

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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Sullivan Marina & Campground, L.L.C.) ASBCA No. 55355
)
Under Contract No. DACW43-1-95-17)

APPEARANCE FOR THE APPELLANT: A. Ben Foster, Esq.
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OPINION BY ADMINISTRATIVE JUDGE FREEMAN
ON THE GOVERNMENT’S MOTION TO DISMISS

Sullivan Marina & Campground, L.L.C. (Sullivan) appeals two final decisions denying its claims for declaratory relief related to the above captioned lease. The government moves to dismiss for failure in part to state a claim upon which relief can be granted.¹ We grant the motion in part and deny it in part.

STATEMENT OF FACTS (SOF)
FOR PURPOSES OF THE MOTION

1. On 2 March 1995, Sullivan and the government entered into a 25-year lease of government property at Lake Shelbyville, Illinois, for operation by Sullivan of a marina and campground. The lease was administered for the government by the U.S. Army Corps of Engineers (USACE), St. Louis District. (R4, tab 2 at 1, 3, 14)

¹ The government initially filed a motion to dismiss for lack of jurisdiction. It subsequently amended the motion as stated above. References in this opinion to the government motion and appellant’s reply are to the amended motion and reply thereto.

2. The relevant terms of the lease were as follows:

5. USE AND DEVELOPMENT OF THE PREMISES

a. . . . Lessee shall provide facilities and activities in accordance with the Use and Development Plan . . . attached hereto as Exhibit "C". . . .

. . . .

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

. . . .

32. TRANSIENT USE

a. Camping, including transient trailers or recreational vehicles, at one or more campsites for a period longer than thirty (30) days during any sixty (60) consecutive day period is prohibited. . . .

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.

33. 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. . . .

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

. . . .

e. The District Engineer's decision shall be final unless the Lessee appeals or files a suit as provided in the Act.

. . . .

h. The Lessee shall proceed diligently with performance of the lease, pending final resolution of any request for relief, claim, appeal, or action arising under the lease, and comply with any decision of the District Engineer.

(R4, tab 2 at 3-4, 11-13)

3. Exhibit C to the lease specified the various facilities and services to be provided by Sullivan. Paragraph II.B. stated in relevant part: "Said business may also include at [Sullivan's] option, with approval: . . . 3. Provision of seasonal camping and non-transient trailer sites which meet applicable standards." (R4, tab 2, ex. C at 1-2)

4. On 16 February 2000, the parties amended the lease to add a tract of land "to be utilized as a storage area for customer boat trailers, boats and miscellaneous equipment" (R4, tab 3).

5. Notwithstanding paragraph 32.a of the lease, and without the formal approval required by section II, paragraph B.3 of exhibit C of the lease, Sullivan from the start of the lease rented campsites to individual customers for an entire recreational season (R4, tab 141 at 3).

6. On 2 June 2000, an internal memorandum from the St. Louis District to the USACE Mississippi Valley Division requested approval for extended stay camping at the Sullivan lease. This request was not initiated by Sullivan. However, the memorandum stated that Sullivan's owner (Mr. Fayhee) had "indicated that he concurs with the proposal presented in this memorandum." (R4, tab 144 at 1-3)

7. On 21 June 2000, the Mississippi Valley Division approved the St. Louis District's extended stay camping proposal for the Sullivan lease (R4, tab 141 at 1).

On 28 June 2000, the St. Louis District sent Sullivan a letter “to clarify provisions for extended stay camping” as follows:

a. Extended Stay Camping is defined as the use of any approved full service campsite (i.e. campsite with water, electric and sewer) for the recreation season from April 1 through October 31 of each year. Currently, 142 full service campsites have been approved per our letter to you dated August 19, 2000 [sic] addressing the capacity of our sewage treatment system.

b. Camping unit storage is permitted on full service campsites during the off-season from November 1 through March 31 of the following year.

c. Full service campsites covered by this approval shall not be used for full or part-time residency and must not have any improvements such as mailboxes, landscaping, wheels or axles removed, trailer skirting, fencing or any other features that would indicate or give the appearance of permanent habitation. These campsites are intended for occasional, recreational use only.

d. Full service campsites shall also be available to transient recreational users. Approval for Extended Stay Camping is predicated upon the availability of full service campsites for transient campers as demand for such services warrants.

