



INTERIOR BOARD OF INDIAN APPEALS

Naomi Dobbins and Roger P. Marshall Holding Company, LLC v.
Acting Eastern Oklahoma Regional Director, Bureau of Indian Affairs

59 IBIA 79 (08/18/2014)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
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ARLINGTON, VA 22203

NAOMI DOBBINS and ROGER P.)	Order Affirming Decision
MARSHALL HOLDING COMPANY,)	
LLC,)	
Appellants,)	
)	Docket Nos. IBIA 12-036
v.)	12-040
)	
ACTING EASTERN OKLAHOMA)	
REGIONAL DIRECTOR, BUREAU)	
OF INDIAN AFFAIRS,)	
Appellee.)	August 18, 2014

In these consolidated appeals, Naomi Dobbins (Dobbins) and Roger P. Marshall Holding Company, LLC (Holding Company) (collectively, Appellants) each appeal to the Board of Indian Appeals (Board) from separate portions of an October 6, 2011, decision (Decision) of the Acting Eastern Oklahoma Regional Director (Regional Director), Bureau of Indian Affairs (BIA), regarding Business Lease No. G07-733 (Lease) between Dobbins as lessor and Oak Grove Center, Inc. (Oak Grove) as lessee, encumbered by a mortgage of the leasehold interest held by Tulsa National Bank (Bank).¹

The Bank/Holding Company appeals from the portion of the Decision affirming a January 25, 2011, decision of BIA’s Okmulgee Agency Superintendent (Superintendent) that, as relevant to the appeal, provided notice that the Lease rent was adjusted to \$3,893.10/month for the 5-year period from October 1, 2005, through September 30, 2010 (2005 rental adjustment). The Bank asserts that BIA and Dobbins waited too long to

¹ The appeal by the Holding Company was originally filed by the Bank, and was assigned Docket No. IBIA 12-040. On June 2, 2014, after the conclusion of briefing, the Board received a “Notice of Assignment of Interest” from the Holding Company, which states that the Bank has assigned its interest in the Lease to the Holding Company in anticipation of a bank merger. The Holding Company adopts all filings made by the Bank and requests that the Board substitute the Holding Company for the Bank. Therefore, the case caption has been amended to reflect the Holding Company as appellant. For ease of reference, in our decision we refer to the Bank and the Holding Company interchangeably.

provide notice of the 2005 rental adjustment, and thus it need not remit the corresponding \$33,786 difference in rent, in place of the lessee in receivership, to maintain the Lease.

Dobbins appeals from the portion of the Decision affirming a separate June 28, 2011, decision of the Superintendent that rejected Dobbins's assertion that she unilaterally terminated the Lease in 2011 and which declined her request that BIA join in the termination and eject the lessee from the premises for alleged Lease violations. Dobbins argues that she had the authority to cancel the Lease without BIA approval, or, in the alternative, that it was an abuse of discretion for BIA to decline to cancel the Lease and allow the Bank additional time to remedy the alleged defaults.

We affirm the Decision because neither the Bank/Holding Company nor Dobbins has met their burden on appeal. The 2005 rental adjustment was mandatory under the terms of the Lease as amended, and the delay in giving notice of the amount of the adjustment is insufficient reason for the Board to relieve, on equitable grounds, the lessee or the Bank/Holding Company from paying the difference in rent. Further, Dobbins does not show that the Lease, as amended, provides her with a unilateral right of cancellation, nor that the Regional Director's decision not to cancel the Lease at this time is contrary to the Lease or otherwise an abuse of discretion.

Background

I. The Original Lease

On September 23, 1980, Dobbins and the original lessee, Seven Oaks Center, Inc., entered into a 25-year lease (Lease), with an option to renew for another 25 years, for property in Coweta, Oklahoma.² Lease at 1-2 (unnumbered) (Administrative Record (AR) Tab 11). BIA approved the Lease. *Id.* at 14 (unnumbered). A shopping center was planned for, and eventually constructed on, the property.

Over the course of the Lease, the leasehold interest was acquired by different entities and the parties entered into several addendums and modifications to the Lease. As relevant to the Bank's/Holding Company's and Dobbins's respective appeals, the subsequent Lease agreements are described below.

² After an adjustment made in 1986, the leased property consists of 14.04 restricted acres and 2.09 unrestricted acres, located in Lots 3 and 4, Section 7, Township 16 North, Range 16 East, Eastern Indian Meridian, in Wagoner County, Oklahoma. Lease at 1-2 (unnumbered); Addendum to Business Lease, Oct. 24, 1986, at 1 (AR Tab 29).

II. The 2005 Rental Adjustment Dispute

Initially, the Lease set the base monthly rent according to the number of buildings constructed on the property. Lease ¶ 4(b). At the end of each 5-year lease period, the Lease called for a rental review based on the equities involved, including economic conditions at the time, and possibly a rental adjustment. *Id.* ¶ 4.

On September 11, 1990, an addendum (1990 Addendum) to the Lease was executed by Dobbins and, as the next lessee, Local America Bank of Tulsa, to include “its successors and assigns,” and was subsequently approved by BIA. 1990 Addendum at 2, 5 (AR Tab 49). In lieu of the original rental described above, the 1990 Addendum increased the monthly “Base Rent” to \$3,000, with no adjustments for the period October 1, 1990, through September 30, 2000, and changed how the rent was to be adjusted thereafter. *Id.* ¶ 2. In 1993, Local America Bank of Tulsa assigned the Lease to Oak Grove, the current lessee. Assignment of Business Lease, July 22, 1993 (AR Tab 58).

