



INTERIOR BOARD OF INDIAN APPEALS

Mr. and Mrs. Mario J. Rossi, Jr. v. Acting Phoenix Area Director, Bureau of Indian Affairs

26 IBIA 3 (05/18/1994)

Judicial review of this case:

Appeal filed, *Rossi v. Babbitt*, CIV 94-1289 PCT SMM (D. Ariz. filed July 1, 1994)



United States Department of the Interior

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

MR. AND MRS. MARIO J. ROSSI, JR.

v.

ACTING PHOENIX AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 93-131-A

Decided May 18, 1994

Appeal from the cancellation of a business lease of Yavapai-Prescott tribal land.

Affirmed.

1. Indians: Leases and Permits: Cancellation or Revocation

When a lessee of Indian land has been given ample opportunity to cure a breach of a lease and has failed to do so, the Bureau of Indian Affairs may cancel the lease.

APPEARANCES: Wm. Lee Eaton, Esq., Prescott, Arizona, for appellants; Kathleen A. Miller, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Arizona, for the Area Director

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellants Mr. and Mrs. Mario J. Rossi, Jr., seek review of an August 5, 1993, decision of the Acting Phoenix Area Director, Bureau Of Indian Affairs (Area Director; BIA), cancelling a business lease (lease) of Yavapai-Prescott tribal land. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision

Background

On November 15, 1988, appellants and the Yavapai-Prescott Tribe (Tribe) entered into a lease covering "[t]he Front 50' x 70' part of building on Highway 69 known as Tim's R.V. Center, on the Yavapai-Prescott Reservation." The lease, which was approved by the Superintendent, Truxton Canon Agency, BIA (Superintendent), on January 23, 1989, had a 25-year term, beginning on May 1, 1989.

Paragraphs 2.A and 10 of the lease required the Tribe to provide sewer service to the exterior of the building within 90 days after the former tenant, a recreational vehicle dealership, vacated the premises. Paragraph 12 provided for repairs and maintenance:

[Appellants], at [their] own cost and expense, agree[] to maintain the interior of the buildings, located upon the leased

property. [Appellants] shall have the right to make repairs to the interior of the buildings, located on the leased property. [Appellants] shall not add any improvements or make any alterations without the prior written consent of the [Tribe]. All improvements and alterations to the improvements located on the leased property during the term of this lease are to be accomplished at the sole cost and expense of [appellants] and shall not decrease the market value of the buildings or leased premises. All such improvements and alterations shall become the property of the [Tribe] at such time as they are accomplished.

[The Tribe] shall perform all repairs and maintenance to the exterior of the leased premises, including the roof, outside walls, structure, parking lot and sidewalks.

Under Paragraph 25 of the lease appellants “agree[d] to be bound by all of the laws, ordinances and regulations of the * * * Tribe now in effect, as may be amended, or hereafter adopted.” Paragraph 35.A provided that “[appellants] will make the necessary improvements to the building and add the necessary equipment to operate a full service restaurant facility.”

In August, 1990, an incident occurred involving grease in the sewer system. At that time appellants agreed to split with the Tribe the cost of pumping a manhole outside the building.

By early 1992, sewer problems had reached the point of necessitating action by the District Sanitarian for the Western Arizona District office of the Indian Health Service (IHS). In a June 30, 1992, letter to appellants, the District Sanitarian noted that it was not clear whether appellants had installed a grease trap, but if one had been installed it was apparently not being properly maintained. Appellants were informed that a grease trap was required to meet the standards of the Uniform Plumbing Code (UPC), which the Tribe had adopted for application on the reservation. 1/

1/ Section 108(c) of the UPC defines “grease trap” as “[a] device designated to retain grease from one to a maximum of four fixtures.” Section 108(b) defines “grease interceptor” as “[a]n interceptor of at least 750 gallon capacity to serve one or more fixtures and which shall be remotely located.”

