



INTERIOR BOARD OF INDIAN APPEALS

Earle C. Strebe v. Deputy Assistant Secretary - Indian Affairs (Operations)

14 IBIA 111 (05/21/1986)

Judicial review of this case:

Complaint filed, *Strebe v. Cummins*, No. 88-02161-RMT (Tx)  
(C.D. Calif. filed Apr. 20, 1988)

Related Board case:

16 IBIA 62



# United States Department of the Interior

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

EARLE C. STREBE

v.

DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS)

IBIA 85-19-A

Decided May 21, 1986

Appeal from a decision of the Deputy Assistant Secretary--Indian Affairs (Operations) upholding the cancellation of Palm Springs Lease No. PSL-24.

Referred for evidentiary hearing and recommended decision.

1. Administrative Procedure: Hearings--Indians: Leases and Permits: Development Leases

When the administrative record does not contain the necessary factual basis for a determination of whether a long-term development lease of Indian trust land should be canceled, the matter will be referred for an evidentiary hearing and recommended decision.

APPEARANCES: Allen O. Perrier, Esq., Palm Springs, California, for appellant; Barbara E. Karshmar, Esq., and George Forman, Esq., Fresno, California, for lessor Frances Lucille Diaz Cummings. Counsel to the Board: Kathryn A. Lynn.

## OPINION BY ADMINISTRATIVE JUDGE ARNESS

On January 28, 1985, the Board of Indian Appeals (Board) received a notice of appeal from Earle C. Strebe (appellant, lessee). Appellant sought review of a November 30, 1984, decision issued by the Deputy Assistant Secretary--Indian Affairs (Operations) (appellee). That decision upheld the cancellation of Palm Springs Lease No. PSL-24, contract no. 14-20-550-730, between appellant and Frances Lucille Diaz Cummings (Cummings), Palm Springs Allottee No. 98, and Arthur Diaz, Jr. (Diaz), Palm Springs Allottee No. 104 (lessors). For the reasons discussed below, the Board refers this appeal to the Hearings Division of this office for an evidentiary hearing and recommended decision by an administrative law judge.

### Background

Lessors were both minors when PSL-24 was negotiated on their behalf in 1959 by their guardians, Beverly Diaz and Eugene E. Therieau. <sup>1/</sup> The lease

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<sup>1/</sup> Beverly Diaz is the lessors' mother; Eugene E. Therieau is an attorney practicing in Palm Springs, California.

covers 40 acres of Indian trust land which, when the lease was executed, was located in Riverside County, California. The land was subsequently annexed to the City of Palm Springs. The leased property was situated close to the Palm Springs airport in the flood plain of the Whiteriver Wash, and is undeveloped desert acreage subject to blow sand problems. The lease was approved by the Bureau of Indian Affairs (BIA) on October 7, 1959. Both lessors have now attained their majority. Diaz is not a part to this appeal. 2/

The original term of PSL-24 was 25 years, with appellant having the option to extend the lease for another 25 years under the terms and provisions in effect at the end of the original term. In consideration for this lease, appellant was to develop 10 acres of the leased premises as a drive-in theater and pay lessors an annual rental of 1.8 percent of the gross revenues from the operation of the theater. The remaining 30 acres were to be developed as commercial property, with lessors receiving annual rentals equaling 18 percent of the gross receipts from subleases. If appellant operated any business on the property, he was to pay lessors a rent equal to 18 percent of an agreed or arbitrated fair annual rental for such a business. In addition, appellant was to pay a minimum annual rental for the entire property. This rental was set at \$4,800 per year for the first and second years of the lease, \$7,200 per year for the third and fourth years, and \$9,600 per year for the fifth and following years. Lessors retained title to all buildings and improvements constructed on the property. The lease further provided that a material part of the consideration was appellant's good faith attempt to complete all construction on the leased premises in accordance with the general development plan required by the lease within the first 3 years of the lease term.

Under Paragraph 4 of the lease, within 120 days after the beginning of the lease term appellant was to prepare and submit to the Sacramento Area Director (Area Director) and lessors a general plan and architect's design for the development of the entire leased premises. Because of pressure from the City of Palm Springs to annex the leased premises, BIA altered its normal procedure and allowed appellant to submit the plans and specifications for the theater alone before submitting a general development plan for the entire property. 3/

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2/ Although in her answer brief Cummings states her belief that Diaz supports her attempt to cancel the lease, the record contains no indication of Diaz's position.