The 1990 Addendum provides that, “[c]ommencing October 1, 2000 and on October 1 of each fifth (5th) year thereafter,” through September 30, 2030, “the Base Rent payable by Lessee to Lessor shall be adjusted,” and that each adjustment “shall be . . . based upon the [Consumer Price] Index” (CPI).³ 1990 Addendum ¶ 2(c). The addendum calls for the lessor to compare the CPI issued by the Bureau of Labor Statistics for the month of September of the year during which the adjustment is to be made with the corresponding CPI for September 1995, and, “[i]f the comparison reveals a change, an adjustment to Base Rent payable monthly shall be re-computed.” *Id.* In no event is the rent to be adjusted below the Base Rent. *Id.* The addendum also states that, for each adjustment, “Lessor shall prepare and deliver to Lessee” a notice of the “amount of the adjustment to Base Rent due Lessor for the then current lease year,” with the notice to be given “[a]s soon as practical after the end of September of each year during which an adjustment is to be made.” *Id.* And, within 10 days after delivery of such notice, the lessee is to pay the amount by which the adjusted Base Rent exceeds the monthly rent payable for the year preceding the adjustment, “multiplied by the number of months commencing with October of the year during which the adjustment is to be made through the month of such payment, inclusive.” *Id.*

Prior to the October 1, 2000, rental adjustment (2000 rental adjustment), notice was given to Oak Grove by the Muscogee (Creek) Nation Realty Trust Services Department (Creek Realty)—BIA’s contracted real estate services provider for tribes within

³ In particular, the 1990 Addendum specifies use of the Consumer Price Index – National Average for All Urban Consumers, 1982-84 = 100, All Items.

the jurisdiction of the Okmulgee Agency—that the rent would be adjusted to \$3,330. *See* Letter from Creek Realty to Oak Grove, Aug. 21, 2000 (AR Tab 171). The 2000 rental adjustment is not in dispute.

On April 25, 2001, Dobbins and Oak Grove executed a Lessor’s Estoppel Certificate and Consent Affidavit (Consent Affidavit), in which Dobbins consented to a mortgage of the leasehold interest in favor of Tulsa National Bank, the “Bank” in these appeals. Consent Affidavit at 2 ¶ 6 (AR Tab 199). The Consent Affidavit was approved by BIA. *Id.* at 3.

Nine years later, the Bank filed suit in the District Court of Wagoner County, Oklahoma, seeking to foreclose on the leasehold mortgage. Amended Petition, *Tulsa National Bank v. Real Estate of North America, Inc., et al.*, No. CJ-2010-268 (Dist. Ct. Wagoner County, Okla., May 12, 2010) (AR Tab 364). As part of the foreclosure proceedings, a receiver (Receiver) was appointed to take possession of the property and administer the shopping center. Order Appointing Receiver, *Tulsa National Bank* (June 16, 2010) (AR Tab 371).⁴

On January 25, 2011, Dobbins’s counsel sent a letter to counsel for BIA asserting that for several reasons the Lease was no longer in effect, including that “no payments of any of the CPI adjustment[s] have ever been made.” Letter from Malcolm E. Rosser IV to Office of the Field Solicitor, Jan. 25, 2011, at 3 (AR Tab 403). On that same day, the Superintendent issued a notice, which included appeal rights, of the 2005 rental adjustment to Oak Grove, the Receiver, and the Bank. Notice of Adjustment to Rental, Jan. 25, 2011 (AR Tab 400). The notice stated that a “rental adjustment should have occurred on October 1, 2005,” and that “[i]n accordance with the formula set forth in the [1990 Addendum], we have calculated that the rental due during the period October 1, 2005 through September 30, 2010, was \$3,893.10 monthly.” *Id.* at 1. The notice further stated that “you have ten (10) days to remit the difference between the rental paid for such period (\$3,330.00 monthly) and the adjusted rental due (\$3,893.10) in the amount of \$33,786.00.” *Id.* The Superintendent did not assert, for the time period prior to the notice, that any interest or late fee was owed in connection with the 2005 rental adjustment.⁵

⁴ The District Court granted an unopposed motion to stay the case until resolution of this appeal, and thus the foreclosure remains pending. *See* Secretary of the Interior’s Motion to Stay Case Pending Exhaustion of Federal Administrative Remedies, Aug. 23, 2011 (AR Tab 507).

⁵ In the notice of the 2005 rental adjustment, the Superintendent also gave notice that the current monthly rent was adjusted to \$4,277.40, effective October 1, 2010 (2010 rental adjustment). AR Tab 400. The 2010 rental adjustment was not challenged.

The Bank appealed the 2005 rental adjustment to the Regional Director, arguing that the notice of the adjustment was not timely pursuant to the 1990 Addendum and thus the rent increase was not owed; that in light of the delay the adjustment was also inequitable as it “would cause a tremendous financial burden on the Lessee and Receiver in managing the Lease, and now [the Bank] in its efforts to cure” alleged Lease defaults; that Dobbins waived the adjustment by accepting rent payments lacking the 2005 rental adjustment; and that, by failing to serve the notice “when the Lessee was operational and solvent, the BIA has shifted unfairly the Lessee’s obligations to the Receiver which has no way to recover the funds from the Lessee.” Bank’s Statement of Reasons, Mar. 23, 2011, at 3-4 (AR Tab 442). The Bank did not dispute the *calculation* of the 2005 rental adjustment and arrears. Initially, the Receiver paid the adjustment under protest into the foreclosure court and in July 2011 the Bank posted an appeal bond with BIA in the amount of \$34,264.77.⁶ See Decision at 9, 11; Letter from Catherine Santee Hughes to BIA, July 14, 2011, and Attach. (AR Tab 485).

