustee pursuant to the regulation at 43 CFR 2565.3(c). An application for deed filed on behalf of a party not in occupancy at the time of subdivisional survey is properly rejected by the trustee.

APPEARANCES: James Vollintine, Esq., Anchorage, Alaska, for appellant; John M. Allen, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The Bristol Bay Housing Authority has appealed from a decision of the townsite trustee, Alaska State Office, Bureau of Land Management (BLM), dated January 17, 1985, rejecting its applications for trustee deeds to various townsite lots filed pursuant to section 11 of the Act of March 3, 1891, 43 U.S.C. § 732 (1970) (repealed by section 703(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), P.L. 94-579, 90 Stat. 2790 (1976), effective October 21, 1976, subject to valid existing rights).

On November 2, 1984, appellant filed 15 applications for trustee deeds to townsite lots 1/ which had been occupied since December 28, 1981, by

1/ The lots are lots 8 and 9, block 10; lots 9 through 12, 14 through 16, block 11; and lots 2, 3, 5 through 8, block 12, all in Tract "B," USS No. 4992, within the Clarks Point Townsite.

Alaskan Natives, in houses constructed in 1980 by appellant. Construction of the houses was funded by the U.S. Department of Housing and Urban Development (HUD). In a letter which accompanied appellant's applications, appellant requested the townsite trustee to convey the various lots directly to appellant in accordance with prior understandings and in order to allow appellant to enforce its occupancy agreement with each home buyer and to secure funding for maintenance and repairs from HUD.

In her January 1985 decision, the trustee rejected appellant's applications because the townsite lots could not be deeded to the occupants due to the fact that occupancy had not commenced until after the date of approval of the final subdivisional survey. ^{2/} The trustee stated that, in accordance with 43 CFR 2565.3(c), the lots must be deeded to the applicable municipality, the city of Clarks Point, upon proof of incorporation, under 43 CFR 2565.7. However, the trustee also noted a pending suit in Federal district court, Ounalashka v. United States, Civ. No. A81-435 (D. Alaska), asserting an alleged obligation to convey the lots under the Alaska Native Claims Settlement Act of 1976 (ANCSA), 43 U.S.C. §§ 1601-1629a (1982), to the applicable Native village corporation, in this case, Saguyak, Inc. Therefore, the trustee held that, depending upon the outcome of that case, the lots would be conveyed to the city of Clarks Point or Saguyak, Inc.

Appellant contends the trustee has in the past recognized Native claims to vacant, subdivided land initiated after approval of the subdivisional survey. Appellant argues 43 CFR 2565.3(c), which BLM stated precludes conveyance in the case to occupants whose occupancy commenced after the date of survey approval, is not applicable to Native townsites. In this respect, appellant asserts error in this Board's decisions in City of Klawock v. Andrew, 24 IBLA 85, 83 I.D. 47 (1976), aff'd, City of Klawock v. Gustafson, Civ. No. K-74-2 (D. Alaska Nov. 11, 1976), and Ruth B. Sandvik, 26 IBLA 97 (1976). Appellant also asserts that conveyance of title to appellant is supported by an April 11, 1976, cooperation agreement between appellant and the village of Clarks Point and resolution No. 78-04 of the village, HUD regulations, ^{3/} the occupancy agreements signed by the home buyers, ^{4/} and the need for title. Appellant

^{2/} The date of approval was Apr. 11, 1975, in the case of the Clarks Point townsite. The date of occupancy was Dec. 28, 1981.

^{3/} Appellant cites in part 24 CFR 805.218(b) (now 24 CFR 905.218(b)) which provides that housing sites on "unrestricted land may be either conveyed to the IHA [Indian Housing Authority] in fee, or leased to the IHA for a term of not less than 50 years." Appellant states that it is an IHA under State law. See 24 CFR 905.102, 24 CFR 905.108(b). Appellant also states that HUD approved construction of the Clarks Point project with the understanding that title would go to the city and then to appellant, citing a Sept. 25, 1980, letter from HUD. That letter, however, merely states that title will pass to the city of Clarks Point and "[t]herefore, [appellant] must secure title on behalf of its Homebuyers after patent is received [by the townsite trustee] and transferred to the City."

^{4/} Appellant notes the townsite trustee previously conveyed 28 townsite lots within the subdivided area of the Togiak Townsite, with houses constructed by appellant, to Alaskan Natives between 1975 and 1976 and the

argues it needs title in order to be able to enforce the occupancy agreements, especially in cases where home buyers are in arrears with respect to monthly payments which support appellant's operations. Further, title is required to obtain funding from HUD, which will not advance money until appellant secures title, for maintenance and repair of the constructed houses.