(R4, tab 140)

8. By letter dated 31 October 2001, the St. Louis District told Sullivan that several campsites had improvements giving the appearance of permanent habitation in violation of the 28 June 2000 provisions for extended stay camping. The letter requested Sullivan to have the improvements removed before the summer of 2002. (R4, tab 110)

9. Continuing non-compliance by Sullivan with the provisions for extended stay camping was noted in the St. Louis District lease compliance inspections on 18 June 2002, 6 August 2002, 1 November 2002, 6 February 2003 and 8 April 2003. All five of these inspections rated Sullivan’s lease compliance as unsatisfactory. (R4, tab 15 at 1, tab 16 at 2, tab 17 at 2, tab 18 at 2, tab 19 at 2)

10. By letter to Sullivan dated 9 June 2003, the St. Louis District stated that “sufficient justification exists to warrant revocation of this lease based on a track record of persistent non-compliance with the terms and conditions of the lease.” With respect to the provisions for extended stay camping, the letter stated:

. . . [A]t the conclusion of the recreation season on November 1, 2003, we will re-inspect your facility to ensure that all campers are disconnected from the services, all personal property has been properly removed, and there is no appearance of private exclusive use. One hundred percent compliance is required. Your failure to comply will result in the St. Louis District rescinding the approval for extended-stay-camping.

(R4, tab 84 at 1-2)

11. By letter dated 14 November 2003, the St. Louis District told Sullivan that a compliance inspection on 4 November 2003 found personal property at extended stay campsites, and that the only visible personal property allowed on site from 1 November through 31 March of each year was a single recreational vehicle or camper disconnected from all utilities. This letter further told Sullivan that 100 percent compliance was required and that if the personal property was not removed by 15 December 2003, the approval for extended stay camping would be revoked. (R4, tab 76)

12. At the follow-up inspection on 15 December 2003, ten campsites still had personal property other than the camping unit, and one unit was still connected to the utilities. By letter dated 30 January 2004, the St. Louis District revoked the approval for on-site camping unit storage effective 1 November 2004, and also directed Sullivan to remove all boats stored at the entrance to the marina. (R4, tab 71)

13. On 23 February 2004, Sullivan requested approval to continue to store boats near the entrance to the marina because the entrance had a hard surface (R4, tab 68). On 17 March 2004, the St. Louis District told Sullivan that it would consider a request to place a hard surface on the boat storage area created by the 16 February 2000 amendment to the lease (R4, tab 66).

14. On 7 May 2004, Sullivan requested a final decision pursuant to the Disputes clause of the lease (i) reversing the revocation of the camping unit storage approval, and (ii) reversing the prohibition against boat storage on the paved area at the entrance to the marina (R4, tab 64).

15. Sullivan's request for a final decision was not answered by the District Engineer. By letter dated 14 June 2004, the St. Louis District, Acting Chief, Real Estate Division reinstated approval of camping unit storage, except for eight sites (A2, A3, G3, J1, J5, K8, P8, and P9) that were still non-compliant with the 28 June 2000 provisions for extended stay camping. This letter also denied the request to store boats on the paved area near the entrance to the marina. (R4, tab 63)

16. Following the close of the 2004 camping season, the St. Louis District on 6 December 2004 inspected the Sullivan lease and found all camping units disconnected from the utility services, all other personal property removed from the extended stay campsites, and no other appearance of private exclusive use on those campsites (R4, tab 57).

