



INTERIOR BOARD OF INDIAN APPEALS

Patrick Patencio, et al. v. Deputy Assistant Secretary - Indian Affairs (Operations)

14 IBIA 92 (04/04/1986)

Reconsideration denied:

14 IBIA 120



# United States Department of the Interior

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

PATRICK PATENCIO, ET AL.

v.

DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS)

IBIA 85-31-A

Decided April 4, 1986

Appeal from a decision of the Deputy Assistant Secretary--Indian Affairs (Operations) reversing the Sacramento Area Director's cancellation of Palm Springs Lease No. PSL-23, between appellants and Pitts Indian Avenue, Inc.

Affirmed.

- I. Indians: Leases and Permits: Cancellation or Revocation--Indians: Leases and Permits: Violation/Breach: Generally

Where the terms of a lease of Indian trust land set forth specific revocation or cancellation procedures, such terms are binding on the parties and on the Bureau of Indian Affairs in its capacity as trustee.

APPEARANCES: Barbara E. Karshmer, Esq., and George Forman, Esq., Fresno, California, for appellants; Barry R. Schlom, Esq., Beverly Hills, California, for Pitts Indian Avenue, Inc. Counsel to the Board: Kathryn A. Lynn.

## OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

On April 11, 1985, the Board of Indian Appeals (Board) received a notice of appeal from Patrick Patencio, Winifred Preckwinkle, Priscilla P. Gonzalez, Beverly P. Diaz, Violeta Torro, Ruth Elaine Patencio, Edmund Siva, and Ray L. Patencio (appellants; lessors). Appellants sought review of a February 12, 1985, decision of the Deputy Assistant Secretary--Indian Affairs (Operations) (appellee) that reversed the cancellation of Palm Springs Lease No. PSL-23, between appellants and Pitts Indian Avenue, Inc. (lessee). The lease had been canceled by the Sacramento Area Director, Bureau of Indian Affairs (BIA, Area Director). For the reasons discussed below, the Board affirms the Deputy Assistant Secretary's decision.

### Background

Appellants are all members and allottees of the Agua Caliente Band of Cahuilla Indians in Palm Springs, California. PSL-23 was awarded to lessee after a competitive bidding proceeding conducted through the Superior Court of Riverside County, California. The lease was approved by the Area Director

on August 19, 1959, 1/ and had an initial term of 25 years, with an option to renew for an additional 25 years. The property covered by the lease consists of a rectangular parcel located in the center of the downtown business district of Palm Springs. The property is zoned for General Commercial and Large Scale Commercial development and, according to appellants, has a present value of \$2.2 million.

In 1959 improvements on the leased premises included a large commercial building, a Red Barn restaurant, a service station, a detached residence, and the Clara Bee Lodge (lodge). The lodge was composed of former World War II nurses' barracks that were moved to the property in 1953, and were used as low-income housing.

Because the improvements on the property were considered substandard, Article 30 of the lease provided for their removal and the construction of new facilities:

As a material part of the consideration for this lease, Lessee hereby agrees that within a period of five (5) years from the effective date of the within lease, it will remove from the demised premises buildings having an area of at least seventy-five percent (75%) of the total area of buildings now situated on the demised premises. Within the same five (5) year period the Lessee will replace said removed buildings with new improvements costing and having a reasonable worth and value of at least equal to the replacement cost of the said removed buildings. In any event, the new buildings erected on the demised premises shall cost and be reasonably worth at least Three Hundred Thousand Dollars (\$300,000.00).

On April 15, 1960, lessee submitted a general plan for the development of the property. This plan called for removing the restaurant, reconstructing the service station, remodeling the face of the commercial building, and constructing a 12-foot fence or wall around the lodge. Because these changes did not contemplate removing at least 75 percent of the area of the existing buildings, lessee noted at page 1 of his letter to BIA that the additional area would have to be taken from the lodge and stated: "In the event a portion of these remaining facilities were to be so removed there could be no replacement improvements put on the premises because of the present City [of Palm Springs zoning] ordinances."