In answer to appellant's statement of reasons, BLM contends that the case is governed by 43 CFR 2565.3(c) such that, where occupancy of the townsite lots did not predate approval of the final subdivisional survey, the lots cannot be conveyed to such occupants, but must be conveyed to the appropriate municipality pursuant to 43 CFR 2565.7 or sold pursuant to 43 CFR 2565.5. BLM also argues that neither BIA nor the townsite trustee is obligated to secure title to the townsite lots for appellant.

[1] Section 11 of the Act of March 3, 1891, under which appellant filed its applications, provides for the entry of lands in Alaska "for townsite purposes, for the several use and benefit of the occupants of such town sites" by a trustee appointed by the Secretary of the Interior and that, upon entry, the Secretary "shall provide by regulation for the proper execution of the trust in favor of the inhabitants of the town site, including the survey of the land into lots." Section 3 of the Act of May 25, 1926, 43 U.S.C. § 735 (1970) (repealed by section 703(a) of FLPMA, P.L. 94-579, 90 Stat. 2789 (1976), effective October 21, 1976, subject to valid existing rights), essentially extended the provisions of section 11 of the Act of March 3, 1891, to Native townsites, subject to the same limitations and restrictions. See Aleknagik Natives, Ltd. v. United States, 635 F.Supp. 1477, 1497 (D. Alaska 1985). Clarks Point is a Native townsite.

Section 11 of the Act of March 3, 1891, supra, does not specifically provide the manner by which the trust is to be executed in favor of the

fn 4. (continued)

Natives, despite the occupancy agreements, have since refused to reconvey or to lease the lots to appellant. Affidavit of Judy Wallace, Executive Director, BBHA, dated Jan. 29, 1985, at 3. These occupancy agreements, entitled "Mutual Help and Occupancy Agreement" (MHO Agreement), provide in section 2.1 that "by lease" the home buyer has donated the townsite lot to appellant. Appellant has also submitted resolution No. 78-04, dated Apr. 11, 1976, of the village of Clarks Point under which the village states it "intends to convey lands within the [various townsite lots in that village] * * * to the recipients of the HUD low income housing project." In a letter dated Sept. 25, 1980, to appellant, the Director of Housing, Anchorage Area Office, HUD, stated that title would pass to the city (formerly the village) of Clarks Point and that, despite the resolution, appellant "must secure title on behalf of its Homebuyers after patent is received and transferred to the City." By letter dated Aug. 28, 1984, appellant requested the city of Clarks Point to quit-claim the townsite lots in the city to appellant. By letter dated Sept. 17, 1984, the City denied appellant's request, noting that it did not have title to the lots.

inhabitants of the townsite or who will be considered "inhabitants" or "occupants." Those matters were left to the Secretary's discretion in promulgating regulations. Indeed, this case is governed by Departmental regulation. In particular, 43 CFR 2565.3 provides for the subdivision of townsite land into lots and the awarding of those lots. The terms of 43 CFR 2565.3(c) provide that "[o]nly those who were occupants of lots or entitled to such occupancy at the date of the approval of final subdivisional townsite survey * * * are entitled to the allotments herein provided." That regulations was first promulgated in 1918. 46 L.D. 460 (1918).

In City of Klawock v. Andrew, *supra*, the Board held that a townsite trustee may properly award townsite lots only to those inhabitants who occupied the lots "at the date of final subdivisional townsite survey" pursuant to 43 CFR 2565.3(c), regardless of whether the lots are in Native or non-Native townsites. 24 IBLA at 90, 83 I.D. at 51. We based this holding on the conclusion that land within Native townsites must be disposed of in conformity with section 11 of the Act of March 3, 1891, and its applicable regulations, including 43 CFR 2565.3(c), "unless there is an explicit Native townsite regulation applicable, or to do so would violate the provisions or purposes of the Native townsite law." Ruth B. Sandvik, *supra* at 98. On this basis, the Board distinguished the Deputy Solicitor's opinion in Disposal of Lots in Saxman, Alaska, 66 I.D. 212 (1959), regarding the payment of purchase money or survey fees. In the case of 43 CFR 2565.3(c), we concluded in City of Klawock that there is no explicit applicable Native townsite regulation and that to invoke the regulation would not violate the provisions or purposes of the Native townsite law. We also stated in City of Klawock v. Andrew, *supra* at 93 n.5, that the city might have a claim to lands which were unoccupied on the date of approval of the final subdivisional survey pursuant to 43 CFR 2565.5 and 2565.7. The Board's holding in City of Klawock was affirmed on appeal by the United States district court for Alaska in City of Klawock v. Gustafson, *supra*. ^{5/} The court also stated the 1926 Act

does not preclude the trustee from disposing of unoccupied and unclaimed lots in Native townsites as he disposes of such lots in other townsites. Based on the general regulations governing Alaska townsites, 43 CFR, Section 2565.5 and 2565.7, the City is eligible to receive deeds to the unoccupied and unsold lots within the Klawock townsite and to receive the economic benefits of the lots that are sold by competitive bidding.

