



INTERIOR BOARD OF INDIAN APPEALS

Seminole Tribe of Florida v. Eastern Regional Director, Bureau of Indian Affairs

53 IBIA 195 (06/03/2011)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

SEMINOLE TRIBE OF FLORIDA,)	Order Affirming Decision
Appellant,)	
)	
v.)	
)	Docket No. IBIA 09-37-A
EASTERN REGIONAL DIRECTOR,)	
BUREAU OF INDIAN AFFAIRS,)	
Appellee.)	June 3, 2011

The Seminole Tribe of Florida (Tribe) asked the Bureau of Indian Affairs (BIA) to cancel a commercial lease between the Tribe, as lessor, and Hollywood Mobile Estates, Ltd. (HME), as lessee, based on HME's failure to cure certain alleged breaches of the lease, which included (1) failing to completely develop the leased premises; (2) entering into an unapproved leasehold mortgage with Michigan National Bank - Oakland (Michigan National) and into unapproved agreements and assignments related to that financing; and (3) mismanaging the property. The BIA Eastern Regional Director (Regional Director) declined the Tribe's request to cancel the lease, finding that HME had not breached the lease.¹ With respect to the management-related alleged defaults, the Regional Director additionally concluded that they could not serve as a basis to cancel the lease because the Tribe had ousted HME from the premises without affording HME an opportunity to cure those alleged defaults.

We affirm the Decision because we find it to be reasonable and supported by the administrative record.² The Regional Director correctly concluded that the Tribe has not demonstrated that HME committed any material breach of the lease. In addition, the

¹ See Letter from Regional Director to Spencer M. Partrich, HME, Dec. 4, 2008 (Decision), Administrative Record (AR) Tab 61.

² The Tribe; HME; and Bank of America, N.A. and LaSalle Bank Midwest (successors-in-interest to Michigan National) requested oral argument. The Board finds that the comprehensive briefs filed by the parties are sufficient for presenting their respective arguments. Therefore the requests for oral argument are denied.

Regional Director correctly concluded that alleged management-related deficiencies, even if they rose to the level of a breach, could not serve as a basis to cancel the lease when the Tribe itself — without affording HME an opportunity to cure — ousted HME from the premises.

First, we agree with the Regional Director that HME's failure to develop a 10-acre portion of the premises did not serve as a basis to cancel the lease. The lease was approved by BIA in 1969 and required the then-lessee to prepare and to submit for BIA approval, within the following year, a general plan and architect's design for the full improvement and complete development of the premises. All permanent improvements were required to be completed within 5 years. None of the parties has located the development plan, but it is undisputed that neither the original lessee nor its successors-in-interest ever developed the 10-acre area. When HME became the lessee by assignment in 1986 — 17 years into the lease — the Tribe (and BIA) expressly agreed that there were no uncured defaults on the part of the lessee and that there was no event or occurrence which, but for the passage of time or the giving of notice, would constitute a default. As the successor-in-interest, HME stepped into the shoes of the prior lessees, acquiring the same obligations under the lease as those lessee predecessors-in-interest, but no new obligations. The Tribe now seeks to rely on general language in the lease expressing the parties intent that the leased property be utilized to its "highest and best use," as the basis for finding HME in breach for failing to develop the 10-acre area. But that language was in the lease when the Tribe agreed, in 1986, that a 17-year failure by the prior lessees to develop the 10-acre area did not constitute a breach. Thus, we affirm the Regional Director's decision that this issue did not provide a basis to cancel the lease.

Second, the Regional Director correctly concluded that the Tribe and BIA approved, in 1986, the leasehold mortgage between HME and Michigan National, and the related and subsequent agreements, including financing renewals and assignments to successors-in-interest by merger, and therefore these transactions by HME do not constitute material breaches of the lease. The fact that the Tribe's and BIA's approval appears in a separate letter, rather than on the face of the mortgage and financing documents, does not prevent that approval from being effective and legally sufficient. But even if that were not the case, we would uphold the Regional Director's conclusion that the lack of approval on the face of the mortgage documents does not constitute a basis to cancel the lease, because HME reasonably could have relied upon the explicit statements of approval of the encumbrance by the Tribe and BIA. Thus, before HME's failure to obtain approval on the face of the documents could serve as the basis for BIA's cancellation of the lease, HME would be entitled to seek such additional approval, and to invoke the arbitration provisions of the lease if HME believed that approval was being unreasonably withheld. The same holds true

for the related subsequent refinancing agreements and assignments of mortgage to the bank's successors-in-interest by merger.

Third, the Regional Director correctly concluded that HME's failure to cure alleged management-related defects cannot serve as the basis for cancelling the lease when the Tribe itself — prior to giving HME any notice of these alleged breaches — ousted HME from the premises. Even assuming that the Tribe only learned of the management-related issues after taking possession, that would not excuse the requirement that BIA comply with the regulations and provide HME with due process, i.e., an opportunity to cure, before cancelling the lease. Thus we affirm, on this ground, the Regional Director's conclusion that the alleged management-related deficiencies could not serve as a basis to cancel the lease.

Background

I. General

In 1969, the Tribe entered into a 50-year lease with Joseph L. Antonucci, for the development of a mobile home park, together with commercial facilities, community services and amenities for residents of the area, on a parcel of land which now apparently consists of approximately 105 acres. *See* Lease No. 048 (Lease), AR Tab 1; Opening Brief at 1.³ The lease was approved by BIA on March 11, 1969, under the authority of 25 U.S.C. § 415,⁴ and under the regulations then codified at 25 C.F.R. pt. 131 (1969) (Leasing and Permitting). Six months after executing the lease, the Tribe and Antonucci, with the approval of BIA, extended the term to 55 years. *See* AR Tab 2.

Following several interim assignments of the lease, HME became the lessee through an assignment from DeAnza Properties. The Tribe consented to the assignment on March 20, 1986, and BIA approved it on March 21, 1986. *See* AR Tab 11. The consent

³ The total acreage recited in the original lease was 137.44 acres, more or less. *See* Lease art. 2. A 1975 modification amended the land description, but without reciting the total acreage. *See* AR Tab 4. The Tribe states that the leased premises consist of approximately 105 acres. *See* Opening Brief at 1.

⁴ Section 415(a) generally authorizes Indian owners (tribal or individual), to lease their restricted lands with the approval of BIA, and specifically authorizes leases of land on the Tribe's Hollywood (formerly Dania) Reservation for terms not to exceed 99 years. *See id.* § 415(a); 25 C.F.R. § 131.8(a) (1969).

and approval of the assignment signed by the Tribe and BIA provided that HME, as assignee, “assume[d] the obligations of the Lease,” and also provided that the total liability of the assignee “shall not exceed, in the aggregate, the sum of Five Hundred Thousand (\$500,000.00) Dollars.” *Id.*

In connection with the assignment of the lease to HME, the Tribe and BIA signed a letter addressed to the partners who formed HME, and to Michigan National, the bank financing the transaction. The letter stated that “[t]here is no uncured default on the part of the Lessee under [the lease], nor is there any event or occurrence which, but for the passage of time or the giving of notice, would be a default under the [lease].”⁵ As discussed in more detail below, *see infra* at 203-04, the Letter Agreement from the Tribe and BIA also approved and consented to HME’s encumbrance of its leasehold interest by a mortgage to Michigan National, and consented to an extension, modification, or replacement of that mortgage, as long as the principal balance did not exceed \$8,150,000.