3/ See letter of Oct. 15, 1959, from the Palm Springs Field Office (PSO) to appellant at page 1:

"You comprehensive plans for the construction of the Drive-In Theatre submitted in accordance with Article 5 of the lease have been approved by the Area Director. We wish to call to your attention Article 4 which requires that you submit within 120 days after the approval of the lease a plan and architect's design for the improvement and development of the leased premises as a whole. Normally we expect the general development plan to be submitted and approved before comprehensive plans for any particular improvement are submitted. However, in this case because of the difficulties connected with

Construction of the theater was completed in 1964. Appellant states that the remainder of the leased property was not ready for development because it was remote from other developed areas and because of actions taken by the City of Palm Springs. Thus he states that after annexation and until 1973, the property was zoned WGR5, a restrictive classification intended to prevent or limit development. In 1973, the area was rezoned as WO5, an even more restrictive open space classification. Finally, in 1981 the zoning was changed to M1, a light industrial zone. Appellant states it was Palm Springs' policy during the 1960s and 1970s not to permit any nonrecreational development on the leased property, and that the permitted recreational uses were not economically feasible. Appellant notes there is still little construction in the immediate vicinity of the leased premises. However, because of the 1981 zoning change, appellant states that development is now possible, and has presented a proposal for a recreational vehicle vacation park and hotel.

Cummings argues appellant did not mention any zoning problems until 1974, never attempted to get the property rezoned, and has never shown rezoning was not feasible. She states her belief that a zoning change was possible.

On numerous occasions during the 1960s and 1970s, BIA informed appellant that he was not in full compliance with the lease provisions. It appears appellant did not respond in writing to some of the notices. Appellant contends, however, that he kept the PSO informed of the lack of progress in developing the leased property.

The present appeal arose in September 1981 when Cummings requested BIA to issue appellant a 10-day notice to show cause why the lease should not be terminated under 25 CFR 162.14. <sup>4/</sup> The PSO requested an opinion from the Riverside Field Solicitor (Field Solicitor) on the legality of cancelling the lease. By memorandum dated February 19, 1982, the Field Solicitor informed PSO that, in his opinion, certain sections of the lease were ambiguous, and concluded the record available to him was factually insufficient to support cancellation of the lease.

On April 27, 1982, PSO advised Cummings that BIA would not initiate cancellation proceedings. Cummings appealed the decision to the Area Director who, on March 11, 1983, reversed PSO and found appellant in breach

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fn. 3 (continued)

the annexation of this property and your desire to proceed with construction of the Drive-In Theatre at the earliest possible date, we have deviated from normal procedure in approving these plans. The approval is based on the condition that you submit within the time specified in the lease an acceptable development plan for the premises as required by Article 4."

<sup>4/</sup> The leasing regulations formerly appeared in 25 CFR Part 131. Part 131 was renumbered Part 162 without substantive change by notice published in the Federal Register. 47 FR 13327 (Mar. 30, 1982). Section 162.14 provides proceedings for cancellation of leases of Indian trust land.

of the lease. The Area Director gave the parties 60 days in which to attempt to reach an agreement regarding the undeveloped 30 acres. He further stated that if an agreement was not reached in 60 days, he would assist Cummings in cancelling the lease, in accordance with Article 15 of the lease.

The parties met on May 3, 1983, in an attempt to reach an agreement. Because Cummings believed appellant's development proposals were too general and nonspecific, she informed BIA on May 8, 1983, that no agreement had been reached, and again asked BIA to cancel the lease. Appellant was not informed of this request until June 13, 1983, after several inquiries about Cummings' intentions following the May 3 meeting.

On August 2, 1983, the Area Director advised appellant his lease was canceled effective that date and he must surrender possession of the premises. Appellant appealed this decision to appellee who, on November 30, 1984, affirmed the Area Director.

Appellant's appeal from this decision was received by the Board on January 28, 1985. Appellant and Cummings filed briefs on appeal; appellee did not file a brief.

#### Arguments on Appeal

Appellant raises four primary arguments on appeal: (1) He is not in default because he made a good faith attempt to develop the remainder of the leased premises; (2) he is not in default of his obligation to submit a general plan and architect's design; (3) the lease may not be canceled for default because he was not served with a timely 60-day notice to cure the default; and (4) cancellation of the lease would be inequitable under the laws of the State of California. In regard to his second argument, appellant contends (1) development plans submitted to BIA in 1974 and 1982 were neither approved nor disapproved; (2) the requirement to submit a general plan and architect's design was excused when BIA failed to take action against him in 1974; (3) the submission of development plans and the development of the remainder of the property are so closely connected that there must be a default in both requirements for there to be a substantial default; and (4) any defaults have been waived by the lessors' acceptance of rent without any claim of default until 1981.