City of Klawock v. Gustafson, *supra* at 19-20.

Appellant, however, also argues that repeal of the townsite laws by FLPMA, effective October 21, 1976, not only closed townsites to further

^{5/} The court relied on the fact that just as the Act of May 25, 1926, by extending the benefits of the Act of Mar. 3, 1891, in creating townsites to Alaskan Natives, did not generally supplant the prior Act, similarly the regulations promulgated pursuant to the 1926 Act (43 CFR Subpart 2564) did not generally preclude the operation of the regulations promulgated pursuant to the 1891 Act (43 CFR Subpart 2565).

occupancy claims but also validated all claims initiated prior to that date regardless of whether occupancy commenced subsequent to the date of approval of the final subdivisional survey, ^{6/} citing Royal Harris, 45 IBLA 87 (1980), appeal pending, Royal Harris v. Andrus, Civ. No. A 80-174 (D. Alaska). Appellant misconstrues the Board's decision in Royal Harris. The Board held that repeal of the Townsite Acts by FLPMA on October 21, 1976, precluded the initiation of claims to townsite parcels based on occupancy initiated after that date. 45 IBLA at 89-90. The dissenting opinion expressly recognized that for purposes of the townsite laws the date of the subdivisional survey was the cutoff date for initiation of occupancy as the Board held in Klawock v. Andrew, *supra*. 45 IBLA at 95-96. However, the dissent, unlike the majority, would have recognized occupancy claims on lands segregated for townsite purposes where occupancy commenced after FLPMA (but still prior to subdivisional survey) pursuant to the FLPMA proviso recognizing valid lands rights or authorizations existing on the date of approval of FLPMA. 45 IBLA at 97. (1982).

The opinions in City of Klawock by the Board and the district court stand for the proposition that entitlement to land in an Alaskan townsite must be determined by occupancy on the date of approval of the final subdivisional survey in accordance with 43 CFR 2565.3(c). Appellant argues that City of Klawock was erroneously decided by the Board. However, we hereby reaffirm that decision. In the present case, the lots involved within the Clarks Point townsite were admittedly not occupied by Alaskan Natives or by appellant until after approval of the final subdivisional survey. Thus, neither appellant nor the Natives are entitled to the lots because their rights as well as the rights of any non-Native occupants whose occupancy postdates approval of the subdivisional survey, are foreclosed by 43 CFR 2565.3(c). As the court stated in Aleknagik Natives, Ltd. v. United States, *supra* at 1481: "The date that each particular subdivisional survey was approved represented a cutoff date for new occupancy claims on the lands contained in that survey: no individual could begin occupying any of these lands under the townsite laws after that date."

Appellant, however, argues that the decisions in City of Klawock merely invalidated the continued practice by the townsite trustee of awarding townsite lots to occupants whose occupancy commenced after the date of approval of the final subdivisional survey, and that City of Klawock should not be retroactively applied to invalidate occupancy claims initiated in reliance on this past practice. Prior to the Board decision in City of Klawock on February 25, 1976, the townsite trustee apparently did not enforce the regulatory deadline for initiation of occupancy claims against Native occupants. See Aleknagik Natives, Ltd. v. United States, *supra*, at 1481 n.5. Indeed, appellant asserts 28 of the 30 lots on which houses were built by appellant

^{6/} Appellant contends the signing of the cooperation agreement between appellant and Clarks Point prior to Oct. 21, 1976, pursuant to which the houses were subsequently built on the lots, establishes a claim predating repeal of the townsite laws.

within the Togiak townsite were conveyed to the occupants thereof between 1975 and 1976, despite the fact occupancy had commenced after the date of survey approval. That practice was declared invalid by the Board in City of Klawock, prior to the initiation of any occupancy of the lots involved herein or commitment of any funds by appellant in purported reliance on such prior actions. Thus, by invoking City of Klawock, we are neither retroactively applying that decision nor invalidating occupancy claims initiated in reliance on any approval of past practice by the townsite trustee. Appellant, however, asserts the Natives involved herein "would" have occupied the lots prior to survey approval if they had known the trustee's past practice was invalid. This assertion is properly dismissed as speculation. Accordingly, the decision appealed from is properly affirmed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

C. Randall Grant, Jr.
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Bruce R. Harris
Administrative Judge

