

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
Donald M. Lake, d/b/a ) ASBCA No. 54422  
Shady Cove Resort & Marina )  
 )  
Under Contract No. DACW62-1-03-0154 )

APPEARANCE FOR THE APPELLANT: Mr. Donald M. Lake  
Gallatin, TN

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.  
Engineer Chief Trial Attorney  
C. Grady Moore, Jr., Esq.  
Engineer Trial Attorney  
U.S. Army Engineer District, Nashville

OPINION BY ADMINISTRATIVE JUDGE PEACOCK  
ON GOVERNMENT MOTION TO DISMISS

The dispute under the referenced contract for lease of marina facilities concerns provisions regarding “transient use.” The government has moved to dismiss the appeal alleging that the complaint seeks relief that may not be granted by the Board. Appellant, proceeding *pro se*, opposes the motion. We deny the motion.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. This appeal involves a dispute between Donald M. Lake, d/b/a Shady Cove Resort & Marina (appellant or lessee) and the Nashville District of the United States Army Corps of Engineers (Corps or government) regarding the referenced lease, *inter alia*, of marina facilities within the Old Hickory Lock and Dam Project area in Tennessee. The lease was for a 15-year term commencing 1 January 2003 and ending 31 December 2018. Appellant had previously been the lessee under the immediately prior superceded lease of this property having been assigned the prior lease in March, 2001. (R4, tabs 9, 10, 11) The prior lease expired on 31 December 2002.

2. The Statement and Certificate of Award, dated 29 January 2003, states in part, “This lease was granted in accordance with ER 405-1-12, Change 30, Chapter 8, dated 30 September 1994” (R4, tab 11, last page). The following pertinent provisions were set forth in the lease (*id.* at 4, 8, 14, 15):

**5. USE AND DEVELOPMENT OF THE PREMISES**

....

**b.** No structure may be erected or altered upon the premises unless and until such structure has been approved in writing by the District Engineer.

....

**d.** The use and occupation of the premises shall be subject to the general supervision and approval of the District Engineer.

....

**14. APPLICABLE LAWS AND REGULATIONS**

**a.** The Lessee shall comply with all applicable Federal laws and regulations, ordinances, and regulations of the state, county, and municipality wherein the premises are located . . . .

....

**31. TRANSIENT USE**

**a.** Camping, including transient trailers or recreational vehicles, at one or more campsites for any period longer than thirty (30) days during any sixty (60) consecutive day period is prohibited. The Lessee will maintain a ledger and reservation system for the use of any such campsites, said system to be acceptable to the District Engineer.

**b.** Occupying any lands, buildings, vessels or other facilities within the premises for the purpose of maintaining a full- or part-time residence is prohibited, except for employees, residing on the premises, for security purposes, if authorized by the District Engineer.

## **32. DISPUTES CLAUSE**

**a.** Except as provided in the Contract Disputes Act of 1978 (41 U.S.C. §§ 601-613) (the Act), all disputes arising under or relating to this lease shall be resolved under this clause and the provisions of the Act.

**b.** “Claim,” as used in this clause, means a written demand or written assertion by the Lessee seeking, as a matter of right, the payment of money in a sum certain, the adjustment of [sic] interpretation of lease terms, or other relief arising under or relating to this lease. A claim arising under this lease, unlike a claim relating to the lease, is a claim that can be resolved under a lease clause that provides for the relief sought by the Lessee. However, a written demand or written assertion by the Lessee seeking the payment of money exceeding \$100,000 is not a claim under the Act until certified as required by subparagraph c. (2) below.

**c.** (1) A claim by the Lessee shall be made in writing and submitted to the District Engineer for a written decision. A claim by the Government against the Lessee shall be subject to written decision by the District Engineer.

....

**e.** The District Engineer’s decision shall be final unless the Lessee appeals or files as [sic] suit as provided in the Act.

3. In December 2002, the Corps conducted an “ENVIRONMENTAL BASELINE STUDY” (EBS) prior to renewal of the lease. During the EBS, “[n]umerous privately owned camper trailers were noted [by government personnel] in the campground area constructed on Government property, with the appearance of permanency.” (R4, tab 11, ex. B at 2) Several of the trailer/campers concerned “were on blocks and several had decks built around them” (R4, tab 12 at 1, tab 17).