#### Discussion and Conclusions

The dispute in this case requires interpretation of Article 4 of the lease:

#### 4. GENERAL DEVELOPMENT PLAN:

Within one hundred twenty (120) days after the approval of this lease, the Lessee shall cause to be prepared and submitted to the Lessors and the Area Director for their approval, a general plan and architect's design for the improvement and development of the property as a whole. Neither the Lessors nor the Area Director shall unreasonably withhold approval and they shall approve

or state their grounds for disapproval within sixty (60) days after said plans are presented to them by the Lessee. Lessee will in good faith attempt to complete the development of the leased premises in accordance with the approved general plan within the first three (3) years of the lease. In like manner, any improvements to be constructed upon the demised premises at a later date, shall be subject to the approval of the Lessors and the Area Director. In any event, before the Lessee commences any construction of improvements on the demised premises, the Lessee shall submit to the Lessors and the Area Director, comprehensive plans and specifications for the then proposed improvement, who shall approve them if they conform to the general development plan hereinabove required, and, in addition thereto, Lessee shall give Lessors ten (10) days advance notice in writing of intention to begin construction in order that Lessors may post non-responsibility notices, as provided in California Code of Civil Procedure, Section 1183.1, as amended.

As a material part of the consideration for this lease, Lessee will in good faith attempt to complete the development of the leased premises in accordance with the approved general plan within the first three (3) years of the lease.

Lessee covenants and agrees, within the first five (5) years of this lease, that at no cost and expense to the Lessors he will cause to be constructed and thereafter maintained upon the leased premises at all times during the term of this lease permanent improvements having a cost and reasonable worth and value of not less than One Hundred Fifty Thousand Dollars (\$150,000.00).

In addition, Paragraph 15 of the lease, dealing with forfeiture for defaults by appellant, states: "Time is hereby declared to be of the essence of this lease."

Clearly, PSL-24 as written and signed contemplated the full development of the leased premises. However, circumstances changed between the signing of the lease and its execution: The property was annexed by Palm Springs and given a restrictive zoning classification. This fact was anticipated by the parties to the lease and may have played a part in their negotiation of the agreement. The question thus raised in this case concerns the legal effect of those changed circumstances in the absence of specific guidance in the lease.

Appellant's arguments seek a determination that the lease as written can address this situation. Thus, he contends that the language in paragraph 4 to the effect that he "will in good faith attempt to complete the development of the leased premises in accordance with the approved general plan" allows the lease to continue in full force and effect as long as he has made a good faith attempt to overcome the legal impediment to development. He asserts that he made such an attempt, but was not able to develop

the property or to even propose a realistic development plan as long as the restrictive zoning was in effect. The record shows that shortly after the leased property was zoned M1, appellant prepared a proposal for full development.

Cummings argues for a strict construction of the language of the lease and, therefore, contends that any failure to present a general development plan to complete construction within the time periods specified brings Article 15, forfeiture for default, into operation. She also states her belief that the zoning classification could have been changed earlier. The record reveals divided opinions between PSO and the Area Office, with PSO basically agreeing with appellant and the Area Office with Cummings. Appellee followed the Area Office's decision.

As previously noted, PSO requested an opinion on lease cancellation from the Field Solicitor. That opinion, given in February 1982, states at page 2:

The question of what constitutes a "good faith attempt" is subjective, and is also somewhat ambiguous as the term is used in the lease. The phrase leads one to believe that all that is necessary is that the Lessee attempt to complete development. Good faith is a question of fact and we are in no position with the information available, to make a judgment as to the Lessee's good faith attempt or lack thereof to develop. [Emphasis in original.]

The Board agrees with the Field Solicitor and finds that nothing has changed since he stated his opinion that this case could not be totally resolved merely as a matter of law because preliminary questions of fact needed to be addressed. Those questions include, but are not limited to, what expectations existed as to the possibility of development after annexation of the property and whether those expectations had any impact on the "good faith attempt" language, and whether appellant made a good faith attempt under the circumstances to develop the property. Since the parties agree that resolution of these issues will involve interpretation and application of state law, an analysis of California law appears to be desirable in the resolution of this appeal. Another issue suggested by the Field Solicitor's February 1982 opinion, but not raised elsewhere, is whether Palm Springs intends or did intend to condemn this property and, if so, what, if any, effect that fact has in the present controversy.

The Board thus finds that it does not have sufficient information on which to base a legal determination whether PSL-24 was properly canceled. Therefore, an evidentiary hearing before an Administrative Law Judge, in which these questions of fact could be addressed, would be beneficial in resolving this dispute.

Accordingly, this case is referred to the Hearings Division of this Office for an evidentiary hearing and recommended decision by an Administrative Law Judge (Departmental) to resolve the questions of fact and law

involved. The hearing shall be conducted in full compliance with the administrative due process standards generally applicable to other hearings proceedings conducted by Administrative Law Judges (Departmental). The present administrative record may be considered as part of the evidentiary record in the hearing.