17. On 19 September 2005, Sullivan submitted a request pursuant to the Disputes clause of the lease for a final decision of the District Engineer on the following issues "relating to the inspection and supervision of its operations by the St. Louis District:"

1. A reversal of the St. Louis District's decision prohibiting seasonal/non-transient camping at sites A2, A3, G3, J1, J5, K8, P8, and P9.
2. An interpretation of Sullivan Marina's rights as a lessee as opposed to a licensee under ER 405-1-12 and other applicable U.S. Army Corps of Engineers authority;
3. An interpretation of the "express provisions or conditions restricting the use of the property" under the Lease as discussed in ER 405-1-12, Paragraph 8-102.a.;
4. An interpretation of the St. Louis District's authority to impose a 100% compliance requirement with respect to its inspection of seasonal/non-transient sites;
5. An interpretation of the authorities and duties of the St. Louis District's Real Estate Division and Operations and Readiness Division as they relate to the inspection of Sullivan Marina for Lease compliance issues;
6. An interpretation of Sullivan Marina's contractual rights under the Lease to offer seasonal/non-transient

camping including a definition of seasonal/non-transient camping;

7. An interpretation of the Lease's requirements relating to seasonal/non-transient sites, including whether such sites are contractually required to have full sewer hook-ups;

8. An interpretation of the St. Louis District's contractual and regulatory authority to impose a camping season at Sullivan Marina's campground;

9. An interpretation of the St. Louis District's authority to amend contractual obligations under the Lease absent a writing signed by both parties;

10. An interpretation of the compliance standards to which Sullivan Marina must adhere according to the Lease;

11. An interpretation of the St. Louis District's contractual and regulatory authority to impose restrictions regarding "private exclusive" use, the appearance of "permanent habitation," and the presence of private property and utility connections at seasonal/non-transient sites;

12. An interpretation of the St. Louis District's authority to issue citations to Sullivan Marina's campers pursuant to 36 C.F.R. § 327.05;

13. An interpretation of the St. Louis District's contractual and regulatory authority to:

- a. Revoke permission to store camping units during the off season on sites that are in non-compliance;
- b. Revoke permission to store camping units during the off season on all sites;

- c. Revoke permission for extended stay/non-transient camping on those sites in non-compliance;
- d. Permanently convert all non-compliant sites from extended stay/non-transient camping to transient sites; and/or
- e. Revoke permission for extended stay/non-transient camping on all sites for failure to comply with the St. Louis District's requirements relating to seasonal/non-transient camping as set forth in its letter of June 14, 2004;

14. An interpretation of the applicability of Pub.L. 99-662, Title XI, § 1134(d), Nov. 17, 1986, 100 Stat. 4251, as amended by Pub.L. 101-640, Title III, § 320, Nov. 28, 1990, 104 Stat. 4643 to Sullivan Marina's campground operations, and any conflict between these laws and the St. Louis District's application of 36 C.F.R. § 327.7(b), the St. Louis District's requirements regarding removal of trailers from seasonal/non-transient sites, and the St. Louis District's proposed actions set forth in item 13, above;

15. An interpretation of the applicability of 36 C.F.R., Part 327 to Sullivan Marina's operations;

16. An interpretation of the St. Louis District's standards for giving "satisfactory" and "unsatisfactory" ratings for annual compliance inspections.

(R4, tab 50 at 12-14)

18. The same letter also requested a final decision of the District Engineer on the following issues relating to boat storage:

- 1. A reversal of the St. Louis District's prohibition on storing large boats near the entrance to the campground and marina;

2. An interpretation of the St. Louis District's contractual and regulatory authority to prohibit the storage of large boats near the entrance to the campground and marina.

(R4, tab 50 at 14)

19. By letter dated 14 November 2005, the Acting District Engineer replied to Sullivan's 19 September 2005 claim. He stated that the claim for reinstatement of extended stay camping was "moot" since reinstatement had been granted "over one year ago." He denied the claim to allow boat storage at the entrance to the marina except for boats in good repair and placarded "For Sale" on the ground that the lease as amended had added a tract to the leased property specifically for boat storage. He denied the interpretation requests on the ground that "the lease and the laws and regulations on which its terms are based and enforced are clear in their plain meaning." (R4, tab 47)

20. By letter dated 15 December 2005, Sullivan restated item 1 of its 19 September 2005 claim as a claim for reversal of the decision prohibiting off-season storage of camping units on sites A2, A3, G3, J1, J5, K8, P8, and P9, and requested a final decision on item 1 as so revised and on some of the other items in its 19 September 2005 claim which the Acting District Engineer had not decided in his 14 November 2005 letter (R4, tab 46 at 4-6).