In the October 6, 2011, Decision from which the Bank appeals, the Regional Director affirmed the Superintendent’s decision “for the reasons set forth in that decision.” Decision at 14. In addition, the Regional Director considered but found that the Board’s decision in *Mize v. Northwest Regional Director*, 50 IBIA 61 (2009), did not prohibit collection on the adjustment despite the delay in giving notice, because, “[u]nlike the rental review clause in *Mize*, the rental adjustment clause in this Lease expressly provides for rental adjustments to be collected retroactively pursuant to an objective mathematical formula.” *Id.* at 14-15.

III. The Lease Cancellation Dispute

As relevant to Dobbins’s appeal, the Lease imposes maintenance and repair obligations on the lessee, see 1990 Addendum ¶ 5 (amending Lease ¶ 8), which Dobbins contends have been more honored in the breach than in the observance. See Dobbins’s Opening Br. at 5-7 & Ex. 1 (Affidavit of Linda Dobbins with attached photographs showing the property in disrepair). In the case of a default, the Lease allows the lessee notice and 60 days to cure a violation involving maintenance or repair. See Lease ¶ 22. After notice and the 60-day opportunity to cure, in the event of an uncured default, the Lease provides that, among other remedies, “the Lessor and the Secretary [of the Interior] may . . . [t]erminate th[e] lease at any time.” *Id.* ¶ 22(b)(2).

⁶ The appeal bond apparently includes interest and/or late fees assessed after the delivery of the notice of the 2005 rental adjustment.

The Lease also provides that, at least 45 days prior to any termination, the lessor must give “the encumbrancer,” i.e., the Bank, written notice of her intention to do so. *Id.* If the proposed termination is for a default by the lessee,

the encumbrancer shall be entitled to remedy such default at any time before such termination occurs, . . . or if such default cannot be remedied within forty-five (45) days, to commence the remedy thereof within thirty (30) days and diligently prosecute the same thereafter, during which the lease shall not be terminated for such default, nor if fully certified shall it thereafter be terminated for such default.

Id.

There is no dispute that, under the terms of the original Lease and BIA regulations in effect when the Lease was executed, Dobbins could not terminate the Lease without the approval of the Secretary of the Interior (Secretary). *See Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072, 1075-76 (9th Cir. 1983) (holding that a tribe lacked authority unilaterally to terminate a lease notwithstanding that the lease provided that the tribe “and/or” the Secretary could terminate it).

With respect to Dobbins’s claim that the Lease has been or should be cancelled for default, according to inspections performed by Creek Realty in 2006 and after, the property was not being maintained or repaired as required by the Lease. *See, e.g.*, Decision at 16; AR Tab 270 (summary of March 6, 2006, site inspection). On several occasions, Creek Realty or BIA notified Oak Grove that it was not meeting its maintenance and repair obligations. *See, e.g.*, AR Tab 273; AR Tab 321; AR Tab 339. Oak Grove initially took some corrective action, *see, e.g.*, AR Tab 275, and a site inspection in November 2009 indicated that the property was being maintained, *see* AR Tab 350. But thereafter, maintenance and repair issues continued to be reported. *See, e.g.*, Decision at 16; AR Tab 363 (summary of May 5, 2010, site inspection). On January 15, 2010, Creek Realty informed BIA that Dobbins desired to cancel the Lease. Letter from Creek Realty to Superintendent, Jan. 15, 2010, at 2 (unnumbered) (AR Tab 353).

On June 8, 2010, Creek Realty again notified Oak Grove that it was in default for failure to maintain and repair the property pursuant to the Lease, and stated that Oak Grove had 10 business days to cure twelve listed violations. Letter from Creek Realty to Oak Grove, June 8, 2010, at 1-2 (unnumbered) (AR Tab 368). In the meantime, on June 16, 2010, the Receiver was appointed, at the request of the Bank, to administer the shopping center. *See supra* at 82. Creek Realty also sent a copy of the notice of violation to the Bank, and counsel for the Bank responded.

In its initial June 24, 2010, response, counsel for the Bank stated that five repairs had been completed by the Receiver and that Creek Realty would be informed, by August 9, 2010, of the cost and timeframe for performing the remaining repairs. Letter from John W. Cannon to Creek Realty, June 24, 2010, at 1-2 (AR Tab 372). On August 9, counsel for the Bank submitted an estimate to Creek Realty for \$46,700 in remaining repairs. Letter from John W. Cannon to Creek Realty, Aug. 9, 2010, at 1-2 (AR Tab 379). The letter advised that the Receiver would have to borrow the funds from the Bank to make the repairs and that the Bank was willing to provide the funding contingent on Dobbins executing a new base lease that would in effect extend the Lease term. *Id.* at 2; *see also* E-mail from John W. Cannon to Creek Realty, Nov. 5, 2010, and Attach. (proposed Lease amendment) (AR Tab 387).