By letter dated June 9, 1960, the Director of the Palm Springs Field Office, BIA (PSO), informed lessee that the plan was not approved because it did not comply with the requirements of Article 30 to remove at least 75 percent of the existing buildings and erect new improvements reasonably worth at least \$300,000. PSO further stated at page 2 that "the buildings constituting the development now known as Clara Bee Lodge are substandard and do not justify the term of the lease which has been granted to" lessee.

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1/ Lessee states he has been using the property continuously since 1946.

In a July 8, 1960, memorandum to the Area Director, PSO stated that most of the lessee's development plan was acceptable, but the proposed fence around the lodge was not:

The Lessee argues that he cannot replace the Clara Bee Lodge with anything which will return a comparable income. Such a proposition may be true on a short term basis, but we think it is obviously fallacious in the over all picture. The Clara Bee now has 111 units. If it were demolished only 80 units could be substituted because of current zoning limitations. Thus if exactly the same type of units, renting for the same amount, were substituted the Lessee's income would sharply drop. But we feel that little imagination has been used by Lessee. If the Lessee would start from the premise that the Clara Bee had to be removed we think he could find a substitute project that would be profitable. Admittedly he probably won't be able to net as much from a new project because virtually all of his present income is net. That really is the crux of the matter. Lessee, having fully amortized his investment, is now interested only in milking the property. If the Clara Bee is left in place, even with the 12 foot fence, the remainder of the parcel will be down graded and the potential incentive for high quality development on adjacent trust property will be seriously damaged.

Memorandum at page 2; emphasis in original. PSO recommended the Area Director approve lessee's plan as it related to the west 290 feet of the property, but disapprove that portion relating to the lodge, which constituted the east 238 feet. This extraordinary partial approval was recommended so lessee would be able to commence work deemed beneficial to the lessors. PSO specifically stated approval of the west section should be conditioned on the presentation of an acceptable plan for the east section.

The Area Director concurred with PSO's recommendation. In a letter dated July 25, 1960, lessee was informed:

I have no objection to your proceeding with the work on the West 290 feet of the leased premises providing the comprehensive plans required by Article 6 are submitted and approved; however, if you undertake to proceed with that work it is with the expressed understanding that a revised general development plan and architects design will be submitted by you for approval showing the replacement of the Clara Bee Lodge facilities with improvements that are consistent with the optimum development of that area. The revised general plan must also substantially conform with the requirements of Article 30 of the lease. In other words, we do not wish to unduly delay your construction of the premises, but on the other hand we cannot waive any of the restrictions of the lease.

After receiving the Area Director's letter, PSO held a meeting with lessee and representatives of the lessors. The results of the meeting are contained in a letter from PSO to lessee dated August 18, 1960, which states at page 2:

It was agreed that the remodeling of the existing buildings, in accordance with the presented plans, shall be deemed equivalent to the complete removal and reconstruction of existing buildings in this area within the meaning of Article 30, and that the total fair market value of the remodeled structures shall go towards the minimum investment requirement of \$300,000.00 set out in Article 30.

We will continue our negotiations looking toward a mutually agreeable development plan for the Clara Bee Lodge area.

By letter dated August 14, 1961, PSO informed lessee that construction in the area of the lodge had been observed and that no approval had been given for any such construction. Lessee was given 10 days in which to show cause why the lease should not be canceled because of this unapproved activity. Lessee explained the work involved repair and maintenance only. PSO allowed this work to be done because of its minimal cost.

On June 12, 1962, lessee advised PSO he had completed the remodeling and reconstruction of the west portion of the property and the cost exceeded \$300,000. PSO responded that completion of that portion of the work did not constitute complete compliance with Article 30, although the value of the improvements would be applied toward the minimum investment requirement.

The administrative record becomes very sparse after the June 1962 correspondence. A November 23, 1965, memorandum from the Area Office to PSO indicates lessee claimed to have been given an 8-year extension of time to submit an acceptable plan for the development of the lodge area. The correspondence between the Area Office and PSO shows no knowledge of such an extension and, although asked to substantiate his claim, lessee failed to do so.

A January 7, 1969, memorandum from the Area Office to PSO noted at page 1

that the extension of time [lessee] claims he was allowed, a claim never substantiated, has now elapsed. We therefore recommend that you write him to suggest: \* \* \* (2) That he submit plans for the development of the east portion of the property, occupied by the Clara Bee Lodge. He will not be happy since most of the Lodge is an old World War II barracks building and profitable, but the record will show that the Lessors and the Bureau have been patient with this Lessee's consistent refusal to comply with Article 30 of the lease.