21. On 26 January 2006, the Acting District Engineer replied to the 15 December 2005 claim. On the basis of a 15 November 2005 inspection showing full compliance with the provisions for extended stay camping, he reinstated approval for off-season camping unit storage on the eight sites on which it had been prohibited. With respect to the interpretation requests, he repeated the District's position that those requests were not claims within the Disputes clause, but nevertheless provided answers in accordance with the District's "policy to work in a cooperative and collaborative manner with all of our lessees." (R4, tab 44)

22. On 9 February 2006, Sullivan appealed the decisions of 14 November 2005 and 26 January 2006 to the Board (R4, tab 1).

DECISION

The Disputes clause of the lease at paragraph b expressly included claims seeking "interpretation of lease terms" within the claims subject to the clause (SOF, ¶ 2). Sullivan's 19 September and 15 December 2005 claims seeking interpretation of the lease terms were submitted to and decided by the District Engineer, and his decisions have been timely appealed to the Board (SOF, ¶¶ 17-22). Those claims are within our

subject matter jurisdiction. *Martin Marietta Corp.*, ASBCA No. 38920, 90-1 BCA ¶ 22,418. We are, however, “free to consider the appropriateness of declaratory relief, including whether the claim involves a live dispute between the parties, whether a declaration will resolve that dispute, and whether the legal remedies available to the parties would be adequate to protect the parties’ interests.” *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1271, *reh’g denied*, 186 F.3d 1379 (Fed. Cir. 1999).

The government moves to dismiss Sullivan’s claims on the ground that the camping unit storage prohibition issue is now moot and that, with the exception of the boat storage issue, the requested interpretations involve no “live controversy” and are clearly “academic”² (gov’t mot. at 13-15). We agree with the government that the claim (item 1) for reversal of the prohibition of off-season camping unit storage on sites A2, A3, G3, J1, K5, K8, P8 and P9 was mooted in the Acting District Engineer’s decision of 26 January 2006 (SOF, ¶ 21). We also agree with the government that the interpretation claims numbered 2, 3, 5, 9, 10, 12, 15, and 16 in Sullivan’s 19 September 2005 claim are on their face overbroad and not limited to the dispute over the imposition and enforcement of the provisions governing extended stay camping (SOF, ¶ 17). But to the extent they are limited to seeking relief from the economic and practical burdens of complying with those provisions for the remaining 14 years of its lease, they relate to a live controversy (app. opp’n at 2-3).

In *Donald M. Lake*, ASBCA No. 54422, 05-1 BCA ¶ 32,920, we denied a government motion to dismiss an appeal from a decision denying a lessee’s claim for an interpretation of the Transient Use clause that would allow permanent occupation of campsites. We held that the appeal involved “actual, non-academic consequences for the parties.” *Id.* at 163,072. The government distinguishes *Lake* on the ground that in *Lake* “[n]ot only did the Corps’ decision have monetary implications for the lessee, it also would impact the method and manner in which the lessee conducted business” (mot. at 14). While the monetary consequence in *Lake* was more readily quantifiable, the cost of enforcing the extended stay camping provisions and the impact on the conduct of the business in Sullivan’s case, are no less real, and the dispute over the government’s authority to impose and enforce those provisions for the remaining 14 years of the lease involves no less actual, non-academic consequences for Sullivan.

The government’s motion to dismiss is granted as to item 1 in Sullivan’s 19 September 2005 claim, as restated in its 15 December 2005 claim, and as to those interpretation claims or portions thereof that are not relevant to the authority of the

² The government concedes that there is a live controversy as to the boat storage issue and no longer requests dismissal of that part of the appeal (gov’t mot. at 13, 16).

government to impose and enforce the provisions for extended stay camping and boat storage. The motion is otherwise denied.

The government will answer the complaint within 30 days of receipt of this decision and consistent therewith.

Dated: 23 August 2006

MONROE E. FREEMAN, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

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. 55355, Appeal of Sullivan Marina & Campground, L.L.C., rendered in conformance with the Board's Charter.

Dated:

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