II. Procedures for Lease Violations and Enforcement Authority

The lease incorporates by reference BIA’s leasing regulations, including amendments. *See* Lease, Introductory paragraph; *see also* 25 C.F.R. Part 131 (1969), codified as amended at 25 C.F.R. Part 162. Section 162.618 requires that, in the event of a lease violation, the lessee be afforded notice and an opportunity, within 10 days of receipt of the notice of violation, to cure the violation, dispute the determination that a violation has occurred and/or explain why the lease should not be cancelled, or request additional time to cure the violation. Section 162.110 of 25 C.F.R. allows Indian tribes to administer BIA’s leasing regulations under an Indian Self-Determination and Education Assistance Act (ISDA) contract or compact, “[e]xcept insofar as the[] regulations provide for the granting, approval, or enforcement of leases.”

The lease itself also includes provisions requiring notice and an opportunity to cure, in the event of a default. For a non-monetary breach of the lease, the lease provides that if the breach continues uncured for a period of sixty days after written notice of the breach by the Secretary of the Interior (Secretary) to the lessee and to an encumbrancer, then the Tribe and the Secretary are authorized to re-enter the premises and remove the lessee, as

⁵ HME Answer Brief, Ex. C, Letter from Tribe’s Chairman, approved by BIA, addressed to “Spencer M. Pa[r]trich, Mickey Shapiro and Hartman and Tyner, Inc., on behalf of a Partnership to be formed by and among themselves and with others if they so elect (‘Partnership’)” and to Michigan National Bank – Oakland, Mar. 20, 1986 (Letter Agreement).

well as to terminate the lease. Lease art. 18.⁶ The lease also provides, in addition to the 60-day notice, that at least 45 days prior to any termination of the lease, the lessor is required to give the encumbrancer written notice of its intention to terminate the lease, and the encumbrancer is entitled to remedy any default at any time before termination occurs, or to commence the remedy within 30 days and diligently pursue it if the default cannot be cured within 45 days. *See id.*

III. Non-Development of the 10-acre Area on Leased Premises

The lease requires that the premises “shall be developed, used and operated pursuant to a general plan of development prepared by the Lessee and approved by the Lessor and the Secretary.” Lease art. 3. The lease requires that the plan “provide for creation of a Mobile Home Park, together with commercial facilities, community services and amenities for the residents of the area.” *Id.* Before the lease was approved, the lessee (i.e., Antonucci) was required to furnish to the Tribe and BIA a plan of operation for the mobile home park. *Id.* art. 11. Article 11 also required the lessee, within 1 year after BIA’s approval of the lease, to submit for BIA approval “a general plan and architect’s design for the full improvement and complete development of the entire leased premises.” *Id.* BIA could not unreasonably withhold approval, and was required to either approve or state its reasons for disapproval within sixty (60) days after the plans were presented by the lessee. Article 27 of the lease provides that the time of performance by the lessee “of each and every provision and covenant” in the lease “shall be construed as of the very essence of this lease.” *See also id.* art. 18 (“Time is declared to be of the essence of this lease.”).

Article 3 of the lease also states that it is

the intent and understanding of both the Lessee and Lessor that the property will be utilized to its highest and best use during the term of this lease. In the event that a more profitable use can be made of the property in the future, both parties agree to consider any mutual advantages, use, terms and conditions that may occur during the term of this lease.

Article 5.G. provides for arbitration if the parties are unable to reach an agreement as required by the lease.

⁶ The lease defines the “Secretary” to include the Secretary’s “authorized representative, delegate, or successor.” Lease art. 1.

Under the 1-year deadline contained in article 11, Antonucci as the lessee had until March 1970 to submit for approval a general plan and architect's design for the full improvement and complete development of the entire leased premises. The administrative record does not contain, and none of the parties to this appeal apparently has been able to locate, a copy of the general plan and architect's design for the development of the premises.

It is undisputed that a frontage area of the leased premises, consisting of approximately 10 acres, has never been developed. According to HME, there were some efforts beginning in the early 1990's between the Tribe and HME to address the use or disposition of this vacant land. *See* HME Answer Brief at 9.⁷ There is also some indication in the record that in 2005 the parties discussed the issue of the vacant property, *see* AR Tab 55, Ex. B, but no resolution was reached.

On June 17, 2008, the Tribe sent a letter to HME notifying HME of defaults and breaches of the lease by HME, and demanding a cure within 60 days. Among the alleged defaults identified was HME's "22 year failure to fully develop and use the entire leased premises." Letter from Tribe to HME, June 17, 2008 (Notice of Default), AR Tab 12. The events following the Tribe's Notice of Default will be discussed later, after we provide background for the other defaults that the Tribe alleges HME committed.

IV. Assignments and Encumbrances, the Leasehold Mortgage from HME to Michigan National, and Related Financing Agreements and Assignments

A. Lease Terms

The lease permits the lessee to assign its leasehold interest with the written consent of the Tribe and the approval of BIA, which consent may not unreasonably be withheld. *See* Lease art. 14.A. & C.; *see also* 25 C.F.R. § 131.12(a) (1969) (Subleases and

⁷ HME's Answer Brief refers to an affidavit contained in an exhibit to a letter from HME to BIA. A copy of the letter, dated Oct. 13, 2008, is in the record, *see* AR Tab 51, but exhibits are not included. Although we find it unnecessary to review the referenced exhibit in order to resolve this appeal, the Regional Director is reminded that the administrative record must contain complete copies of all documents that were submitted to BIA that set forth claims of interested parties, *see* 43 C.F.R. § 4.335(a), which includes complete copies of exhibits attached to correspondence.

assignments).⁸ The lease prohibits the encumbrance of any right to or interest in the lease, or any of the improvements on the leased premises, unless written approval is obtained from the Tribe and BIA, which consent may not unreasonably be withheld. *See id.* art. 15; *see also* 25 C.F.R. § 131.12(a) (1969). Subject to the requirement for the Tribe's and BIA's approval, the lease permits an encumbrance for the purposes of borrowing capital for the development and improvement of the premises, provided that "the encumbrance is confined to the leasehold interest of the Lessee and does not in any way jeopardize the [Tribe's] interest in the land." Lease art. 15; *cf.* 25 C.F.R. § 131.12(c) (1969). The lease also provides that no encumbrance shall be approved if it provides for the interruption or cessation of rental payments to the Tribe in the event of default, forfeiture, foreclosure, or other action against the lessee. Lease art. 15.

B. Assignment from DeAnza to HME and HME's Mortgage with Michigan National

In October of 1985, DeAnza Properties, which at that time was the lessee, reported to the Tribe that it had entered into an agreement to sell the mobile home park and transfer its leasehold interests and leasehold improvements, contingent upon approval of the Tribe. *See* Letter from DeAnza Associate Counsel to James Shore, Esq. (Tribe's General Counsel), Oct. 10, 1985, AR Tab 8. The letter from DeAnza to the Tribe's General Counsel enclosed another letter from DeAnza, addressed to the Tribe and also dated October 10, 1985, which described the proposed transaction and referenced several documents submitted for the Tribe's approval, including the purchase agreement, assignment of lease forms to be executed by HME, consent and approval of assignment forms to be executed by the Tribe and BIA, and "estoppel letters" relative to the lease. *See* Letter from DeAnza Associate Counsel to Tribe, Oct. 10, 1985, AR Tab 8.