The following year, in January 2011, counsel for Dobbins sent letters to Oak Grove, the Receiver, the Bank, and counsel for BIA, asserting that the Lease had never been properly approved, or had expired without a renewal, or was “hereby terminated” for failure to cure all of the defaults identified in the June 2010 notice of violation. Letter from D. Michael McBride III to Oak Grove, Receiver, and Bank, Jan. 13, 2011, at 1-2 (AR Tab 396); Letter from D. Michael McBride III to Field Solicitor’s Office and Creek Realty, Jan. 13, 2011 (AR Tab 397); Letter from Malcolm E. Rosser IV to Field Solicitor’s Office, Jan. 25, 2011, at 1-2 (AR Tab 403). Dobbins’s counsel also requested that BIA join in the termination of the Lease and Dobbins’s effort to eject Oak Grove and the Receiver from the property. AR Tab 397. On February 11, 2011, the Superintendent replied to the Bank regarding its responses, described above, to the June 2010 notice of violation, and requested confirmation and additional information regarding the plan to remedy the alleged violations. Letter from Superintendent to John Cannon, Feb. 11, 2011, at 1, 3 (unnumbered) (AR Tab 413). On February 22, 2011, counsel for the Bank confirmed that the Bank would fund the repairs as previously estimated, “subject to a determination that the Lease is still valid.” Letter from John W. Cannon to Superintendent, Feb. 22, 2011, at 4 (AR Tab 418).

Ultimately, on June 28, 2011, the Superintendent issued the decision rejecting Dobbins’s contentions that the Lease was invalid or had been terminated, and thus the Superintendent declined Dobbins’s request for BIA to eject Oak Grove and the Receiver from the property. Letter from Superintendent to Dobbins, Oak Grove, Receiver, and Bank, June 28, 2011 (AR Tab 480). The Superintendent concluded that the Lease was properly approved and renewed, and that Dobbins does not have a right to cancel the Lease without approval by the Secretary, pursuant to the terms of the original Lease and *Yavapai-Prescott*. *Id.* at 2, 5-6. The Superintendent also stated that the decision was not a judgment on whether the lessee was presently in violation of the Lease for the grounds stated in the June 2010 notice of violation, and that BIA had not yet taken action to terminate or cancel the Lease. *Id.* at 7. The Superintendent explained that the decision was given in response

to Dobbins's position that the Lease was no longer in effect and the Bank's contention—which the Superintendent found reasonable—that the Bank needed a determination on that issue before it could finance repairs to the premises. *Id.* The Superintendent found that, up to that point in time, the Bank had

timely commenced a remedy to the June 8, 2010 Show Cause Notice and has diligently prosecuted the same by responding to BIA's letters, obtaining estimates for the required repairs, stating that the Bank would fund the repairs contingent upon a determination that the Lease is valid, and by seeking a determination (in the state court foreclosure case) that the Lease is valid

Id. at 7. The Superintendent advised that after any appeal from the decision, BIA would provide a notice to the Bank that the Lease would be cancelled in 45 days for the reasons stated in the June 2010 notice of violation unless the Bank were to remedy the violations described in that notice or provide proof that it is diligently prosecuting a remedy as proposed in the Bank's letter of February 22, 2011. *Id.* at 7 n.4.

Dobbins subsequently abandoned her position that the Lease was not validly approved or renewed, but appealed the Superintendent's June 28, 2011, decision in remaining part to the Regional Director. Dobbins then asserted that the 2001 Consent Affidavit afforded her unilateral authority to cancel the Lease as authorized by BIA's revised leasing regulations, 25 C.F.R. § 162.612 (2001). *See* Dobbins's Statement of Reasons, Aug. 26, 2011, at 10-12 (AR Tab 508). Dobbins also asserted that the Superintendent, in allowing time for the Bank to cure alleged ongoing defaults, had improperly unilaterally amended the Lease and failed to consult with Dobbins. *See id.* at 12-16. According to Dobbins, any default of the maintenance and repair covenants had to be cured by Oak Grove, the Receiver, or the Bank within 60 days after the June 8, 2010, notice of violation, i.e., not later than August 9, 2010. *See id.*

Relevant to Dobbins's claim that she had the right unilaterally to cancel the Lease, the 2001 Consent Affidavit—granting Dobbins's consent to the Bank's mortgage—states in part that “Lessor specifically reserves the right to cancel or otherwise terminate the Lease in the event of default of any obligation by Lessee and as provided in the Lease.” Consent Affidavit ¶ 5. Shortly before the Consent Affidavit was executed, BIA regulations were amended to provide that a lease of individually-owned land may afford the Indian landowners negotiated remedies in the event of a lease violation, in addition to the remedies available to BIA in the regulations. Negotiated remedies may include giving the landowner the power to terminate the lease. *See* 25 C.F.R. § 162.612 (2001); 66 Fed. Reg. 7068, 7068, 7124-25 (Jan. 22, 2001) (making final rule effective March 23, 2001).

The Regional Director adopted and affirmed the Superintendent's decision, without addressing Dobbins's argument that the Consent Affidavit granted her authority to cancel the Lease. *See* Decision at 4, 15. In addition, the Regional Director considered the Receiver's actions in response to the June 2010 notice of violation and found that both the Bank's and the Receiver's responses "have been adequate under the circumstances of this case." *Id.* at 15-16; *see* Letter from Receiver to Wagoner County District Court, July 14, 2011, and Attach. (Operating Statement reporting income and expenses for the shopping center from February 2011 to June 2011) (AR Tab 499). For that reason, and because "the Region believes that the cancellation of the Lease would not be in the best interest of the Lessor," the Regional Director concluded that the Lease should not be cancelled "at this time." Decision at 15-17. The Regional Director advised that, while the current condition of the property is not completely satisfactory, BIA expects that additional repairs and improvements will be made once the foreclosure is complete and, if not, BIA "will issue a new Notice of Violation and proceed accordingly." *Id.* at 17.⁷

The Bank/Holding Company and Dobbins each appealed a portion of the Decision to the Board. The Bank, Dobbins, and the Regional Director each filed briefs in both appeals.⁸

Discussion

I. Standard of Review

The Board reviews questions of law and the sufficiency of evidence to support a BIA decision *de novo*. *Seminole Tribe of Florida v. Eastern Regional Director*, 53 IBIA 195, 210 (2011) (interpretations of lease provisions are subject to *de novo* review). On the other hand, the Board reviews a BIA discretionary decision to determine whether it is in accordance with applicable law, is supported by the administrative record, and is not arbitrary and capricious. *Hawkey v. Acting Northwest Regional Director*, 57 IBIA 262, 264 (2013) (*Hawkey II*). An appellant bears the burden of showing error in a regional director's decision. *Id.*; *see also Seminole Tribe of Florida*, 53 IBIA at 210.