4. On 17 December 2002, the Corps forwarded the proposed renewal lease to appellant for execution. Concerns regarding the permanent appearance of the camper/trailers and their use were brought to the appellant’s attention. Appellant was advised that neither the physical conditions existing at the campsites in question nor the

existing rental system was in compliance with the language of the proposed renewal lease or the applicable regulations. Among other items, appellant was advised to submit a “written plan for corrective action to have the [offending] trailers/campers removed from Corps property when you return the draft lease for approval.” Appellant was also informed that, “Your lease renewal will be pending subject to the submittal and approval of the trailers/campers removal plan.” (R4, tabs 12, 14 at 2)

5. Appellant executed the proposed renewal lease on 30 December 2002. In his cover letter dated 30 December 2002, appellant explained his understanding of the transient use policy and practices under the prior lease and requested that this prior method of operation be allowed to continue under the proposed renewal lease. (R4, tab 15)

6. In a series of letters between 30 December 2002 and 28 January 2003 (R4, tabs 15, 16, 19, 20) appellant consistently expressed his understanding of the transient use provisions of the lease and continued to request “broader interpretation of the regulation” in accordance with practices under the prior lease (R4, tab 19 at 2).

7. By letter dated 15 January 2003, Mr. William O. Barnes, Chief, Real Estate Division, U.S. Army Corps of Engineers, Nashville District, advised appellant *inter alia*, of two regulations concerning the issue, *i.e.*, EP 1165-2-316, May 2000, Rules and Regulations Governing Public Use of Corps of Engineers Water Resources Development Projects, Section 327.7 (the Public Use Regulation); and, Engineer Regulation (ER) 405-1-12, Change 30, 30 September 1994, Chapter 8, Paragraph 8-149, Transient Use (the Transient Use Regulation) (*see* finding 2, *supra*; R4, tab 18).

8. The Public Use Regulation states in part:

a. Camping is permitted only at sites and/or areas designated by the District Commander.

b. Camping at one or more campsites at any one water resource project for a period longer than 14 days during any 30-consecutive-day period (the length of stay has been changed to 30 days in any 60-day period for concessions, ER 405-1-12, Chapter 8, Paragraph 8-149, condition below) is prohibited without the written permission of the District Commander.

c. The unauthorized placement of camping equipment or other items on a campsite and/or personal appearance at a

campsite without daily occupancy for the purpose of reserving that campsite for future occupancy is prohibited.

d. The digging or leveling of any ground or the construction of any structure without written permission of the District Commander is prohibited.

e. Occupying or placement of any camping equipment at a campsite which is posted or otherwise marked or indicated as “reserved” without an authorized reservation for that site is prohibited.

(R4, tab 18)

9. The Transient Use Regulation states in part:

The current Corps policy prohibits camping, to include transient trailers and other recreational vehicles, at one or more campsites for a period longer than 30 days in any 60 consecutive days. Any proposed exception in this length of stay policy must be forwarded for approval by the Division Engineer. This approval authority cannot be delegated to a District Engineer. Lessees are required to maintain a ledger or reservation system in order that compliance with this requirement can be verified. The rationale for this policy is to insure a reasonable degree of availability to camping facilities by the general public within the capacity of the facilities.

(*Id.*)

10. Mr. Barnes’ letter also advised appellant of procedures for obtaining and appealing a final decision. The letter further stated:

By allowing the trailers to permanently stay on government land, you are allowing private exclusive use of Government property. The definition of Private Exclusive Use is defined as any action which gives a special privilege to an individual or group of individuals on land or water at a Corps project that precludes use of those lands and waters by

the general public, is considered to be private exclusive, see enclosed letter, dated 19 June 1985.

You are directed to submit a plan to phase out the trailers that are permanently occupying camping sites on lands within your lease area by 28 January 2003. Phasing out of the trailers must be accomplished by May 1, 2003. A follow-up inspection will be made.

(R4, tab 18)

11. By letter dated 22 January 2003, appellant submitted a plan for removal of the camper/trailers in dispute pending an “appeal” to the District Engineer and any subsequent appeal of his decision. In the same letter, appellant reiterated and detailed his reasons why the original operational practices under the prior lease were compliant with a “broader interpretation” of the new lease and regulations cited by Mr. Barnes. (R4, tab 19 at 2)

12. The Corps executed the proposed renewal lease on 29 January 2003 after receipt of appellant’s plan (R4, tabs 11, 21).