The letter from DeAnza to the Tribe also stated: "The Purchaser has indicated that it plans on obtaining new financing to be placed on the Property at the time of Closing in the approximate amount of \$8,121,600. Enclosed are copies of the proposed loan documents for your review." *Id.* Included with that letter in the administrative record are documents that conform to the documents identified as enclosed with the letter, including an unexecuted copy of a leasehold mortgage between HME and Michigan National. *See* AR Tab 8. In substance, the unexecuted copy of the leasehold mortgage is identical to the

⁸ Section 415 of 25 U.S.C. does not require that subleases or assignments of a lessee's leasehold interest in trust or restricted land be approved by the Tribe or BIA, but the requirement for tribal and/or BIA approval was promulgated in BIA's leasing regulations, where it is currently codified at 25 C.F.R. § 162.610.

leasehold mortgage that was later executed by HME and Michigan National, except for the later insertion of the date of execution as the 24th day of March, 1986, at the beginning of the executed document, and, at the end of the document above the signatures, the handwritten insertion of the word “effective” to refer to the recited date of execution.

In January of 1986, the Tribe transmitted to BIA several documents regarding the sale of the leasehold from DeAnza to HME, “including financing documents to be executed by buyers at closing.” Letter from Jim Shore, Esq., to Superintendent, Jan. 31, 1986, AR Tab 8. The Tribe requested that “this transaction” be approved by BIA “as required by the lease[] and in accordance with the current regulations.” *Id.* Attached to the letter from the Tribe’s counsel was a tribal resolution, in which several “whereas” clauses recited, among other things, that,

- HME will satisfy DeAnza’s mortgage and place a new purchase-money mortgage on the property in the principal amount of \$8,150,000;
- the Tribe will be paid \$400,000 “for approving the assignment of the lease and the \$8,150,000 mortgage;”
- the “[p]urchasers will be personally liable on the leases in the event of a default on lease payments in the amount of, but not exceeding, the sum of \$500,000.”

Tribal Resolution C-122-86, AR Tab 8. The tribal resolution further stated that,

- “the Tribal Council . . . hereby approves and consents to the sale of the Leaseholds and assignments of the leases of the Hollywood Mobile Home Park . . . with taking back a \$8,150,000 purchase money mortgage;”⁹
- “the Tribal Council hereby approves of and consents to the limitation of liability of Purchasers being limited to \$500,000[] in case of default;”
- “the Tribal Council hereby approves and ratifies execution of” a consent and approval of assignment from DeAnza to HME and a “certification letter;” and
- the Tribal Council “has authorized and hereby authorizes the Chairman and the Secretary/Treasurer to execute the documents listed above and all other documents that may be required in order to facilitate the sale and assignment of Hollywood Mobile Home Park.”

⁹ The references to leaseholds and assignments of leases are stated in the plural because the resolution also approved a transaction relating to an adjacent water and sewer facility. That transaction is not at issue in this appeal.

Id. The tribal resolution was adopted by a unanimous vote of the Tribal Council on January 14, 1986, on a motion by Tribal Council Representative Max B. Osceola, Jr., and was signed by the Tribe's Chairman at the time, James E. Billie.

On March 20, 1986, the Tribe, through its Chairman and Secretary/Treasurer, signed a Consent and Approval of Assignment form consenting to DeAnza's assignment of its leasehold interest to HME, and on March 21, 1986, BIA approved the assignment. Also on March 20, 1986, both the Tribe, through its Chairman and attested by its Secretary, and BIA, signed the Letter Agreement¹⁰ addressed to the partnership that formed HME and to Michigan National. The Letter Agreement was in substance identical to the "certification letter" approved in the tribal resolution, and states in relevant part:

- "The undersigned recognizes and acknowledges that the Partnership has agreed to take an assignment of the Lessee's interest in the Ground Leases, and that Michigan National has agreed to make a purchase money loan to the Partnership secured by a first mortgage lien upon the Lessee's interest in the Ground Leases in connection therewith, but that such agreements are conditional, in part, upon the execution of this letter by the undersigned, and that both Michigan National and the Partnership are acting in reliance upon the accuracy and completeness of the contents of this letter;"
- "The undersigned is not entitled to any fee, rent, commission or remuneration . . . upon the assignment of the . . . Leases to the Partnership or encumbering thereof as allowed hereunder, except for the payment of Four Hundred Thousand and 00/100 (\$400,000.00) Dollars;"
- "The undersigned hereby approves and consents to the assignment of the . . . Leases to the Partnership . . . and to the encumbering of the Lessee's interest in such . . . Leases by a leasehold mortgage executed by the Partnership to Michigan National, provided that the original principal balance of the note executed thereby shall not be greater than \$8,150,000, and further provided that the documents used to evidence such loan shall be as set forth in Exhibit 'A', attached hereto and made a part hereof. The undersigned further consents to an extension, modification, or replacement of such leasehold mortgage provided that the original principal balance thereunder shall

¹⁰ The Letter Agreement is also referred to as the "estoppel letter" in various documents in the record, *see, e.g., supra* at 201. We use the description "Letter Agreement," which is used by the Tribe and HME in their briefs on appeal in referring to this document.

in no event exceed Eight Million One Hundred Fifty Thousand and 00/100 (\$8,150,000.00) Dollars;”

- “The foregoing certification may be relied upon by you and your successors and assigns.”

Letter Agreement at 2-3.

Apparently following receipt of the Letter Agreement, HME and Michigan National finalized the leasehold mortgage in the principal amount of \$8,121,600, which recited the date of execution and effectiveness as March 24, 1986. In the leasehold mortgage, HME mortgages, grants, and conveys to the bank “all of [HME’s] right, title and interest in and to the Lease Agreement and the leasehold estate,” together with all buildings, improvements and appurtenances, and all present or future leases, rents, income and profits, “in fee simple and forever.” Leasehold Mortgage at 5, AR Tab 55, Ex. A. Paragraph 34 of the leasehold mortgage recites that the HME partners, as guarantors, have simultaneously executed and delivered to the bank their joint, joint and several, and several limited guaranty of HME’s indebtedness. HME agreed to furnish the bank annually with personal financial statements for each of the guarantors until the principal indebtedness of the loan was reduced to less than \$6,000,000. Paragraph 34 also provided that the guarantors had no personal liability for HME’s indebtedness except as provided by the guaranty.

HME and Michigan National also executed a Collateral Assignment of Leases, Rents, and Profits, on March 24, 1986, through which HME assigned all of its right, title and interest as lessor under present and future leases, and authorized the bank to collect rents and profits. *See* Collateral Assignment, at 2-3, AR Tab 55, Ex. C. Under the collateral assignment, if the bank assumed management, operation, and maintenance of the leased premises, it was to credit the net amount of income to amounts owed by HME, “after payment of all proper charges and expenses.” *Id.* at 5-6.

Neither the leasehold mortgage nor the collateral assignment documents contain any indicia of Tribal or BIA approval. Both were recorded in the Broward County, Florida, office of records, on March 28, 1986.