⁷ The Regional Director's decision also addressed late charges that were unrelated to the 2005 rental adjustment. The Regional Director withdrew that portion of the Decision, and the Board granted a limited remand to BIA for issuance of a new decision on that matter. On September 17, 2012, the Regional Director issued a new decision regarding late charges. No appeals from the September 17, 2012, decision were filed.

⁸ We note that the administrative record contains documents designated by BIA as privileged. *See* AR Tabs 522-537. BIA does not seek to rely on them in defending the Decision, and the Board has not reviewed or considered them.

II. Rules of Lease Construction

The general principles that the Board applies to construction of Indian lease terms are well-recognized:

An Indian lease is a contract and the principles of contract construction apply to ascertain its meaning. The Board's task when construing or interpreting a contract is to determine and give effect to the intent of the parties. See 17A C.J.S. Contracts § 295a (1963). The starting point for discerning the intent of the parties is the language of the document itself. When the parties include language in a contract that is clear, complete, and unambiguous, that language will be given effect as expressing the complete intent of the parties, without resorting to extrinsic evidence. [*Id.*] § 294b(1).

High Desert Recreation, Inc. v. Western Regional Director, 57 IBIA 32, 39 (2013) (alteration in original) (citing *Midthun v. Acting Rocky Mountain Regional Director*, 48 IBIA 282, 289 (2009), and cases cited therein).⁹

III. The Bank's/Holding Company's Appeal

The Bank/Holding Company appeals only from the Regional Director's decision to require payment of the 2005 rental adjustment, effective October 1, 2005, and does not dispute the underlying calculation. The Bank also concedes that a "rental review/adjustment is mandatory under the terms of this Lease," where, as here, the CPI comparison shows a change and the rent is not adjusted below the Base Rent. Bank's Opening Brief (Br.) at 8. As we understand the Bank's arguments, first, Dobbins or BIA was required to deliver notice of the adjusted rent "[a]s soon as practical after the end of September of each year during which an adjustment is to be made," 1990 Addendum ¶ 2(c), but they failed to do so for the 2005 rental adjustment and thus it is not owed. The Bank appears to contend that the notice was a condition precedent to the adjustment or that the delay constitutes waiver of the adjustment. The Bank next argues that because the rental review (i.e., CPI comparison) might not always result in an adjustment, the Bank reasonably believed, when it received no notice, that an adjustment was not mandated and thus the Bank should receive "the same protection from retroactivity" as the lessee in *Mize* obtained from a rental

⁹ If, after giving the lease terms their natural and ordinary meaning they are reasonably susceptible to more than one interpretation, the Board will consider extrinsic evidence to discern the intent of the parties. *High Desert Recreation*, 57 IBIA at 39 n.7 (citing *Midthun*, 48 IBIA at 289).

adjustment that was made without prior notice. Bank's Opening Br. at 5. Lastly, the Bank argues that the Board should apply the equitable doctrine of laches to bar the 2005 rental adjustment, due to alleged inexcusable delay in the notice and resulting prejudice to the Bank. We are unpersuaded by the Bank's arguments and deny its challenge to the 2005 rental adjustment.

At the outset, we will assume that the Superintendent's notice of the 2005 rental adjustment was not given "as soon as practical" pursuant to the 1990 Addendum. We need not belabor that issue because we conclude that the adjustment *itself* is not contingent on the delivery of notice of the *amount*, and that mere delay in giving notice does not constitute a waiver of the adjustment. The fact that the rental adjustment is not dependent upon the date of delivery of the notice is clear in the terms of the Lease as amended. The Lease states that the monthly rent "shall be adjusted" effective "October 1, 2000 and on October 1 of each fifth (5th) year thereafter," provided that the CPI comparison does not call for an adjustment below the Base Rent. 1990 Addendum ¶ 2(c). The Lease addresses possible delay in the giving of notice of the adjustment amount by postponing the lessee's obligation to pay the adjustment amount until after its receipt of the notice, and then requiring the lessee to remit the adjustment amount "multiplied by the number of months" that transpired since the adjustment. *Id.* But, importantly, the Lease does not say that the adjustment itself is deferred or canceled for failure to provide notice in the timeframe stated in the Lease.