13. An exchange of communications between the parties followed, both oral and written, discussing *inter alia*, several possible options regarding transient use. In interpreting the lease, the government invoked provisions of the regulations, including those cited above, to support its position. Appellant repeatedly indicated that it disagreed with and sought to “appeal” the Corps interpretation or seek relief in “court.” (R4, tabs 22, 25, 26, 27, 28, 29) By letters dated 12 and 30 May 2003, the Corps attempted to explain the “appeal” process to appellant and rejected appellant’s interpretation of its rights under the lease and regulations (R4, tabs 26, 28).

14. After appellant sought relief from Mr. Barnes on 11 June 2003 (R4, tab 29) and the Corps Division Engineer on 22 June 2003 (R4, tab 30), the District Engineer in a letter of 8 August 2003 (R4, tab 2) stated he would “uphold the Chief of Real Estate Division’s decision to require removal of the long-term campers.” The District Engineer stated, *inter alia*, that the letter constituted his “final decision” and appellant could appeal within 90 days to this Board (*id.*). There is no evidence indicating when appellant received the District Engineer’s “final decision.”

15. By letter dated 4 November 2003 to the District Engineer, enclosing an appeal to this Board bearing the same date, appellant filed its appeal of the “final decision” (R4, tab 1). The government does not contend that the notice of appeal is untimely.

## DECISION

The government has moved to dismiss this appeal arguing that the Board lacks authority to grant the relief requested. In essence, the motion challenges our jurisdiction to grant specific performance, *i.e.*, to order the government to permit appellant to operate the Marina in accordance with its practice regarding “transient use” under the expired lease. According to the government, the dispute pertains to alleged violations of government policy clearly expressed in the Public Use Regulation and does not involve an interpretation of the lease. The government maintains that the relief sought by appellant resides solely within the discretion of the Corps under the regulation and cannot be directed by the Board.

The government motion mischaracterizes and unduly complicates the gravamen of the dispute. Although the Board does not have the power to grant injunctive relief, it does have authority to interpret and determine the parties’ contractual rights and obligations. Fundamentally, this *pro se* appellant requests an interpretation of its rights under the lease and associated complementary regulations that in pertinent part are incorporated verbatim or by reference (finding 13). Because appellant seeks the “interpretation of contract terms, or other relief arising under or relating to” the lease, the request falls squarely within the definition of claim in FAR 33.201 and the lease’s Disputes clause. Our authority to adjudicate such disputes is well established. *TRW, Inc.*, ASBCA Nos. 51172, 51530, 99-2 BCA ¶ 30,407 at 150,331 (involving requested interpretation of contract clause and associated regulations); *Martin Marietta Corp.*, ASBCA No. 38920, 90-1 BCA ¶ 22,418 at 112,609 (the definition of claim includes a demand for interpretation of contract terms). Our jurisdiction over “non monetary” claims involving such interpretations and/or those seeking so-called “declaratory relief” is also well settled. *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, *reh’g denied*, 186 F.3d 1379, 1380 (Fed. Cir. 1999); *SUFI Network Services, Inc.*, ASBCA No. 54503, 04-1 BCA ¶ 32,606 at 161,366-67; *TRW, Inc., supra*; *General Electric Automated Systems Division*, ASBCA No. 36214, 89-1 BCA ¶ 21,195 at 106,959 (Board has jurisdiction over appeal from contracting officer decision ordering contractor to remove restrictive legends from technical data); *Hicks & Ingle Co. of Va., Inc.*, ASBCA No. 39711, 90-2 BCA ¶ 22,897 at 114,991 (Board authority to determine parties’ equipment ownership rights); *Coast Canvas Products II Co.*, ASBCA No. 31699, 87-1 BCA ¶ 19,678 at 99,609. There is no question that the interpretation dispute presented in this appeal involves actual, non-academic consequences for the parties. *Cf. SUFI Network Services, supra*, at 161,367; *Robert Orr-SYS CO Food Services Co.*, ASBCA No. 50183, 97-1 BCA ¶ 28,903 at 144,096.

The government's motion to dismiss is denied. We express no opinion on the merits of the parties' respective interpretations of the lease and associated regulations.

Dated: 23 March 2005

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ROBERT T. PEACOCK  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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MARK N. STEMLER  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

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EUNICE W. THOMAS  
Administrative Judge  
Vice Chairman  
Armed Services Board  
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 54422, Appeal of Donald M. Lake, d/b/a Shady Grove Resort & Marina rendered in conformance with the Board's Charter.

Dated:

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CATHERINE A. STANTON  
Recorder, Armed Services  
Board of Contract Appeals