Sections 711 and 712 of the UPC specifically deal with grease traps and grease interceptors. Section 711(a) provides:

“When, in the judgement of the Administrative Authority, waste pre-treatment is required, an approved type grease trap complying with the provisions of this section shall be installed in the waste line leading from sinks, drains and other fixtures or equipment in establishments such as restaurants * * * where grease may be introduced into drainage or sewage system in quantities that can effect line stoppage * * *.”

On July 21, 1992, appellants responded that there were two kitchens in the building and that the Tribe had agreed to install grease traps in exchange for their installation of a sprinkler system in the restaurant.

On August 4, 1992, the Tribal Business Manager wrote to the District Sanitarian stating that there was only one kitchen in the building, although there was a snack bar in the bingo hall which served only popcorn and pre-packaged foods. He stated that there was no record of the Board of Directors of the Tribe agreeing that the Tribe would be responsible for installing a grease trap, and that installation of a grease trap was appellants' responsibility.

In an October 1, 1992, letter appellants stated that they had been told that the grease in the sewer system was originating from a source other than their restaurant, and demanded proof that it was originating from the restaurant. Appellants repeated their statement that the Tribe had agreed to install a grease trap in exchange for the sprinkler system.

The Tribe wrote appellants on January 7, 1993, stating that there was only one user dumping grease into the sewer system, and that the failure to install a grease trap would result in the Tribe's declining to renew appellants' food service license, which had expired on December 31, 1992. By letter dated January 13, 1993, the District Sanitarian again wrote appellants, stating that the failure to install a grease trap was a violation of the Department of Health and Human Services Sanitation Manual of 1976.

Appellants obtained information concerning the grease problem from SPE Systems. SPE suggested the installation of two smaller grease interceptors in place of one grease trap. SPE later estimated that a grease trap, which would have to be installed outside the building and would require reworking of certain aspects of the existing sewer system, would cost approximately \$40,000, while the installation of two smaller grease interceptors would cost approximately \$2,000. SPE stated that although maintenance was higher for grease interceptors, appellants understood the necessity to keep the interceptors clean.

On February 9, 1993, the District Sanitarian stated that the proposed grease interceptors did not meet the standards of the UPC and that any exception from those standards would have to be approved by the Tribe. She also expressed concern about whether grease interceptors would be properly maintained, based on the restaurant's prior food service survey reports.

By letter of March 22, 1993, an engineering firm employed by the Tribe stated that the grease interceptors would be an acceptable alternative to a grease trap if the interceptors were installed in accordance with the UPC

fn. 1 (continued)

Section 712 provides that grease interceptors are governed by Appendix H. In pertinent part, Appendix H3 provides that "[a] grease interceptor may not be installed in any part of a building where food is handled."

and were of the proper size. The letter also questioned SPE's estimate of the cost of installing a grease trap.

On April 12, 1993, the sewer blocked again. The accumulated grease caused one sump pump to burn out and prevented the second from turning on. By letter dated June 3, 1993, the Superintendent informed appellants that they were in default of their lease for:

1. Failure to make the necessary improvements to the buildings and adding the necessary equipment, etc., to operate a full service restaurant facility.

Specifically, the grease trap which is non-existent and causing the sewer problem. This sewer problem has caused the tribe thousands of dollars to clear the grease and other items (spoons, forks, knives, a spatula, straws, cracker wrappers, lemon chunks, napkins, etc.) out of the pipes. In the last incident when trying to clean out the discharge piping from the pumps to the main sewer line the plumbers found the line so constricted with grease it had to be blown out with compressed air.

In the lease agreement under Section 35, (A) Other Conditions: "The Lessee [appellants] will make the necessary improvements to the building and add the necessary equipment, inventories and personnel to operate a full service restaurant facility."

2. You have been operating without a Retail Food Service Permit which expired on December 31, 1992. This permit is issued to each Food Service & Retail Food Service operation as required by Tribal Ordinance No.sa 12., Section 2 (d), Definitions - Food Service: "All activities or acts engaged in by any person involving the sale of food at retail, in eating establishments or food stores." Section 3, License Required: "No person shall commence, practice, transact or carry on any business involving food service as defined in this article without first having procured a license as provided for in this article."