Further, we do not think that the delay in this case, standing alone, constitutes waiver of the 2005 rental adjustment. Several court decisions inform our opinion that a mere failure of the lessor to provide notice of a rental increase in the timeframe stated in a lease should not be considered a waiver of the increase—at least where the adjustment amount can be readily ascertained by the lessee at the time of the adjustment. In *Park View Manor v. Housing Authority*, 300 N.W.2d 218 (N.D. 1980), the Court disallowed the landlord's claim for adjusted rent under a costs-of-operation and maintenance escalation clause for failure to give timely notice, but allowed the landlord's claim for adjusted rent under a tax escalation clause, notwithstanding the landlord's failure to submit the claim for tax reimbursement in the timeframe provided in the lease. In allowing the tax escalation clause adjustment, the Court reasoned that, unlike the costs of operation and maintenance, "[t]he amounts of the taxes were certain and easily ascertainable by either party," and that "[i]f the parties intend that a debt shall be absolute, and fix upon a future event merely as a convenient time for payment, the debt shall not be contingent." *Id.* at 230 (citation omitted). In *Mercede v. Mercede Park Italian Restaurant, Inc.*, 392 So. 2d 997 (Fla. Dist. Ct. App. 1981), the lease called for rental adjustments to be made annually based on a CPI, however, the lessor provided notice of the first adjustment 21 months late. The Court allowed the adjustment, stating that "mere delay is insufficient to support a defense of either waiver or estoppel." *Id.* at 998; *see also* 28 Am. Jur. 2d Estoppel and Waiver § 183 (2014)

(“waiver” is the “voluntary and intentional relinquishment of a known right”). And in *Rietsch v. T.W.H. Company, Inc.*, 702 S.W.2d 108 (Mo. Ct. App. 1985), the Court held that the owner of a shopping center who failed for 4 years to provide the tenant with notice of the amount of increased taxes was not estopped from demanding payment pursuant to a tax escalation clause. The Court noted that the annual increase was determinable by the lessee when the property was assessed and, citing *Park View Manor*, stated that “[t]he notice provision . . . did not make the *debt* conditional upon notice; it made *payment* of the debt conditional upon notice.” *Id.* at 113.

Also instructive, the Civilian Board of Contract Appeals (CBCA), in the General Services Administration, has upheld rental adjustments based on both building costs and taxes, even though notice from the lessor under each of the escalation clauses was 6 years late. In *Appeals of Helmsley-Spear, Inc.*, the CBCA found “no reason to differentiate, as some . . . cases do, between rental increases based upon building costs and those based on taxes,” where the lessor “did not act to indicate that it would forego its rights under either clause.” 85-3 BCA ¶ 18277, 1985 WL 16787 (GSBCA July 12, 1985) (not paginated in Westlaw).

In the present case, the Bank does not dispute that the 2005 rental adjustment was objectively quantifiable, by any party, using public CPI data. Nor has the Bank shown that Dobbins intentionally relinquished her right to the rental adjustment. Based on the foregoing, we conclude that the delay in giving notice did not, by itself, prevent or waive the adjustment.

Nor do we find persuasive the Bank’s next argument that BIA’s failure to give notice sooner of the amount of the 2005 rental adjustment makes it an improper “retroactive” rental increase under the Board’s decision in *Mize v. Northwest Regional Director*, 50 IBIA 61 (2009). The Bank takes out of context the Board’s holding that, “for leases that are subject to periodic ‘rental reviews,’ any decision to increase the rent may not be implemented or collected prior to notice to the lessee(s).” *Id.* at 68. Central to the Board’s holding in *Mize* was the finding that the rental review clause¹⁰ provided insufficient notice to the lessee regarding *if or when* an adjustment would occur, or *how* the adjustment might be calculated, to allow a retroactive rent increase. *See id.* at 67. The Board reaffirmed its

¹⁰ Specifically, the clause stated:

The rental provisions . . . shall be subject to review and adjustment by the Secretary at not less than five-year intervals in accordance with the regulations in 25 C.F.R. 162. Such review shall give consideration to the economic conditions at the time, exclusive of improvement or development required by this contract or the contribution value of such improvements.

Mize, 50 IBIA at 62 (citation omitted).

holding in several other cases involving substantively identical rental review clauses. *Kamb v. Acting Northwest Regional Director*, 52 IBIA 74, 81 (2010); *Hawkey v. Acting Northwest Regional Director*, 52 IBIA 86, 90 (2010) (*Hawkey I*); *Hawkey II*, 57 IBIA at 264-65.

For reasons we mentioned in our preceding discussion, *Mize* is not applicable to the rental adjustment provision in this case. Here, the rental adjustment is mandatory on a date certain, not open-ended and discretionary as was the case in *Mize*. Unlike the rental review clause at issue in *Mize*, the 1990 Addendum itself provides notice of when the rental adjustment will be effective, what will determine whether the rent is to be increased, and how the adjusted monthly rent will be calculated. The Bank or any other party could make the CPI comparison and determine whether a rental adjustment would occur, and the amount of the adjustment. Further, the 1990 Addendum specifies that the lessor may collect the rental adjustment, in full, after the effective date of the adjustment, while the lessee's obligation to pay the adjustment is suspended until delivery of notice of the amount. Thus, *Mize* does not support the Bank's position.

Finally, we reject the Bank's argument that the 2005 rental adjustment is barred by laches. The Bank concedes that it bears the burden to demonstrate "inexcusable delay" in the giving of notice of the 2005 rental adjustment, and prejudice to the Bank as a result of the inexcusable delay. Bank's Opening Br. at 7 (citing *Armstrong v. Maple Leaf Apartments, LTD*, 436 F. Supp. 1125, 1147 (N.D. Okla. 1977)). We may assume, without deciding, that the delay was inexcusable, because we conclude that the Bank has not shown that it was prejudiced by the delay.¹¹

Specifically, the Bank contends that it was prejudiced by BIA's demand that the 2005 rental adjustment be paid in full within 10 days of the notice, after several years of delay. Bank's Opening Br. at 8-9. The fact is, however, that BIA does not contend that the Lease was cancelled for failure to pay the amount to BIA within 10 days of the notice.¹² BIA is not seeking to cancel the Lease for that reason—or indeed for any reason at this time, which is why Dobbins appeals. Consequently, the 10-day payment provision cannot serve as a basis to apply laches and the Bank has failed to show that it was prejudiced by the delay in giving notice of the rental adjustment.¹³

¹¹ Thus, we need not consider the parties' arguments regarding the applicability of laches against BIA.