In 1993, HME and Michigan National Bank (successor by merger to Michigan National Bank – Oakland), executed a Modification of Mortgage Agreement, at the request of HME to renew and amend the mortgage so that it matured on October 1, 1998. *See* AR Tab 55, Ex. D. At the time, the outstanding balance on the loan was \$6,784,902.27. In the 1993 modification, paragraph 34 of the mortgage was amended by inserting a reference to the guaranty “as amended by Amendment No. 1 to Loan Documents made and executed

with respect to this Leasehold Mortgage,” and by deleting the language that the annual financial statements of the guarantors were to be furnished until the principal indebtedness was reduced to less than \$6,000,000. *Id.* at 3. Paragraph 11 of the 1993 modification provides: “Except as modified by this Agreement, and Amendment No. 1 to Loan Documents made and executed with respect to this Mortgage, all of the terms and conditions of the Mortgage and Assignment, shall be unmodified and shall remain in full force and effect.” *Id.* at 4.

The 1993 Modification of Mortgage Agreement contains no indicia that it was approved by the Tribe or BIA.

In 1998, HME and Michigan National Bank executed a Second Modification of Mortgage Agreement, which HME requested to renew the loan and amend it so that it matured on August 1, 2008. At the time, the principal balance of the loan from the bank to HME was \$5,363,496.40. *See* AR Tab 55, Ex. E, at 2. The Second Modification of Mortgage Agreement deleted Section 34 of the mortgage, “as the Guaranty referred to therein is void and of no further effect.” *Id.* ¶ 6, at 3.

The 1998 Second Modification of Mortgage Agreement contains no indicia that it was approved by the Tribe or BIA.

In the June 17, 2008, Notice of Default to HME, the Tribe recited the requirement in the lease that encumbrances must be approved by the Tribe and BIA, and stated: “Please be advised that it has come to our attention [that] on or about March 24, 1986, Lessee entered into a leasehold mortgage which granted Michigan National Bank – Oakland a Mortgage . . . securing payment of a loan in an amount in excess of \$8,000,000.” Notice of Default at 3. The Tribe asserted that the mortgage “*was not approved by either the Tribe or the Secretary, as required.*” *Id.* at 4. The Tribe sent the Notice of Default to HME “for the purpose of demanding cure.” *Id.* at 1.

The Notice of Default raised a host of objections to provisions in the leasehold mortgage, including the fact that the property secured by the mortgage included plumbing, electrical and other fixtures, streets and personal property, improvements, and present and future leases, rents and profits derived from the leased premises. *Id.* at 4-6. The Tribe also objected to the remedies afforded to the bank in case of HME’s default, characterizing the mortgage as giving the bank the “unfettered right to enter upon, hold, occupy and enjoy the leased premises,” and to reenter the leased premises in the event of a default, to the exclusion of the Tribe and BIA, in order to permit the bank to lease, operate, and control

the leased premises. *Id.* at 4-5. According to the Tribe, the provisions in the leasehold mortgage appeared to violate 25 U.S.C. §§ 177 and 81.¹¹

The Tribe also objected to the collateral assignment of leases, rents and profits that HME and Michigan National had executed on March 24, 1986, and to the 1993 and 1998 mortgage modifications, as both substantively offensive and procedurally defective for lack of Tribal and BIA approval. Some of the Tribe's substantive objections were the same or similar to its objections to the leasehold mortgage; an additional objection was that the guarantor individuals had been released from personal liability for indebtedness to the bank. *See* Notice of Default at 7-8.

The Tribe stated that it was giving HME an opportunity to cure each of the defaults and breaches set forth in the notice within the time frames in Article 18 of the lease (e.g., the 60-day deadline for curing non-monetary defaults). The Tribe also stated that although the Tribe regarded the mortgage and all related documentation to be null and void *ab initio*, HME might want to put the bank on notice of the alleged defaults and breaches. The Tribe did not give notice to Michigan National or any of its successors-in-interest by merger.¹²

¹¹ Section 177, also referred to as the Indian Non-Intercourse Act, broadly prohibits purchases, grants, leases, or other conveyances of Indian tribal lands, or of any title or claim thereto, unless otherwise authorized by Congress. *See Chemehuevi v. Western Regional Director*, 52 IBIA 192, 194 (2010). Generally, § 81 formerly prohibited agreements with Indian tribes "relative to their lands" without BIA approval, and, as amended in 2000, it prohibits "encumbrances" of tribal lands for 7 years or more without such approval, subject to implementing regulations to interpret and apply the statute. By regulation, BIA has excluded from the scope of agreements requiring § 81 approval contracts or agreements that are otherwise subject to BIA review and approval under other regulations, including leasehold mortgages governed by 25 C.F.R. Part 162. *See* 25 C.F.R. § 84.004(a).

¹² The Notice of Default also alleged that HME had violated the lease by failing to submit financial statements prepared by a Certified Public Accountant (CPA) licensed in the State of Florida or the State of California. The source of the Tribe's complaint apparently was that HME's financial statements were prepared by a CPA licensed in Michigan. The Letter Agreement signed by the Tribe and BIA stated that HME's financial statements could be prepared by a CPA licensed in Michigan. The Tribe has not pursued this issue as a ground for cancellation of the lease.

V. Tribe's Repossession of the Premises and Purported Termination of the Lease, Request from Tribe to BIA to Terminate the Lease "on behalf of the United States," and Management-Related Allegations of Breach

HME responded to the Notice of Default by denying that defaults or breaches had occurred and demanding arbitration. The Tribe disagreed that the arbitration clause in the lease applied to defaults and breaches. On July 15, 2008 — 28 days after the Notice of Default — the Tribe advised HME that in view of the fact that HME had "no intention" of curing the defaults and breaches, the Tribe "is exercising its right as Lessor to reenter and retake the leased premises, subject to the rights of subtenants," and that the Tribe "hereby declares the lease to be terminated and has retaken the property effective immediately." Letter from Tribe to HME, July 15, 2008, AR Tab 16.

Earlier the same day, in an unsuccessful attempt to forestall the Tribe's repossession of the premises, HME filed an emergency motion in Federal court for a preliminary injunction. See *Hollywood Mobile Estates Ltd. v. Seminole Tribe of Florida*, 2008 WL 2959850, at *1, No. 08-61048-CIV (S.D. Fla. July 28, 2008) (order denying motion for preliminary injunction) (slip op. at AR Tab 58). The court found that "[b]oth parties had performed their obligations under the Lease without incident up until June 17th of [2008] when the Tribe formally served [HME] with a letter of default." *Id.* The court denied HME's motion, however, because it concluded that the Tribe had not waived its sovereign immunity, and therefore HME had no likelihood of success and therefore could not satisfy the standard for obtaining a preliminary injunction. *Id.* at *1-2. In concluding that the Tribe had not waived its sovereign immunity, the court agreed with the Tribe that the arbitration clause did not apply to the default provision in the lease. *Id.* at *2.