* * * * *

You are hereby directed within ten (10) days from the date of receipt of this notice to show cause why the lease should not be canceled in accordance with Title 25 Code of Federal Regulations, Part 162.14. [2/]

2/ Paragraph 19 of the lease, Remedies in the Event of Default, provides that appellants had 60 days from notice of a non-monetary default in which to effect cure. Appellants do not contend that they were not given proper notice. Under the circumstances of this case, the Board finds the reference to the 10-day cure provision in 25 CFR 162.14 to be harmless error because more than 60 days passed before the Area Director's cancellation of the lease.

By letter of June 17, 1993, appellants again disputed their responsibility for installing a grease trap. They contended that the former Business Manager for the Tribe had agreed that the Tribe was to install a grease trap, apparently as part of the sewer system; the problems with the sewer system resulted from its being overloaded because of the bingo operation; and they were entitled to rely on the fact that the restaurant passed an IHS inspection prior to opening as an indication that it was ready for operation. Appellants requested a meeting between all of the parties.

A meeting was held on June 21, 1993, and an agreement was apparently reached. As stated by the Tribe, the agreement was that appellants would “provide a grease trap or interceptor system installed in accordance with the [UPC]” and agreed to reimburse the Tribe approximately \$11,000 incurred in cleaning the sewer lines and to make certain lease modifications. (Letter of June 23, 1993, from Counsel for the Tribe). By letter of June 23, 1993, the Superintendent requested specific plans from appellant for effectuating this settlement.

On July 29, 1993, appellants informed the Tribe of their “proposal for resolution of this particular matter.” This proposal did not conform with the agreement as set forth in the Tribe's June 23, 1993, letter. In particular, appellants did not recognize any responsibility for installing a grease trap or interceptors, but instead proposed use of “a heavy duty grease emulsifier which is supposed to have the ability to break down the grease into readily disposable units so that they will not collect and congeal within the sewer pipes.” Appellants stated that this would resolve the problem without the necessity of installing a grease trap.

By letter of August 5, 1993, the Area Director cancelled the lease, stating “Although you have been given ample opportunity to cure this lease violation and avoid a forfeiture we find that the record demonstrates a clear unwillingness and/or inability to meet your contractual obligations.”

By letter dated August 11, 1993, the Tribe rejected appellants' proposal, stating: “Neither the [IHS] nor [the Tribe] think that a chemical addition to the grease is sufficient to obviate the clear requirements of the ([PC] that a grease trap be placed in the sewer line.”

Appellants appealed the Area Director's decision to the Board. Both appellants and the Area Director filed briefs on appeal.

Discussion and Conclusions

Throughout this proceeding, appellants have raised varying arguments as to why they should not be responsible for installing a grease trap, some of which were set forth in the Background section, supra. On appeal, however, appellants contend that the installation of a grease trap is the responsibility of the Tribe either because the Tribe is responsible for maintenance of the exterior of the building, where a grease trap would have to be installed, or because a grease trap is an integral part of the sewer

system for which the Tribe is responsible. The Board concludes that appellants have abandoned their earlier theories for non-liability, and addresses only the arguments raised in their present appeal.

Paragraph 35.A of the lease requires appellants to “make the necessary improvements to the building and add the necessary equipment * * * to operate a full service restaurant facility.” The UPC, which appellants admit governs their operation, requires the installation of a grease trap or appropriate grease interceptors for food service facilities. As shown in the UPC, this equipment is clearly part of the plumbing required for the operation of a food service facility, not part of the sewer system. It is, in fact, equipment necessary for the protection of the sewer system from the types of waste generated by food service facilities. The Board rejects appellants’ argument that they are not liable for the installation of a grease trap or interceptors because this equipment is part of the sewer system

Paragraph 12 of the lease states that the Tribe is responsible for performing repairs and maintenance to the exterior of the building. The paragraph evidences the Tribe’s agreement to maintain the building, parking lot, and sidewalks. It does not commit the Tribe to install and/or maintain equipment necessary for the operation of a food service facility merely because that equipment had to be installed outside the building. 4/

3/ In their notice of appeal, appellants also contend that they “have secured the permission of the Tribe to secure a waiver of the 1988 Plumbing Code Requirement to permit the installation of grease interceptors in the interior of the building.” Appellants support this statement with a copy of an Aug. 26, 1993, letter.