¹² As we explained as background, the Bank posted an appeal bond for the rental adjustment with BIA in July 2011. *See supra* at 83.

¹³ In a reply brief, the Bank argues that the delay in giving notice is prejudicial to the Bank because, instead of asking Oak Grove to pay the rent increase "during the pertinent period (continued...)

For all of the foregoing reasons, the Bank has not met its burden of establishing that the Regional Director erred in affirming the 2005 rental adjustment. Accordingly, we affirm this portion of the Regional Director's decision.

IV. Dobbins's Appeal

A. Whether Dobbins May Unilaterally Terminate the Lease

Dobbins's leading argument on appeal is that the Consent Affidavit affords her the power unilaterally to cancel the Lease.¹⁴ The language that Dobbins relies on states that "Lessor specifically reserves the right to cancel or otherwise terminate the Lease in the event of default of any obligation by Lessee and as provided in the Lease." Consent Affidavit ¶ 5. In her view, this language modifies the termination provision contained in paragraph 22 of the original Lease by eliminating the requirement that any termination must be approved by BIA. If we conclude that the language of the Consent Affidavit is clear, complete, and unambiguous, we will give effect to the expressed intent, without considering extrinsic evidence (i.e., information outside the four corners of the Consent Affidavit) of the parties' intent. *High Desert Recreation*, 57 IBIA at 39. We conclude that the language on which Dobbins relies is plain in its meaning and, contrary to Dobbins's position, does not afford her the right of unilateral termination. Therefore, we do not reach Dobbins's arguments regarding the parties' intent based on extrinsic evidence.

The language on which Dobbins relies is a "reserv[ation]" of rights, Consent Affidavit ¶ 5, and thus must be interpreted in the context of the source of an existing right,

(...continued)

of time, the retroactive adjustment attempts to force [the Bank] to pay rental increases from current retail lease receipts or from additional debt[,] . . . and precludes the ability to pass on any increases to the shopping center tenants." Bank's Reply Br. to Regional Director's Response to Bank's Opening Br. at 2. The Board generally will not consider arguments raised by an appellant for the first time in a reply brief. *State of New York v. Acting Eastern Regional Director*, 58 IBIA 323, 355 n.40 (2014), and cases cited therein. We see no reason here to depart from that practice, and were we to consider the Bank's argument we would reject it. The Bank held a mortgage on the leasehold during the entire October 1, 2005, to September 30, 2010, time period at issue, and the 2005 rental adjustment was mandatory and objectively quantifiable under the Lease terms, which the Bank knew or should have known. Moreover, the Bank fails to support its claim of prejudice with evidence.

¹⁴ Although Dobbins made her argument to BIA and the Regional Director failed to address it in the Decision, matters of lease interpretation are questions of law, which the Board reviews *de novo*.

i.e., the Lease. Dobbins concedes that, under the original Lease and the regulations in effect at the time the Lease was executed, she could not terminate the Lease without BIA approval. Dobbins's Opening Br. at 9. While, pursuant to BIA's regulations made effective shortly before the Consent Affidavit was executed, Dobbins could have amended the Lease to *grant* her the right to terminate the Lease without BIA action, in the event of a default, *see supra* at 86, she would have first needed to negotiate that remedy with the lessee.

The Consent Affidavit does not reflect that the parties agreed to such a material change in the Lease terms. Conversely, the agreement that the parties do make is clear: Dobbins "consents" to the leasehold mortgage, and Dobbins and Oak Grove "agree" to the payment of a late charge if the monthly rent is not paid on time. Consent Affidavit ¶ 6. Oak Grove gives "its acknowledgment, acceptance and approval *of the late charge provisions* hereinabove set forth in detail." *Id.* at 4 (emphasis added). Nowhere in the Consent Affidavit do we find language supporting Dobbins's claim that it is intended to alter or replace the termination provision in the Lease, to give her the power unilaterally to terminate the Lease.

Returning once more to the Consent Affidavit provision on which she relies, Dobbins offers two different explanations of the same language to support her argument, neither of which is sustained by a plain reading. In her opening brief, Dobbins contends that the phrase, "and as provided in the Lease," is intended to "acknowledge[] that in exercising her rights and powers Ms. Dobbins must comply with the notice and *other* requirements in the Lease in order to effectuate a termination." Dobbins's Opening Br. at 11 (emphasis added). Dobbins fails to identify the "other" requirements with which she must still comply to effectuate a termination and fails to convince us that the requirement to obtain BIA approval is no longer among them. In her reply brief, Dobbins contends that the same phrase, "and as provided in the Lease," is intended to preserve Dobbins's ability to cancel the Lease on grounds other than default. *See* Dobbins's Reply Br. at 3 ("Thus, the [Consent Affidavit] provides that the basis for Ms. Dobbins' termination right is a default under the Lease *or any other basis for termination under the Lease (i.e., such as non-payment of rent)*." Emphasis added.). This interpretation is unconvincing because non-payment of rent is a "default" under the Lease. *See* Lease ¶ 22. Therefore, neither of Dobbins's interpretations is convincing and we conclude that Dobbins does not have the right unilaterally to cancel or terminate the Lease.