By memorandum dated October 7, 1970, the Area Office recommended PSO serve lessee with another 10-day show cause notice in an attempt either to force the lessee to conform with the lease or renegotiate rentals. A show-cause notice was apparently not issued. Another memorandum, dated February 28, 1983, from the Area Office to PSO again recommended a show-cause notice be issued because lessee had still not complied with the lease requirements.

By letter dated March 10, 1983, the Area Director informed lessee of the continuing lease violations and gave him 10 days to show cause why

the lease should not be canceled. A meeting between lessee and PSO staff resulted in a request for an extension of time to respond to the notice so a meeting could be held with the lessors. Lessee was given a 30-day extension of time to respond. On page 1 of a letter dated April 18, 1983, lessee stated he

met with Mr. McDermott of the Palm Springs Office [on July 18, 1972] and again discussed the matter of the Clara Bee Lodge. It was again agreed that it would be in the best interests of all concerned to leave the Clara Bee Lodge as is. We have continued to operate the Clara Bee Lodge for many years based on our agreement.

I understand that we may disregard the 30 day notice to show cause as set forth in your letter of March 24, 1983.

The Area Director responded to lessee by letter dated April 28, 1983. That letter states on page 1:

Because of your reference to letters dated August 25, 1961, October 25, 1962, and October 1, 1971, and a meeting held at the Palm Springs Office on July 18, 1972, regarding the status of the Clara Bee Lodge in relation to Article 30 of Lease No. PSL-23, we are requesting copies of the Palm Springs Office's response to the subject letters and the meeting before a final determination is made in regard to Article 30. Contrary to your understanding that you may disregard the 30-day notice to show cause as set forth in my letter of March 24, 1983, the matter is not, and will not be closed, until such notice is issued by this office.

After receiving information from PSO, the Area Director wrote lessee another letter on July 6, 1983, which concluded on page 4:

No revised general development plan and architect's design were ever submitted for the area comprising the east half of the leased premises and where the Clara Bee Lodge is situated. When confronted with this matter on August 14, 1960, you advised that you were occupying the premises, citing Paragraph No. 2, which called for negotiations by the parties as to percentage rental for such use. Despite such reference to Paragraph No. 2, no amendment or supplemental agreement has emerged reflecting negotiations or agreement for such use, which amendment or supplemental agreement would require the approval of the Secretary or his authorized representative.

Your reference to a meeting with the Lessors as to an 8-year extension of the master plan for the east half of the leased premises, continually cited in your Certified Public Accountant's statement of gross receipts, has not been substantiated by any correspondence or documents that might support your claim, nor by the material enclosed with your letter of April 18, 1983. In fact, you were issued a show cause letter one year after the alleged meeting for failure to submit a plan for replacement

of the Clara Bee Lodge. Moreover, any matter that would change or otherwise affect the provision of the lease would have had to be mutually agreed upon by the parties, evidenced by a document to that effect, and approved by the Secretary or his authorized representative.

Therefore, based on the foregoing and in accordance with 25 CFR 162.14, Lease No. PSL-23, is cancelled effective the date of this letter and you are hereby notified that payment of all obligations are now due and payable together with your surrender of possession of the premises.

Lessee appealed this decision to appellee. By letter dated February 12, 1985, appellee found none of lessee's arguments against lease cancellation persuasive; however, he concluded the lease should not be canceled:

While we find lessee to be in breach, we do not believe that such breach warrants a cancellation of the lease for the following reasons. Lessee has substantially complied with Article 30 by removing or renovating approximately 55 percent of the existing improvements. The inactivity on the part of BIA and lessors to resolve the dispute over the renovation of the Clara Bee Lodge from 1972 to 1983, while not sufficient to excuse lessee's full compliance with Article 30, caused lessee to believe that the BIA and lessors had agreed to maintain the status quo; therefore, lessor was justified in seeking a determination of whether he was in fact in default before attempting to cure such default. Having found lessee to be in default, pursuant to Paragraph 20 of the lease, lessee shall have 60 days to submit to the Sacramento Area Office its plans for the removal and/or renovation of the Clara Bee Lodge.