After taking possession of the premises, the Tribe wrote to the Regional Director asking BIA to cancel the lease "on behalf of the United States." See Letter from Tribe to Regional Director, July 21, 2008, AR Tab 18.¹³ In its request, the Tribe identified additional issues that it contended had been brought to its attention. The Tribe alleged that

¹³ The Tribe asserted that the Department of the Interior's Solicitor's Office had informed it that under the Tribe's ISDA contract with BIA, the Tribe possessed all of the rights that BIA had regarding the lease, "with the sole exception of terminating the Business Lease on behalf of the United States." *Id.* Although the Tribe asserted that it had terminated the lease "as between" HME and the Tribe, the Tribe appeared to recognize that BIA action is required to terminate the lease "on behalf of the United States." *Id.* Subsequently, the Tribe asserted that it had full authority to terminate the lease, and characterized its request to BIA as having been taken "out of an abundance of caution." Letter from Tribe to Regional Director, Aug. 8, 2008, AR Tab 24.

HME had failed to conduct background checks to ensure that only persons age 55 and over reside on the property, that HME had allowed residents to operate commercial establishments from their homes, and that there had been several search warrants revealing criminal activity. In subsequent letters to BIA, the Tribe made more allegations regarding HME's management of the property, e.g., stating that the leased premises had fallen into disrepair, and that HME had allowed, and thereby caused, criminal activity on the premises. *See* Letter from Tribe to Regional Director, Aug. 8, 2008, AR Tab 24; Letter from Tribe to Regional Director, Aug. 20, 2008, AR Tab 29.

VI. Regional Director's Order to Show Cause, Decision, and Appeal to the Board

On September 26, 2008, the Regional Director sent a notification to HME, pursuant to 25 C.F.R. § 162.618 ("What will BIA do in the event of a violation of a lease?"), giving HME 10 days to show cause why the lease should not be cancelled. *See* Letter from Regional Director to HME, Sept. 26, 2008 (OSC), AR Tab 43. The Regional Director's OSC identified as grounds for cancellation: (1) failure to fully develop and utilize the premises; and (2) several management-related violations, including failure to maintain the leased property, allowing the property to be used for unlawful conduct and purposes, and failure to comply with rules and regulations applicable to management of the property.¹⁴ The OSC did not identify the leasehold mortgage or the related financing agreements as violations of the lease.

HME objected to the OSC on both procedural and substantive grounds, and in particular noted that only one alleged violation — failure to fully develop the premises — had been included in the Tribe's Notice of Default, and that the other alleged violations were based on allegations about HME's management that the Tribe had made after ousting HME from the premises. HME provided declarations and photographs responding to the allegations regarding HME's management of the leased premises. *See* Letter from HME to Regional Director, Oct. 13, 2008, and exhibits, AR Tab 49. The Tribe submitted an affidavit of Tribal Council member Max B. Osceola, Jr., which raised additional allegations about HME's management of the property. *See* Letter from Tribe to Regional Director, Oct. 17, 2008 (enclosing Affidavit of Max B. Osceola, Jr.), AR Tab 53.

¹⁴ The lease includes language required by BIA's leasing regulations that the lessee "agrees that it will not use or cause to be used any part of the leased premises for any unlawful conduct or purpose." Lease art. 19.C.; *see* 25 C.F.R. 162.604(g)(3); 25 C.F.R. § 131.5(g)(3) (1969).

Osceola also averred, based on his “personal recollection of the issues pertaining to” the Letter Agreement, that the purpose of the Letter Agreement was solely to authorize HME to proceed with negotiation and preparation of final documents, and that the original Letter Agreement “at the time of execution [by the Tribe’s Chairman] did not contain any mortgage loan documents or related financing documents as these were to be attached once they were approved as to form and content by the Tribe and [BIA] which evidently never happened.” Affidavit of Max B. Osceola, Jr., ¶¶ 5-6. Osceola asserted that the Tribal Council never intended the Letter Agreement as a substitute for final approval.

On December 4, 2008, the Regional Director issued the Decision declining to cancel the lease. The Regional Director addressed the alleged violations raised in his OSC, as well as the additional violations that were included in the Tribe’s Notice of Default, and concluded that HME had not breached the lease. Relevant to this appeal, the Regional Director first concluded that HME’s failure to develop the 10-acre vacant area did not provide a basis to cancel the lease. The Regional Director reasoned that because the lease required a plan, within 1 year of its approval, to fully develop the premises, apparently the premises were developed according to such a plan, although the plan itself had not been located. But even if no plan existed, the Regional Director concluded that any breach was waived by the Letter Agreement signed by the Tribe and BIA.¹⁵

Next, the Regional Director found that the intent of the parties in 1986 was to approve the leasehold mortgage, and even if such approval was not shown on the face of the document, that would at most be a technical breach that could easily be remedied.¹⁶

With respect to the alleged management-related violations, the Regional Director concluded that the alleged misconduct by residents could not be characterized as “caused” by HME, and that both sides had submitted self-serving affidavits about the maintenance issues. The Regional Director concluded that the evidence suggested a maintenance backlog, but not a material breach of the lease by HME. But aside from whether there were, in fact, management-related deficiencies or even defaults, the Regional Director concluded that there was an additional reason why the management-related allegations could not serve as a basis to cancel the lease: the Tribe had ousted HME before any notice

¹⁵ The Regional Director agreed that the 10-acre area should be developed, but found that the remedy was a negotiated resolution between the parties.

¹⁶ The Regional Director found that although the alleged deficiency could easily be cured by submission of the leasehold mortgage to BIA for approval, he did not believe that was necessary.

was given to HME of the alleged management-related violations, and thus the Tribe had prevented HME from having an opportunity to cure the very deficiencies about which it was complaining.

The Tribe appealed the Decision to the Board. The Tribe filed an opening brief; the Regional Director, HME, and the Bank of America (as successor-in-interest by merger to Michigan National Bank), filed answer briefs; and the Tribe filed a reply brief.

Discussion

I. Standard of Review

The Board reviews questions of law de novo, which include interpretations of lease provisions. See *A C Building & Supply Co. v. Western Regional Director*, 51 IBIA 59, 72 (2010), and cases cited therein. We also review de novo the sufficiency of evidence to support a BIA decision. See *Smartlowit v. Northwest Regional Director*, 50 IBIA 98, 104 (2009). If a BIA decision involves an exercise of discretion, the Board reviews the sufficiency of BIA's explanation for its decision, but we do not substitute our judgment for that of BIA. See, e.g., *Gourneau v. Acting Rocky Mountain Regional Director*, 50 IBIA 33, 43 (2009); *Wallowing Bull-C'Hair v. Rocky Mountain Regional Director*, 49 IBIA 120, 123-24 (2009). An appellant bears the burden of proving that BIA's decision was in error, not supported by substantial evidence, or an abuse of discretion. *Id.* at 124.

II. Issues Presented

The Tribe argues that the Regional Director erred in finding that HME was not in default so as to warrant cancellation of the lease, and that his findings are not supported by substantial evidence. Opening Brief at 28. Specifically, the Tribe contends that HME was in breach (1) for failing to completely develop the premises, (2) for entering into an unapproved leasehold mortgage and related financing agreements, and (3) for mismanaging the mobile home park in numerous respects. We address each argument in turn and, as summarized earlier, we conclude that the Regional Director properly rejected each of the alleged defaults as grounds for cancelling the lease.¹⁷

¹⁷ The Tribe makes an additional general argument that the Regional Director failed to adequately explain his refusal to cancel the lease after issuing an OSC that made an "unequivocal" express determination that HME had violated the lease. Opening Brief at 31; Reply Brief at 3. But a BIA determination, for purposes of issuing an OSC, is not

(continued...)