B. Whether BIA's Decision Not to Cancel the Lease Was an Abuse of Discretion

Dobbins alternatively argues that BIA unilaterally amended the Lease by allowing the Bank more time to cure alleged defaults than she asserts is allowed under the Lease, and thus BIA abused its discretion by declining to cancel the Lease. Dobbins also asserts that BIA never consulted with her in extending the time to cure defaults. According to

Dobbins, the deadline for the lessee, the Receiver, and the Bank to cure any defaults after the June 8, 2010, notice of violation was 60 days later, i.e., August 9, 2010, and any additional time given beyond that date to cure a default is contrary to the express Lease terms and otherwise an abuse of discretion. While the Bank does not dispute Dobbins's contention that the June 2010 notice of violation triggered the Bank's opportunity to cure the lessee's default, the Bank contends that it was entitled to and did diligently prosecute a remedy from that time forward. We are unpersuaded by Dobbins's argument that BIA "extended" the time for the Bank to exercise its rights, and conclude that the Regional Director reasonably determined that the Bank was diligently prosecuting a remedy of alleged Lease violations and therefore the Lease should not be cancelled.

While Dobbins is correct that the lessee is entitled to 60 days to cure a default involving maintenance or repair, *see* Lease ¶ 22, the Lease does not require, after that timeframe, that the lessor and the Secretary must immediately terminate the Lease. The Lease provides that, after the time for the lessee to cure, the lessor and the Secretary "may" pursue various remedies, which include the ability to "[t]erminate this lease *at any time.*" Lease ¶ 22(b)(2) (emphasis added). Thus, a failure by BIA to immediately terminate the Lease after 60 days was not an "extension" for the lessee to comply with the notice of violation.

Further, Dobbins disregards the Bank's role as "encumbrancer," not lessee, under the Lease. *See* Dobbins's Opening Br. at 13 n.5 (Dobbins concedes that the Bank "is not the lessee" but "for the sake of simplicity" refers to the Bank "as if it were the lessee.>"). In doing so, she ignores the Lease provision that allows the encumbrancer, upon receipt of a notice of intent to terminate the Lease, 45 days to cure the lessee's default or, if the default cannot be cured in that time, then 30 days to commence the remedy and "diligently prosecute the same thereafter, during which time the lease shall not be terminated" Lease ¶ 22(b)(2). Thus, Dobbins is not correct that the Bank had to cure all defaults by August 9, 2010.

A review of the Decision shows that the Regional Director adequately considered the Bank's actions in response to the June 2010 notice of violation, and Dobbins fails to show that the Regional Director erred in concluding that the Bank was diligently prosecuting a remedy. In the Decision, the Regional Director adopted the Superintendent's finding that the Bank reasonably and timely responded to the alleged violations by ascertaining the cost of repairs, agreeing to fund the repairs if the Lease was determined to be valid despite Dobbins's claim to the contrary, and seeking a determination regarding the

validity of the Lease in the foreclosure proceedings. *See* Decision at 15-16; AR Tab 480 at 7.¹⁵

Dobbins does not demonstrate that the Bank's actions following the June 2010 notice of violation are insufficient under the Lease and render BIA's decision not to terminate the Lease an abuse of discretion. Apart from her contention that it was error under the Lease terms to consider the Bank's actions after August 9, 2010—which we have rejected—Dobbins argues that the Bank requested a new base lease to extend the Lease term beyond 2030 in exchange for an agreement to fund the estimated repair costs. Whatever the merits of the Bank's initial proposal, the Bank did not obtain the proposed Lease extension but nonetheless agreed to fund the repairs, subject to a determination that Dobbins had not canceled the Lease. Thus, we find Dobbins's argument that the Bank has not acted with reasonable diligence unconvincing.

Lastly, we reject Dobbins's argument that BIA violated a duty to consult with her regarding the time allowed for the Bank to exercise its rights under the Lease. The regulation on which Dobbins relies provides that, if a tenant does not cure a violation of a lease, BIA "will consult with the Indian landowners, as appropriate," and will determine whether the lease should be canceled, whether BIA or the Indian landowners may wish to invoke any other remedies available under the lease, or whether the tenant should be given additional time in which to cure the violation. 25 C.F.R. § 162.619(a). Here, as we have explained, BIA did not afford the Bank any rights it did not have under the Lease, and did not "extend" the time period for its compliance with the duties of an encumbrancer. Moreover, the record shows that BIA consulted with Dobbins throughout the process of considering whether the Lease should be canceled. *See, e.g.*, Letter from Malcolm E. Rosser IV to Office of the Field Solicitor, Mar. 25, 2011 (AR Tab 445) (discussing meeting with Dobbins family); Regional Director's Response to Dobbins's Opening Br. at 9 (citing numerous documents submitted by Dobbins and considered by the Regional Director).

¹⁵ The Regional Director stated that, while BIA is "not completely satisfied" with the current condition of the property, the Lease will not be canceled at this time but that, if additional repairs to the property are not made in the future, BIA "will issue a *new* Notice of Violation and proceed accordingly." Decision at 17 (emphasis added). To the extent that the Regional Director believed such a new notice of violation was required by the Lease, the record does not support that conclusion: It is undisputed that at the time the Decision issued, not all defaults had been cured. Thus, it appears, as the Superintendent concluded, that BIA has the right to terminate the Lease without issuing a new notice of violation, if the Bank fails to diligently address and cure the defaults.

For the foregoing reasons, we affirm that portion of the Regional Director's decision declining at this time to cancel the Lease.

Conclusion

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms the Regional Director's October 6, 2011, decision.

I concur:

// original signed
Thomas A. Blaser
Administrative Judge

//original signed
Steven K. Linscheid
Chief Administrative Judge