Letter at page 4.

Appellants' appeal from this reversal of the Area Director's decision was received by the Board on April 11, 1985. Briefs on appeal were filed by appellants and lessee.

#### Discussion and Conclusions

Much of appellants' argument on appeal concerns appellee's statement that lessee substantially complied with the lease requirements by removing approximately 55 percent of the improvements previously existing on the leased property. Appellants state that the conclusion that the lease was breached precludes a finding of substantial performance and, therefore, appellee's decision is legally inconsistent. Appellants further argue that the facts do not support a conclusion of substantial performance.

Appellants are correct that a finding of substantial performance requires a finding that the lease was not breached. See, e.g., Wells Benz, Inc. v. United States, 333 F.2d 89, 92 (9th Cir. 1964) ("Substantial performance is performance"). In this case, however, appellee, although perhaps

making an unfortunate choice of words, did not find "substantial performance," but rather "Substantial compliance." Read in context, the Board believes that appellee's statement concerning substantial compliance was intended as a prelude to his actual conclusion, namely that, even though BIA had objected to the limited actions taken by lessee under the lease, by its inactivity for a period of more than a decade, BIA caused lessee reasonably to believe that additional performance was not required, 2/ and that as a consequence, the lessee was now entitled to an actual determination on the issue of its breach.

Appellee thereupon found that lessee was in breach of the lease for failing to comply fully with the requirement of Article 30 to remove and replace at least 75 percent of the area of the improvements previously existing on the leased property. In accordance with Article 20 of the lease, 3/ appellee therefore gave lessee 60 days in which to cure his breach. Such an opportunity to cure had not been given in the Area Director's decision, which canceled the lease effective the date on which breach was determined.

Lessee has not appealed appellee's decision that he breached the lease. Accordingly, that decision is affirmed.

[1] Where the terms of the lease set forth specific revocation or cancellation procedures, such terms are binding on the parties, including BIA in its capacity as trustee. Here, appellee properly determined that paragraph 20 of the lease provides lessee with a 60-day opportunity to cure any breach of the lease, once breach is determined. This provision prevents the onerous result of instant forfeiture. Because lessee had not previously been given the right to cure the breach, appellee, in conformity with the terms of the lease, properly allowed him 60 days to cure the breach by submitting to the Area Director a plan for the removal and/or renovation of the lodge. 4/ See e.g., Day v. Navajo Area Director, 12 IBIA 9 (1983).

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2/ The administrative record does not disclose the reason for this hiatus.

3/ Article 20 states in pertinent part:

"If the Lessee \* \* \* shall breach any other covenant, condition or restrictions of this lease herein provided to be kept or performed by the Lessee, and if such default or breach shall continue uncured \* \* \* without the Lessee having reasonably begun and diligently and continuously carried on the curing thereof, so far as possible, within a period of sixty (60) days from and after written notice thereof by Lessors to Lessee, (during which \* \* \* 60-day period \* \* \* Lessee shall have the privilege of curing such default or breach), then and in such event, Lessors, at their option, may declare this lease forfeited by giving the Lessee written notice thereof."

4/ Under Departmental regulations in 43 CFR 4.21(a), "a decision will not be effective during the time in which a person adversely affected may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal." Lessee was therefore, not required to comply with appellee's order to submit a plan for the removal and/or renovation of the lodge until the conclusion of the present appeal to the Board.

However, on January 10, 1986, the Board received a statement from lessee that, pursuant to appellee's decision, he had submitted to the Area

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the February 12, 1985 decision of the Deputy Assistant Secretary--Indian Affairs (Operations) is affirmed.

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//original signed  
Jerry Muskrat  
Administrative Judge

I concur:

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//original signed  
Wm. Philip Horton  
Acting Chief Administrative Judge

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fn. 4 (continued)

Director plans for the removal of 10,514 square feet of the existing improvements on the leased property. Lessee stated that on April 26, 1985, the Area Director had agreed that the proposed plan would bring him into compliance with Article 30 of the lease. The January 1986 letter stated that the removal contemplated in the plans submitted to the Area Director had been completed.

The Board did not consider the fact that the breach has been cured in reaching its conclusion as to the legal sufficiency of appellee's decision.