III. Failure to Completely Develop the Premises

The Regional Director examined both Articles 3 and 11 of the lease, and concluded that they required the lessee to submit a development plan and architect's design for full improvement of the premises within 1 year of the lease's approval. The Regional Director surmised that although no such plan had been located, there must have been some plan that was followed to develop the premises, but that even if no such plan existed, the Tribe waived any deficiency when it signed the Letter Agreement in 1986 stating that the lessee was not in default of any provision in the lease. The Regional Director found, on the basis of the "clear ordinary words of the lease," that HME was not in breach for failure to develop the 10-acre area. The Regional Director agreed with the Tribe that the 10-acre area should be developed, but concluded that any such development should be the subject of negotiations between the parties.

The Tribe argues that "[h]ad HME honored its obligation to completely develop and use the 10 acres of valuable frontage property *pursuant to the general plan*, it would have resulted in several million dollars of additional gross rentals." Opening Brief at 15 (emphasis added). The Tribe concedes that "if any Lessee prior to the 1986 Lease assignment to HME failed to comply with the Lease, such default clearly would have been waived by virtue of the Letter Agreement." *Id.* at 42. But the Tribe contends that the Letter Agreement "did not . . . excuse HME from defaults under the Lease *arising after March 20, 1986.*" *Id.* The Tribe also argues that at most, articles 3 and 11 create a "possible ambiguity" as to whether HME was obligated to fulfill the clear stated purpose of the lease, *id.* at 43, apparently by creating additional mobile home lots on the vacant area because this was a use that had been approved for the premises. The Tribe argues that any such ambiguity should be resolved in favor of the Tribe. As noted earlier, neither the Tribe nor any other party has produced the general plan of development that was required by the lease.

¹⁷(...continued)

and cannot be characterized as "unequivocal" — at least not in the sense of either being irrevocable or as carrying some presumptive weight against a contrary conclusion by BIA in a final decision. An OSC may be based on incomplete information (and possibly no information at all from the recipient), and one of the express purposes of the OSC is to afford the recipient an opportunity to convince the decision maker that the initial determination upon which the OSC was based was erroneous. *See* 25 C.F.R. § 162.618(b)(2).

We agree with the Regional Director that the language of articles 3 and 11 is clear in linking the complete-development requirement to the general plan, and that in any event the Tribe's express representation — 17 years into the lease — that the lessee was not in default of any provision in the lease, precludes a finding that HME's failure to develop the 10-acre area constitutes a breach upon which the lease may be cancelled. Articles 3 and 11 required a development plan and architect's design, *within 1 year after the lease was approved*, for the "full improvement and complete development of the entire leased premises." Lease art. 11.B. Article 3 expresses the parties' overall intent and understanding that the property be utilized for its "highest and best use," but that language must be read in relation to the general plan of development, and to any changes of use contemplated by the parties. Article 10 required the lessee to complete construction of permanent improvements within 5 years of the beginning of the lease. And article 27 stated that time was of the very essence. Although the Tribe argues that HME violated the lease by failing to develop and use the 10-acre area "pursuant to the general plan," Opening Brief at 15, the Tribe has not produced the general plan. Thus, the Tribe has not demonstrated that HME's failure to develop the 10-acre area is inconsistent with the lessee's duty to develop the premises pursuant to the general plan of development. And in the absence of such a showing of default, the Tribe's argument that the 1986 Letter Agreement only waived defaults with respect to "prior" lessees — but not with respect to HME — does not aid the Tribe.

But even if the lease could be read as imposing a development duty on the lessee, separate and apart from developing the premises pursuant to the general plan, the Tribe's execution of the Letter Agreement in 1986 makes clear that the Tribe did not consider non-development of the 10-acre area to constitute a breach of the lease. The Letter Agreement signed by the Tribe and BIA represented that "[t]here is no uncured default on the part of the Lessee under [the lease], nor is there any event or occurrence which, but for the passage of time or the giving of notice, would be a default under the [lease]." Letter Agreement at 3. When the lease was assigned to HME, HME stepped into the shoes of the prior lessees. If the prior lessees were not in default by failing to develop the 10-acre area, then neither did HME's failure give rise to a new default because the assignment did not impose new obligations upon HME.¹⁸ The Tribe clearly knew how to, and did, explicitly reserve certain obligations that might otherwise have been excused by the no-uncured-default language. The Letter Agreement provides that notwithstanding the no-uncured-default

¹⁸ The Tribe argues that the "full and productive use of the entire parcel is an essential condition precedent to the economic relationship between the parties," Opening Brief at 8, but that argument gets the Tribe nowhere because at most it relates back to the sufficiency of the original development plan, or is relevant to whether prior lessees' failure to develop the 10-acre area constituted a breach (which the Tribe agreed it did not).

language, HME might still be obligated to repair a utility plant that was under another lease also covered by the Letter Agreement. The Tribe made no similar exception for possible obligations regarding the 10 acres. Finally, in addition to warranting that there were no uncured defaults, the Tribe expressly represented to HME that the “certification may be relied upon by *you and your successors and assigns*.” Letter Agreement at 4 (emphasis added).

And finally, if there were any ambiguities in the lease language that were not governed by the no-uncured-default language in the Letter Agreement, the Tribe itself concedes that an ambiguity in a written contract can be overcome by the contemporaneous actions and understandings of the parties to the contract. Opening Brief at 43. The Tribe’s long-standing acquiescence in the non-development of the 10 acres fully supports resolution of any ambiguity by finding that the parties did not interpret the lease as requiring development of the 10 acres, and certainly not as giving rise to a new obligation by HME to do so when it was assigned the lease in 1986.

IV. Failure to Obtain Approval for Leasehold Mortgage and Related Financing Documents

The Regional Director concluded that the Letter Agreement was sufficient to constitute approval by the Tribe and BIA of the leasehold mortgage, but that if additional approval were in fact required, HME’s failure to have obtained that approval was at most a technical breach that can easily be remedied by submission of the leasehold mortgage to BIA for approval. We agree that the Letter Agreement, which represented to HME that proposed loan documents had been reviewed by BIA and the Tribe and were approved, was sufficient to constitute the necessary approval. The Tribal Resolution authorizing the Tribe’s Chairman to execute the necessary documents made the same representation with respect to Tribal review and approval of the underlying documents. And, although the Regional Director failed to address the 1993 and 1998 loan renewal documents, we conclude that the Letter Agreement covered those as well because the principal balance on the loan did not exceed \$8,150,000, the Tribe has not shown that the extensions and modifications of the mortgage agreement substantively altered the leasehold mortgage, and the subsequent assignments of the mortgage agreement were limited to assignments of rights to successors-in-interest to Michigan National by merger. Moreover, whether or not additional approval might be required for the 1993 and 1998 modifications, we find no fault or abuse of discretion in the Regional Director’s conclusion that even if a breach could be deemed to exist, HME should be afforded an opportunity to seek any necessary additional approval before the lease could be cancelled.

The Tribal Council Resolution, adopted by a unanimous vote on a motion by Tribal Council member Max B. Osceola, Jr., expressly approved and consented to the assignment

to HME “with taking back a \$8,150,000 purchase money mortgage,” and “authorize[d] the Chairman and the Secretary/Treasurer to execute the documents listed above and all other documents that may be required in order to facilitate the sale and assignment.” Tribal Resolution C-122-86, AR Tab 8. The Letter Agreement states that the Tribe and BIA “approve[] and consent[] to the assignment . . . and to the encumbering of [HME’s] interest . . . by a leasehold mortgage excuted by [HME] and Michigan National,” provided that the original principal balance was not greater than \$8,150,000. The Letter Agreement also states that the loan documents were as set forth in the attached exhibit. Nothing in the Tribal Resolution conditioned the Tribe’s approval on further action by the Council, and nothing in the Letter Agreement conditioned the Tribe’s approval on further action by the Tribe’s Chairman.

The Tribe argues that the Letter Agreement did not approve any specific terms and conditions for a leasehold mortgage or related financing documents, but instead contemplated that it served only as a starting point, after which HME and its mortgage lender would ultimately submit a proposed set of final documents to the Tribe and BIA for review and approval. Opening Brief at 2. In support of this argument, the Tribe relies on an affidavit executed by Osceola, whose statements are based on his “personal recollection of the issues pertaining to” the Letter Agreement. Affidavit of Max B. Osceola, Jr., ¶ 5, AR Tab 53. Osceola avers that the purpose of the Letter Agreement was solely to authorize HME to proceed with negotiation and preparation of final documents, and that the original Letter Agreement “at the time of its execution [by the Tribe’s Chairman] did not contain any mortgage loan documents or related financing documents as these *were to be attached* once they were approved as to form and content by the Tribe and [BIA] which evidently never happened.” *Id.* ¶ 6 (emphasis added). Osceola asserts that the Tribal Council never intended the Letter Agreement as a substitute for final approval.

The Tribe contends that Osceola’s “unrefuted testimony” stands as the “only competent evidence in the record” to demonstrate that the Tribe never approved the leasehold mortgage and related financing documents. Opening Brief at 34. We disagree. First, Osceola provides no foundation for his purported “recollection” of which documents were or were not attached to the Letter Agreement signed by the Tribe’s Chairman. Osceola does not say that he was present when the Chairman signed the Letter Agreement, in which the Chairman approved and consented to HME encumbering the leasehold by a leasehold mortgage “provided that the documents used to evidence such loan shall be as set forth in Exhibit ‘A,’ *attached hereto and made a part hereof.*” Letter Agreement at 4 (emphasis added). Osceola’s assertion that the documents “were to be attached” is flatly contradicted by the representation made by the Chairman in signing the Letter Agreement. Second, the Tribal Council Resolution expressly authorized the Chairman to execute any documents required to effectuate the assignment. As previously noted, the Letter

Agreement signed by the Chairman also represented to HME that the certification “may be relied upon by you and your successors and assigns.” *Id.* Third, Osceola fails to provide any foundation for his testimony concerning the “intent” of the Tribal Council. That testimony also conflicts with the language of the Council’s own Resolution approving the transaction. Moreover, a letter from the Tribe’s counsel to BIA stated that enclosed with the letter were the “financing documents to be executed by the buyers at closing.” Letter from Jim Shore, Esq. to Superintendent, Jan. 31, 1986, AR Tab 8. As noted earlier, the documents accompanying Shore’s letter included an unexecuted copy of the leasehold mortgage that is identical in substance to the final executed mortgage. To contend, as the Tribe does in this appeal, that neither BIA nor the Tribe were ever aware of the mortgage loan documents, *see* Opening Brief at 6, is thus contradicted by the Tribe’s own contemporaneous representations through its Chairman, legal counsel,¹⁹ and Tribal Council Resolution. Osceola’s personal recollection of the events in 1986 simply does not provide us with a basis to ignore the contemporaneous documentation of the Tribe’s and BIA’s approval of the leasehold mortgage.²⁰

The fact that approval by the Tribe and BIA does not appear on the face of the leasehold mortgage and related financing documents does not defeat the validity or effectiveness of that approval. The administrative record overwhelmingly supports the Regional Director’s finding that the leasehold mortgage and related financing documents executed at the time the lease was assigned to HME were approved by the Tribe and BIA.

The Tribe also argues that even if the leasehold mortgage was approved, the 1993 and 1998 modifications were not approved. The Tribe (justifiably) criticizes the Decision for failing to address the 1993 and 1998 modifications, through which HME renewed the mortgage and through which successors-in-interest by merger replaced Michigan National. But that deficiency in the Decision does not require a remand because we conclude as a matter of law that HME’s subsequent renewals of the loan fell within the scope of the

¹⁹ Jim Shore is identified as the Tribe’s General Council in 1986. In the present dispute, the Tribe is represented by Donald A. Orlovsky, Esq., of Kamen & Orlovsky, P.A.

²⁰ Because we find that Osceola failed to provide a foundation for testifying as to what documents were or were not attached to the Letter Agreement at the time it was signed by the Tribe’s Chairman (as attested by the Tribe’s Secretary/Treasurer), and that Osceola also failed to provide a foundation for testifying as to the intention of the Tribal Council as a body, we conclude that the conflict between Osceola’s affidavit and the evidence in the administrative record does not give rise to the existence of material disputed facts that would warrant either a remand or a hearing.

Letter Agreement. The Letter Agreement stated that the Tribe and BIA “consent[] to an extension, modification, or replacement of such leasehold mortgage provided that the original principal balance thereunder shall in no event exceed Eight Million One Hundred Fifty Thousand and 00/100 (\$8,150,000) Dollars.” Letter Agreement at 4. Each of the subsequent modifications to the mortgage were for new principal balances well below the \$8,150,000 cap. And we are not convinced that the replacement of Michigan National by its successors-in-interest by merger were modifications that fell outside the scope of the approval granted in the Letter Agreement.

The Tribe also argues that by dropping paragraph 34 of the leasehold mortgage in the 1998 modification — the paragraph incorporating a personal limited guaranty by HME’s partners to Michigan National — HME materially altered the leasehold mortgage to the detriment of the Tribe. We conclude that the Tribe has not satisfied its burden of showing how the Tribe was affected. The record does not contain a copy of the guaranty from HME’s partners to Michigan National, but it appears that the guaranty was based on the amount of the outstanding principal balance. When the outstanding principal balance dropped below \$6,000,000, HME and the bank declared the guaranty to be void and of no further effect, implying that the conditions that required the guaranty had been satisfied. Whether or not that was, in fact, the case, the Tribe has not shown that eliminating a guaranty by the partners to the bank resulted in any detriment to the Tribe. In this regard, the Tribe’s assertion that the lapse of the guaranty somehow enabled or encouraged HME to mismanage the property is wholly conjectural.

Because we conclude that HME did not breach the lease by failing to obtain required approvals for the leasehold mortgage and related financing documents, we need not decide whether the numerous substantive objections that the Tribe now raises against the terms of those documents have merit. HME and Bank of America contend that the Tribe’s objections are based on mischaracterizations of the effect of language in the leasehold mortgage and related documents. For example, the Tribe characterizes the leasehold mortgage as attempting to convey the Tribe’s underlying trust property; HME and Bank of America point out that HME only purported to convey HME’s rights and interests in the leasehold mortgage, not the underlying trust property. As another example, the Tribe purports to interpret HME’s collateral assignment of “all rents” as violating the lease’s prohibition against encumbrances that “provide for the interruption or cessation of rental payments to the [Tribe] in the event of default, forfeiture, [or] foreclosure.” Opening Brief at 16, quoting Lease art. 15. HME and the Bank of America respond that the assignment by HME to the bank of HME’s right to receive rents (i.e., from sublessee tenants) cannot reasonably be construed as purporting to place a superior “lien” on the Tribe’s right to receive rent from HME as lessee (or from the bank in the event of HME’s foreclosure).

Even were we to conclude that further approval of the mortgage or financing documents was required, we would find that the Tribe's objections are misplaced and premature in the context of requesting that the lease be cancelled by BIA. At a minimum, given the representations made by the Tribe and BIA to HME, we agree with the Regional Director that before the lease should be cancelled, HME should be afforded a reasonable opportunity to present the mortgage and financing documents to BIA and the Tribe for approval, pursuant to article 14 of the lease. Article 14.C. provides that the Tribe and BIA "shall not unreasonably withhold approval" of any assignment or transfer, and the Tribe itself concedes that article 14.C. is subject to the arbitration provision in the lease. *See* Opening Brief at 10. Thus, under the circumstances, it would be premature to cancel the lease without at least addressing, and developing a more complete record on, the possibility of approval of the documents.²¹

V. Management-Related Breaches

After ousting HME from the premises, the Tribe identified numerous management-related alleged breaches of the lease, including HME's alleged failure to follow its own rules and regulations, and state law, for operating a mobile home park for residents 55 years of age and over, allowing unauthorized commercial uses (a "used car lot"), allowing the premises to fall into a state of disrepair, and "knowingly" failing to take steps as manager to mitigate or eliminate criminal activity "about which HME knew or should have known." Opening Brief at 26.

The Regional Director concluded that the presence of some children living in the mobile home park did not violate the lease, which did not prohibit residency by persons under 55 years of age; that HME's purported disregard for criminal activity did not rise to the level of causation and breach; that the evidence was insufficient to conclude that HME had materially breached the lease by permitting unauthorized commercial activities; and that

²¹ The Tribe argues that the Board held in *Quantum Entertainment Ltd. v. Acting Southwest Regional Director*, 44 IBIA 178 (2007), that BIA would be "without power" to approve retroactively an agreement between a tribe and a third party under 25 U.S.C. § 81. Opening Brief at 36. Of course, the agreements at issue in the present case are not between a tribe and a third party; instead, they are between a lessee and a third party, concerning a (non-trust) leasehold estate. Moreover, the Board made no such holding in *Quantum*. The Tribe errs by conflating the principle of standing to challenge BIA action with the issue of BIA's authority to take action. The Board's finding in *Quantum* that Quantum lacked standing to challenge BIA's disapproval of Quantum's agreement with a tribe has no applicability to the present case.

the alleged lack of maintenance appeared more indicative of a maintenance backlog which, again, did not rise to the level of a material breach. The Regional Director also concluded that regardless of the merits of the Tribe's complaints about HME's management, those complaints could not serve as grounds to cancel the lease because the Tribe had taken possession of the leased premises prior to giving HME notice of the alleged violations and an opportunity to cure them.

We conclude that the Tribe's dispossession of HME, prior to giving it notice and an opportunity to cure, is dispositive. BIA's leasing regulations incorporate a due process requirement that a tenant in violation of a lease must be given notice *and an opportunity to cure* before a lease can be cancelled. *See* 25 C.F.R. § 162.618. So does the lease. *See* Lease art. 18. Failure to give the requisite notice invalidates a lease cancellation decision. *See A C Building Supply Co.*, 51 IBIA at 73-74, and cases cited therein. Similarly, when the Tribe as lessor actively prevented HME from having any opportunity to cure alleged management-related defaults, it would be plain error on the part of BIA to proceed with a lease cancellation decision, particularly when the Tribe ousted HME from possession before even giving HME notice of these alleged defaults. Therefore, the Regional Director correctly concluded that HME's alleged management-related defaults could not serve as grounds to cancel the lease.²²

VI. Tribe's Termination of the Lease

In its opening brief, the Tribe explains its actions of notifying HME of alleged violations of the lease and then taking possession of the premises as actions required by the Tribe's ISDA contract, which requires the Tribe to monitor leases for contractual compliance "and *act on cases of non-compliance.*" Opening Brief at 7. But the Tribe's opening brief does not present as an issue for the Board to decide whether the Tribe's actions purporting to terminate the lease were, by themselves, effective without requiring action by BIA; nor does the Tribe request a declaration from the Board that the lease was terminated as a result of the Tribe's action, thus rendering review of the Regional Director's Decision moot. In its reply brief, however, the Tribe for the first time suggests that "[t]he only just action is Lease cancellation by the Regional Director *if cancellation by the Seminole Tribe under [its ISDA] contract is found to be ineffective.*" Reply Brief at 5 (emphasis added). The Tribe proceeds to argue that the Tribe's cancellation of the lease under its ISDA

²² Because the Tribe's violation of HME's procedural due process rights is dispositive with respect to the management-related alleged defaults, we need not address the Regional Director's finding that the alleged deficiencies were not sufficient to constitute grounds to cancel the lease.

contract “should be regarded as effective,” and the Tribe faults the Regional Director’s Decision for failing to “confirm that the Tribe validly cancelled the Lease.” *Id.* at 10, 14.

As a general rule, the Board does not consider arguments raised by an appellant for the first time in a reply brief, and we see no reason to make an exception in this case. *See, e.g., Linabery v. Acting Great Plains Regional Director*, 53 IBIA 42, 49 (2011), and cases cited therein. The Tribe did not present in its opening brief its own actions as a ground upon which the Board should or could grant relief, separate and independent from any review of the Regional Director’s decision, nor did the Tribe fault the Decision for failing to “confirm” that the Tribe’s actions had been effective.

Even if we were to consider the issue as properly presented, we would reject it. The Tribe argues that 25 C.F.R. Part 162 does not forbid BIA from contracting BIA’s enforcement authority to a tribe. Reply Brief at 7. The Tribe is incorrect. Section 162.110 allows tribes to administer BIA’s leasing regulations under an ISDA contract or compact, “[e]xcept insofar as the[] regulations provide for the granting, approval, or enforcement of leases.” (Emphasis added.) The express exception withholding authorization has the same effect as a prohibition, and thus, the Tribe’s argument is refuted by the clear language of the regulation.

VII. Bank of America’s Request for Relief

In the proceedings before the Regional Director, Bank of America asked the Regional Director to restore HME to the premises and to require that rents be escrowed pending resolution of the dispute. In its answer brief in this appeal, in which HME joins, Bank of America complains that its request to the Regional Director was not addressed in the Decision, and Bank of America asks that the Board restore HME to the premises and order BIA to conduct an independent accounting of the collection of rents to provide HME and Bank of America complete relief.

Neither HME nor the Bank of America appealed from the Regional Director’s decision, Bank of America’s objections and request for relief are outside the scope of this appeal, and BIA’s authority to take action, in addition to declining to cancel the lease, is not an issue that is necessarily implicated in our resolution of the Tribe’s appeal.

Conclusion

For the reasons explained above, we conclude that the Tribe has failed to demonstrate error in the Regional Director’s decision declining to cancel the lease.

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 December 4, 2008, decision.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Debora G. Luther
Administrative Judge