Pending completion of the hearing and the issuance of the recommended decision, further procedures will be established by the Administrative Law Judge assigned to this case.

Therefore, it is ordered that this case is referred to the Hearings Division for assignment to an Administrative Law Judge (Departmental) who shall conduct a hearing and recommend a decision to the Board. As provided in 43 CFR 4.339, any party may file exceptions or other comments with the Board within 30 days from receipt of the recommended decision. The Board will then inform the parties of any further procedures in the appeal or issue a final decision.

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//original signed  
Franklin D. Arness  
Administrative Judge

I concur:

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//original signed  
Bernard V. Parrette  
Administrative Judge

## ADMINISTRATIVE JUDGE MUSKRAT DISSENTING:

The determinative issues involved in this appeal are whether or not appellee correctly determined appellant to be in breach and, if so, whether appellee correctly followed the appropriate cancellation procedures. As to the issue of breach, I agree with appellee that appellant was and is in breach of Article 4 of the lease. As the record indicates, no general plan and architect's design for the improvement and development of the property as a whole has been submitted and approved nor has development of the entire leased premises, in accordance with such a plan, occurred. Appellant's excuses and BIA's lack of diligence <sup>1/</sup> notwithstanding, I find appellant in breach of Article 4 and would affirm that portion of the appellee's decision.

As to the issue of cancellation, appellant argues that even if he is in default, the lease cannot be canceled because he was not given 60 days to cure the default as required by Article 15 of the lease. Appellee maintains that the 60-day period for negotiations with the lessors, set forth in the Area Director's March 11, 1983, letter, was intended to be the 60-day period to cure appellant's breach. Therefore, appellee concludes the lease was properly canceled when the required negotiations were unsuccessful.

The Area Director's letter of March 11, 1983; states in pertinent part:

It is my determination that the Lessee is, and has been in default, under the provisions of [Article] 4. However, rather than take action to cancel the lease in its entirety, and because of such determination, I am requesting that the Lessors \* \* \* meet with \* \* \* Lessee, to arrive at an agreement regarding the undeveloped portion of the leased premises. If such an agreement, as to the 30 acres, is not finalized and submitted to the Palm Springs Office within 60 days of the receipt of this letter by both parties, I will assist the Lessors in executing the option available to them under [Article] 15, DEFAULT BY LESSEE FORFEITURE.

I believe the Area Director's March 11, 1983, letter is ambiguous. Although it requires a 60-day negotiation period, it also concludes that if negotiations are not successful, action will be taken to cancel the lease in accordance with Article 15. Article 15 states in pertinent part:

If the Lessee \* \* \* shall breach any other covenant, condition or restriction of this lease herein provided to be kept or performed by the Lessee, and if such default or breach shall

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<sup>1/</sup> As the court noted in Sessions, Inc. v. Morton, 348 F. Supp 694, 703 (C.D. Cal. 1972); aff'd 491 F.2d 854 (9th Cir. 1974):

"The delays of the Department of Interior through its Bureau of Indian Affairs, joined by \* \* \* [the Indian lessor] raise serious questions of concern for Indian affairs \* \* \*. The Department is charged with the responsibility of the management of its trust obligations in the best interest of Indian beneficiaries. This fiduciary duty carries with it--if not express--at least an implied requirement of diligence."

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 any such event, Lessors, at their option, may declare this lease forfeited by giving the Lessee written notice thereof.

Appellant could reasonably have believed that the negotiation period given by the Area Director was in addition to the opportunity to cure granted by the lease.

When the terms of the lease set forth specific revocation or cancellation procedures, such terms are binding on the parties and on BIA. Here, Article 15 provides appellant with an opportunity to cure a breach in order to prevent instant forfeiture of the lease. Because appellant was not clearly afforded an opportunity to cure his default, I would reverse that part of appellee's decision affirming the lease cancellation, and remand this case to give appellant 60 days in which to cure his default. 2/

Therefore, I respectfully dissent from the disposition afforded this case by the majority.

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//original signed  
Jerry Muskrat  
Administrative Judge

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2/ The provisions of Article 15 distinguish this case from Downtown Properties, Inc. v. Deputy Assistant Secretary--Indian Affairs (Operations), 13 IBIA 62 (1984), where the Board held that BIA was not required to give the lessee additional reasonable time to cure its default. The lease in Downtown Properties incorporated the cancellation procedures of 25 CFR 162.14 which provide that a lessee in default must be given a 10-day period to show cause why the lease should not be canceled.

"If within the ten day period, it is determined that the breach may be corrected and the lessee agrees to take the necessary corrective measure, he will be given an opportunity to carry out such measure and shall be given a reasonable time within which to take corrective action to cure the breach." BIA determined in that case that the breach was so substantial it could not be corrected.