The Aug. 26 letter was written by counsel for appellants to counsel for the Tribe and states: “I would like your confirmation of an agreement along these lines [of installing grease interceptors in the interior of the building] so I can include that confirmation within my reply to the [BIA] letter of August 9th indicating termination of the lease * * *.” Appellants have not produced any such confirmation letter. The Area Director has, however, provided a copy of a Sept. 20, 1993, letter from counsel for the Tribe to the Superintendent which states: “[Appellants] have steadfastly refused to act to rectify these problems until the Tribe or the [BIA] forced them to do so. Even the actual cancellation of their lease was insufficient to get [appellants] to comply with the [UPC]. * * * I would urge you in the strongest possible terms to vigorously prosecute the appeal” (Tribal Attorney’s letter at 4-5).

The Board rejects appellants’ contention that they have secured from the Tribe a waiver of the UPC’s requirement that grease interceptors not be installed in any area where food is handled.

4/ It is not clear from the record whether a grease trap or interceptors could have been installed inside the building if the installation occurred before the completion of other renovation work necessary to convert the former recreational vehicle dealership to a restaurant. A May 30, 1989,

The Board rejects appellants' argument that the Tribe is responsible for installing the grease trap or interceptor because it would have to be installed on the exterior of the building.

With their opening brief, appellants submitted affidavits from the former Tribal President and former Business Manager. Appellants allege that these affidavits show that the installation of a grease trap was not discussed during the negotiations for the lease and did not arise when the building was inspected prior to opening. They further contend that the affidavits show an understanding that the Tribe was responsible for the installation of the grease trap. The Board agrees that the affidavits state that there was no discussion of the installation of a grease trap, but disagrees that they show any acknowledgment of responsibility by the Tribe. However, the fact that there may not have been any discussions about a grease trap is irrelevant to a decision as to whether appellants were responsible for installing one. Such installation was required by the UPC, and did not necessarily have to be the subject of discussions during the negotiations for the lease.

[1] The Board concludes that, under the terms of the lease and the UPC, appellants were responsible for installing an appropriate grease trap or interceptors before commencing operations. By failing to provide the Tribe and BIA with plans and specifications for alterations and equipment to be installed in the building before commencing work, appellants assumed the risk that their alterations and installations would not be adequate and that they would later be required to make additional, more expensive, changes. ^{5/} When appellants failed to correct the problem after having been given ample opportunity to do so, BIA properly cancelled the lease.

fn. 4 (continued)

letter to the Tribe from an architectural firm apparently doing renovations for the bingo ball stated that problems had arisen because of the lack of plans and drawings for the renovations done by appellants. The letter ended:

“I would advise that you obtain an as-built set of drawings from [appellants] at the conclusion of the project, particularly in regard to utilities which have been placed below the slab. I know that [appellants are] not fond of formal working drawings, however, in years to come these may prove to be the only way of determining what you have in the building that you own.”

^{5/} It appears possible that, by failing to obtain prior written consent for all improvements and alterations made, appellants violated Paragraph 12 of the lease which provides: “[Appellants] shall not add any improvements or make any alterations without the prior written consent of the [Tribe].” This possibility is not used as a basis for affirming the Area Director's decision in this case, but is noted only to suggest that had appellants obtained Tribal consent prior to making improvements and alterations, the present problem might have been prevented.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the August 5, 1993, decision of the Acting Phoenix Area Director is affirmed.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge