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December 20, 2007

Via ECF

The Honorable Joseph F. Bianco
United States District Judge
Long Island Federal Courthouse
100 Federal Plaza
Central Islip, New York 11722

**Re: State of New York, et al. v. The Shinnecock Indian Nation, et al.
(03 Civ. 3243)
Town of Southampton v. The Shinnecock Tribe, et al.
(03 Civ. 3466) (Consolidated)**

Dear Judge Bianco:

This letter is submitted on behalf of the State plaintiffs and plaintiff Town of Southampton pursuant to the Court's Order dated November 16, 2007, as modified by the Orders dated November 20, 2007 and December 12, 2007. Pursuant to those Orders, this letter: (i) describes the outstanding, unresolved objections between the parties concerning the language of the proposed judgment which remain following the "meet and confer" efforts of the parties, as directed by the Court's November 16th Order, and sets forth plaintiffs' position on those objections and sets forth what plaintiffs are prepared to agree to in terms of the proposed judgment language and their reasons for same; and (ii) sets forth plaintiffs' opposition to defendants' November 14, 2007 letter motion ("Letter Motion") asking the Court to modify its October 30, 2007 Memorandum and Order based on newly-discovered evidence, which defendants contend provides a basis for the Court "to relieve [them] of [Stipulation #9 contained in the parties' Proposed Joint Pretrial Order, filed September 28, 2006]." Letter Motion at p. 1.

The Parties' Efforts to Agree Upon the Language of the Proposed Judgment

In furtherance of the Court's November 16, 2007 Order, all parties have worked diligently in an effort to reach agreement on the language of the proposed judgment. By letter dated November 30, 2007 ("Pltfs. Nov. 30 Ltr.") plaintiffs provided to defendants a paragraph-

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by-paragraph response to the contents of defendants' proposed judgment ("Defs. Initial Judgment") [Doc. 374-2], which was filed with the Court on November 14, 2007, under cover of defense counsel's letter of that date ("Defs. Nov. 14 Ltr."), and set forth the reasons for plaintiffs' agreement or disagreement with defendants' proposed language. A copy of Pltfs. Nov. 30 Ltr. is attached as **Exhibit A**. The parties thereafter held a three-hour "meet and confer" telephone conference on December 6, 2007, which was followed up with numerous e-mail and telephone communications to continue to negotiate language. The Southampton Town Board met with the Town's counsel on December 11, 2007, to consider relevant issues and plaintiffs thereafter forwarded to defense counsel a revised, proposed permanent injunction and judgment in an effort to address several of the remaining areas of disagreement. A copy of plaintiffs' December 11, 2007 version of the judgment and the email which transmitted same to defendants' counsel, are attached as **Exhibit B**.

We understand that defense counsel, Christopher Lunding, has also met with his clients to discuss the relevant issues. On the evening of December 18, 2007, Mr. Lunding sent to plaintiffs a letter and counter-proposed judgment ("Defs. Revised Judgment") (collectively attached as **Exhibit C**), which, to plaintiffs' disappointment, backtracks on various issues as to which we were hopeful of achieving consensus. Mr. Lunding explained the reason for this:

[T]he Town's recent actions have caused the Nation's leadership to conclude that the Town likely has an undisclosed objective of 'punishing' the Nation through use of the injunctive relief to be entered by the Court. This, in turn, has influenced the defendants' objections to the text of the permanent injunction, in the form most recently proposed by the State and the Town.

Ltr. of Christopher Lunding, dated December 18, 2007 (Exhibit C), at p. 3.

In the same vein, today, in an email, Mr. Lunding charged that "it appears to us that the Town's position, as [Acting Town Attorney] Ms. Murray states it [in a press account], is simply a subterfuge designed to conceal an intention by the Town to try to prohibit the Nation from continuing to engage in these historical uses of Westwoods at all."

The Town views the conclusion by the Nation, and its suspicions, as articulated by Mr. Lunding, as absolutely baseless. Since its receipt of this Court's Order of November 16, 2007, the Town's effort has been, and remains, solely to document, in a judgment containing appropriate declaratory and injunctive provisions, this Court's determinations, as reflected in the Memorandum and Order. Defendants' conspiracy theories have absolutely no legitimate place in this process, but we reference them here because defendants themselves assert that they have "influenced the defendants' objections."

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The Proposed Judgment

Plaintiffs assume the Court's familiarity with both plaintiffs' initial proposed judgment submitted to the Court on November 7, 2007 [Doc. 373-2] ("Pltfs. Initial Judgment") as well as Defendants' Initial Judgment ("Def's. Initial Judgment") submitted on November 14, 2007. To assist the Court in understanding the language to which plaintiffs are now prepared to agree and how it differs from that which plaintiffs initially proposed, we have attached as **Exhibit D** a black-line showing plaintiffs' proposed revisions to their initial judgment. These changes arise from several sources: plaintiffs' adoption of some of the language defendants' version of the proposed judgment, language that was agreed upon with defense counsel during our extended "meet and confer" efforts, as well as revisions that plaintiffs have adopted in order to make the judgment clearer and/or otherwise to address certain issues, concerns and objections raised by defendants (though defendants have not necessarily agreed that the language plaintiffs propose addresses adequately their concerns). We have also attached as **Exhibit E** a clean copy of the judgment plaintiffs now request the Court to enter ("Pltfs. Revised Judgment"), along with the attached "Table of Use Regulations (Residence Districts) from the Southampton Town Code, which is referenced in paragraph 1(e) of Pltfs. Revised Judgment and incorporated therein by reference, and which was inadvertently omitted from inclusion with Plaintiffs' Initial Judgment filed on November 7th.

To assist the Court in reconciling the parties' competing versions of the proposed judgment, and determining the areas of agreement and disagreement which remain, plaintiffs will now set forth, paragraph by paragraph (i) their understanding of what objections remain unresolved as well as plaintiffs' reasons for their objections to defendants' proposed language and rationale for the alternative language plaintiffs now propose; and (ii) the language that has been agreed to by all parties.

Introductory Paragraph:¹

Plaintiffs object to defendants' proposed reference to the Order issued by Judge Platt on November 7, 2005. In particular, plaintiffs object to the following language defendants propose to include in the judgment: "and the Court by prior Memorandum and Order filed on November 7, 2005 (docket no. 181 in 03 Civ. 3243) having determined and adjudicated the status of the Shinnecock Indian Nation as an Indian tribe under federal common law" See Defs. Initial Judgment at p. 2, introductory paragraph (beginning "These consolidated actions . . . "). There is no need to reference any of the numerous orders entered previously in this litigation, including the order issued by Judge Platt on November 7, 2005. Defendants did not seek any declaratory relief in this action, and this proposed declaration is not necessary, or even pertinent, to the relief sought by plaintiffs. With the exception of the above-quoted language plaintiffs believe should

¹ The references to the various paragraphs of the proposed judgment set forth as subheadings in this portion of the letter track the numbering and lettering of all versions of the proposed judgments, and where they differ, that will be so indicated in the heading.

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not be included in the judgment, the parties otherwise agree on the language of the introductory paragraph. See Pltfs. Revised Judgment (Exhibit E) at p. 1.

Injunctive Subparagraph 1:

Plaintiffs object to the language defendants have included in paragraph 1 of Defs. Initial Judgment, which attempts to limit the scope of the injunction as it pertains to the individual defendants to only those acts undertaken "in their official capacity." When submitting their initial judgment defendants contended that they amended this subparagraph to make it consistent with Fed. R. Civ. P. 65(d). See Defs. Nov. 14 Ltr., at p. 2. That rule, however, does not limit injunctive relief against officers, agents, employees, etc. "acting in their official capacity." More recently, in an effort to further justify their inclusion of this limitation (see Defs. Revised Judgment at subparagraph 1) defendants have contended that "[t]he Court was very clear that its holdings apply, as to individual defendants, only to acts undertaken in an official capacity" See Defs. December 18, 2007 Ltr. (Exhibit C) at p. 2. Defendants' reference is simply to that portion of the Memorandum and Order which outlines the nature of plaintiffs' claims, not to the extent of the relief granted. In point of fact, the Town sued the individual defendants in their official and individual capacities, and the Town's requests for relief on its claims were granted in their entirety. See Town Complaint [Doc. No. 1-2 in Case No. 03 Civ. 3466] at ¶¶ 4-6. No agreement on this issue has been reached.

Plaintiffs have agreed to defendants' proposed deletion of the words "chairpersons" and "contractors" from Pltfs. Initial Judgment so long as the defined term "Shinnecock Indian Nation" appears after the word "attorneys" in paragraph 1. These changes, to which plaintiffs agree, are reflected in paragraph 1 of Pltfs. Revised Judgment (Exhibit E).

The parties have also agreed to delete the language "from time to time" which appeared in the sixth line of paragraph 1 of Defs. Initial Judgment.

Injunctive Subparagraph 1(a)

Plaintiffs have agreed to adopt defendants' proposed language for this subparagraph, and the parties are therefore in full agreement on the language of this subparagraph, as reflected in Pltfs. Revised Judgment, at subparagraph 1(a) (and also in Defs. Revised Judgment, at subparagraph 1(a)).

Injunctive Subparagraph 1(a)(i):

The parties are in full agreement on the language of this subparagraph, as reflected in Pltfs. Revised Judgment at subparagraph 1(a)(i) (and also in Defs. Revised Judgment, at subparagraph 1(a)(i)).

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Injunctive Subparagraph 1(a)(ii):

The parties are in full agreement on the language of this subparagraph, as reflected in Pltfs. Revised Judgment at subparagraph 1(a)(ii) (and also in Defs. Revised Judgment, at subparagraph 1(a)(ii)).

Injunctive Subparagraph 1(a)(iii)

The parties are in full agreement on the language of this subparagraph, as reflected in Pltfs. Revised Judgment at subparagraph 1(a)(iii) (and also in Defs. Revised Judgment, at subparagraph 1(a)(iii)).

Injunctive Subparagraph 1(a)(iii)(1)

The parties are in full agreement on the language of this subparagraph, as reflected in Pltfs. Revised Judgment at subparagraph 1(a)(iii)(1) (and also in Defs. Revised Judgment, at subparagraph 1(a)(iii)(1)).

Injunctive Subparagraph 1(a)(iii)(2)

The parties are in full agreement on the language of this subparagraph, as reflected in Pltfs. Revised Judgment at subparagraph 1(a)(iii)(2) (and also in Defs. Revised Judgment, at subparagraph 1(a)(iii)(2)).

Injunctive Subparagraph 1(a)(iii)(3)

The parties are in full agreement on the language of this subparagraph, as reflected in Pltfs. Revised Judgment at subparagraph 1(a)(iii)(3) (and also in Defs. Revised Judgment, at subparagraph 1(a)(iii)(3)).

Injunctive Subparagraph 1(a)(iv)

The parties are in full agreement on the language of this subparagraph, as reflected in Pltfs. Revised Judgment at subparagraph 1(a)(iv) (and also in Defs. Revised Judgment, at subparagraph 1(a)(iv)).

Injunctive Subparagraph 1(b):

Plaintiffs object to defendants' proposed limitation of this subparagraph to "any facility for the conduct of bingo or any other game of chance" (see Defs. Initial Judgment at subparagraph 1(b)), and to defendants' more recent construct, "a facility in which it is intended that the conduct of bingo or any other game of chance will occur" (see Defs. Revised Judgment at subparagraph 1(b)). In the Town Complaint, the Town sought a declaration that defendants

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had violated Southampton Town Code § 330-184(I), and a permanent injunction restraining defendants from "taking any steps to clear, excavate, grade . . . or to otherwise engage in any other actions or work at the Property in violation of the Town Code." See Town Complaint at "WHEREFORE" clause, ¶ A (emphasis added). The injunctive relief sought plainly was not limited to activities in furtherance of construction of a facility for "the conduct of bingo or any other game of chance," and therefore, the limitation defendants propose is not appropriate.

Defendants have agreed to withdraw the language "to the extent and as and when required," which they proposed in Defs. Initial Judgment (at subparagraph 1(b)). See Defs. Initial Judgment at subparagraph 1(b).

During the parties' meet and confer efforts, defense counsel expressed concern that the language initially proposed by plaintiffs might be read to require site plan approval or planning board permission as a precondition to defendants' engagement in the activities enumerated in this subparagraph, in instances where the site plan approval process under the Town Code did not apply. In an effort to address defendants' concerns, plaintiffs proposed to add the following proviso to this subparagraph:

provided, however, that nothing in this subparagraph "b" shall be construed to require any person otherwise enjoined or restrained hereby to obtain prior site plan approval or written permission of the Town Planning Board in order to engage in any activity, use or construction to which the site plan review process does not apply under Southampton Town Code § 330-181(A).

See Pltfs. Revised Judgment at subparagraph 1(b).

Defendants' Revised Judgment (Exhibit C) includes and accepts this proviso, but, as noted above, defendants also seek to limit this provision to activities in furtherance of construction of a facility for "the conduct of bingo or any other game of chance." The Town's intention in adding this proviso was to modify appropriately the otherwise broad injunction term which applied generally to the activities enumerated in subparagraph 1(b). In the event this Court determines to include defendants' limitation of this subparagraph to "the conduct of bingo or any other game of chance," however, the proviso would no longer be necessary or appropriate, and the Town would not consent to its inclusion. This is so because any gaming facility, ipso facto would necessarily require compliance with a site plan approval process, i.e., it could not fall within any of the limited circumstances in which the site plan approval process would not be applicable under Town Code § 330-181(A). In sum it is plaintiffs' position that inclusion of the proviso is only appropriate if this Court were to adopt plaintiffs' proposed language for the balance of this subparagraph. See Pltfs. Revised Judgment at subparagraph 1(b).

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Injunctive Subparagraph 1(c):

As with the preceding provision, plaintiffs object to defendants' proposed limitation of this paragraph to "any facility for the conduct of bingo or any other game of chance" (see Defs. Initial Judgment at subparagraph 1(c)), and to defendants' more recent construct, "a facility in which it is intended that the conduct of bingo or any other game of chance will occur" (see Defs. Revised Judgment at subparagraph 1(c)). At trial, the Town demonstrated that defendants had violated Southampton Town Code § 123-9(A), by virtue of their failure to obtain a building permit with respect to their effort to develop a casino at Westwoods, and this Court expressly found such violation. See Memorandum and Order at p. 67.

The language proposed here by plaintiffs essentially tracks the pertinent Town Code provision regarding the requirement of a building permit, and therefore any of the conduct referenced in this paragraph necessarily requires a building permit, making inappropriate defendants' effort to limit the applicability of this injunctive provision to facilities "in which it is intended that the conduct of bingo or any other game of chance will occur." Plaintiffs therefore believe the Court should adopt their version of this portion of the judgment, as set forth in Pltfs. Revised Judgment, which it should be noted, accepts defendants' revision changing all words ending with "ion" contained in that provision to words ending with "ing." (e.g., changing "erection" to "erecting").

Injunctive Subparagraph 1(d)

As with the preceding provisions, plaintiffs object to defendants' proposed limitation of this paragraph to "any facility for the conduct of bingo or any other game of chance" (see Defs. Initial Judgment at ¶ 1(d)), and to defendants' more recent construct, "a facility in which it is intended that the conduct of bingo or any other game of chance will occur" (see Defs. Revised Judgment at ¶ 1(d)).

The provisions of Southampton Town Code § 325 address any and all development activities in violation of its terms, not only development of facilities for the conduct of bingo or any other games of chance. With respect to defendants' alleged violations of Southampton Town Code § 325-6(A), the Town Complaint sought to restrain and enjoin all violations of that provision, not only violations which result from the development or construction of facilities for "bingo or any other game of chance." In addition, as the Court found in its Memorandum and Order, "any development of Westwoods within 200 feet of the wetlands on its northern boundary . . . would implicate Chapter 325 of the Town Code." Memorandum and Order at p. 67 (emphasis added). The Court did not limit that finding to the "development or construction of a facility for the conduct of bingo or any other game of chance," and therefore, no such limitation should be included in the judgment.

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Plaintiffs have agreed to accept defendants' insertion of "(A)" after § 123-9 in this subparagraph so that the parties are in agreement that the reference in this subparagraph reads "§123-9(A)(2)."

Defendants initially objected to plaintiffs' enumeration of the activities which could implicate Town Code Chapter 325 (see Defs. Nov. 14 Ltr.), in favor of language simply referencing, generically, the activities listed in the relevant statute. During the meet and confer efforts between the parties, plaintiffs agreed to defendants' suggestion in this regard. See Exhibit B at p. 4 ("[plaintiffs] accept your deletion of the references to specific construction-related activities in this paragraph, in favor of your insertion of the language 'for any activity for which . . .'"). Defendants have now reversed course completely, and propose inclusion of a modified "laundry list" of activities which does not even capture the entire scope of "regulated activities" identified in Town Code § 325-6 (Town Tr. Exhibit 268). Accordingly, plaintiffs continue to object to defendants' effort to rewrite the provisions of § 325-6. As Plaintiffs' Revised Judgment provides, this subparagraph of the judgment should address "any activity for which a building permit or an administrative wetlands permit is required by § 123-9(A)(2) and/or § 325-6 of the Southampton Town Code." See Pltfs. Revised Judgment at subparagraph 1(d).

Plaintiffs object also to defendants' effort to describe generically the wetlands and/or wetland boundary at Westwoods in this subparagraph. See Defendants' Initial Judgment at subparagraph 1d) (referring to area regulated by Chapter 325 as being "within 200 feet south of the area inundated by tidal action and/or peak lunar tides on the shore of the Great Peconic Bay within the portion of Westwoods shown on the Suffolk County Tax Map as District No. 0900, Section 186, Block No. 2, Lot No. 38"). There is no existing map which delineates the wetlands or wetland boundary at Westwoods for the purposes of Chapter 325, and such a delineation (*i.e.*, the flagging of the wetlands and wetland boundaries) would occur only upon a site inspection of Westwoods by the Town. In connection with the negotiation of this language with defense counsel, the Town checked not once, but twice, with the Town's Chief Environmental Analyst, Martin Shea, whose responsibility it is to administer the Town's environmental regulations, including Chapter 325. Mr. Shea was clear that it was not appropriate under Chapter 325 to define the wetlands as defendants have proposed, particularly in the absence of an actual site inspection to define the precisely the regulated wetland boundary at Westwoods under Chapter 325. This conclusion is consistent with Mr. Shea's testimony at trial. (Trial Tr. at p. 280).²

² Unlike the State, which determines whether there are freshwater or tidal wetlands present based on preexisting mapping and, in the case of freshwater wetlands, generally only regulates freshwater wetlands greater than 12.4 acres in size, the Town's determination of the presence of wetlands and their boundaries is different. See, NY ECL §§ 24-0301 (DEC to map freshwater wetlands in excess of 12.4 acres generally); 24-0701 (permit needed for activity in designated freshwater wetlands); 25-0201 (DEC to prepare tidal wetland inventory); 25-0401 (permit needed for activity in inventoried tidal wetlands). The State has not mapped any freshwater wetlands within Westwoods, only tidal wetlands along its north shoreline, and given the bluff along the shoreline, for purposes of an injunction the State is able to define the adjacent area subject to tidal wetland regulation without further inspection in order to flag the boundary line. See 6 N.Y.C.R.R. § 661.4(b)(1)(iii) (tidal wetlands adjacent area extends to crest of bluff). In contrast, in order to determine whether Town-

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These facts/explanations were shared with defense counsel, but defendants still refuse to accept plaintiffs' proposed language and wish their "within 200 feet south of the area inundated by tidal action and/or peak lunar tides on the shore of the Great Peconic Bay within the portion of Westwoods shown on the Suffolk County Tax Map as District No. 0900, Section 186, Block No. 2, Lot No. 38" to be included. Plaintiffs believe their proposed language, namely "engaging in any activity within 'wetlands' located on Westwoods or within 200 feet of a 'wetlands boundary' at Westwoods, as those terms are defined in § 325-3 of the Southampton Town Code," appropriately accounts for the Town's right to exercise jurisdiction over Westwoods to define the wetlands and/or wetlands boundary thereon at the time of and within the context of a specific application or proposed activity to be conducted at Westwoods. Plaintiffs see no reason why an effort must or should be made now to define in this judgment the wetlands or wetlands boundary in the abstract and based on incomplete information, as defendants wish. Certainly, nothing in the Memorandum and Order entitles defendants to such relief.

To the extent defendants need the wetland boundary defined in order to determine whether certain of their activities at Westwoods might implicate Chapter 325, they stand in the same position as any other landowner within the Town who is free to seek guidance from Mr. Shea and his department. As Mr. Shea stated at trial when asked how his department is typically presented with the opportunity to make wetlands determinations: "Typically we are contacted directly by landowners who either submit letters requesting wetlands determinations, or call me on the phone, or come to Town Hall to speak with us." (Trial Tr. at p. 278.) This avenue is available to defendants should they be concerned about risking contempt or other enforcement action for a potential violation of Chapter 325 of the Town Code. Defendants should not, however, be permitted to define the wetlands and/or wetland boundary as they wish, thereby usurping the Town's jurisdiction under Chapter 325 – which is part and parcel of the relief the Town sought and ultimately obtained in this action.

Injunctive Subparagraph 1(e)

Defendants' recently-proposed modifications to subparagraph 1(e) effectively obliterate the purposes underlying that subparagraph, as proposed by plaintiffs, namely, to embody the use restrictions which the Town Code imposes on Westwoods, as property zoned "R-60." Defendants' restructured subparagraph 1(e) is not only confusing, and limited inappropriately to activities in furtherance of the preparation of Westwoods for "a facility in which it is intended that the conduct of bingo or any other game of chance will occur," it fails entirely to capture the point of plaintiffs' original proposal, *i.e.*, that in light of this Court's express determination that Westwoods is zoned "R-60," "Westwoods is limited to single-family residential use." Memorandum and Order at p. 67.

(Footnote continued from previous page)

regulated wetlands are present, land is inspected and, based on that inspection, a determination is made whether there are wetlands subject to the Town's regulatory oversight.

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To fully appreciate defendants' unreasonableness regarding this provision, a brief history of the negotiation of this provision is unfortunately necessary. In their original submission to this Court, plaintiffs proposed the following subparagraph 1(e):

utilizing Westwoods, or any portion thereof, for any use other than those uses which are permitted uses for properties classified as R-60 zoning districts under Southampton Town Code § 330-6 and the Table of Use Regulations (Residence Districts) currently set forth at Southampton Town Code § 330-10, a copy of which is attached hereto and incorporated herein by reference

Pltfs. Initial Judgment, at subparagraph 1(e).

In their original submission to this Court, defendants urged that plaintiffs' proposed subparagraph 1(e) be modified to read as follows:

utilizing Westwoods, or any portion thereof, for any use other than those uses which are permitted uses for properties classified as R-60 zoning districts under Southampton Town Code § 330-6 and the Table of Use Regulations (Residence Districts) set forth at Southampton Town Code § 330-10; provided that nothing in this subparagraph "e" shall be deemed to enjoin or restrain any person otherwise enjoined or restrained hereby from applying for or obtaining a variance or from engaging at Westwoods in any pre-existing nonconforming use of Westwoods, including without limitation the cutting and harvesting of timber and picnics, outings, ceremonial and recreational uses and related tribal activities.

See Defs. Initial Judgment, at subparagraph 1(e).

During the course of the parties' meet and confer efforts, plaintiffs informed defendants that in an effort to address defendants' concerns about defendants' right to seek relief from the use restrictions imposed by Town Code §§ 330-6 and 330-10 by establishing a pre-existing, nonconforming use, and/or the right to a variance, plaintiffs would add the following proviso to their initially-proposed language:

provided that nothing in this subparagraph (e) shall be deemed to enjoin or restrain any person otherwise enjoined or restrained hereby from seeking appropriate relief from the Town of Southampton as to any proposed use of Westwoods;

See Pltfs. Nov. 30 Ltr. (Exhibit A), at p. 4.

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Defendants have now rewritten subparagraph 1(e) to provide as follows:

clearing, excavating, grading, regrading, bulldozing, removing trees, or engaging in any other work in preparation for the future use of Westwoods or any portion thereof as a facility in which it is intended that the conduct of bingo or any other game of chance will occur, unless and until permission to do so first is obtained from the Town of Southampton acting through its authorized instrumentalities and relief is granted by the Town of Southampton acting through its authorized instrumentalities from the restrictions of R-60 zoning under Southampton Town Code § 330-6 and the Table of Use Regulations (Residence Districts) set forth at Southampton Town Code § 330-10.

See Defs. Revised Judgment at subparagraph 1(e).

This newest proposal is objectionable for a variety of reasons. First and foremost, defendants have inexplicably narrowed the scope of this provision, from one which enjoined “any use other than those uses which are permitted uses for properties classified as R-60 zoning districts” (see Defs. Initial Judgment at subparagraph 1(e)) to one which would enjoin only clearing, excavating, etc. attendant to the future use of Westwoods “as a facility in which it is intended that the conduct of bingo or any other game of chance will occur.” See Defs. Revised Judgment at subparagraph 1(e). This is unacceptable to plaintiffs for the reasons which have been set forth above. See Comments to Injunctive Subparagraph 1(b), supra.

In addition, defendants continue to refuse to agree to the attachment of the Town’s Table of Use Regulations (Residence Districts), set forth at Town Code § 330-10 to the judgment and its incorporation by reference. In light of the settled requirement that an injunction be clear on its face as to the activities it purports to restrain, however, plaintiffs believe that it is appropriate to incorporate and attach the Table of Use Regulations (Residence Districts) to the judgment. That Table, which we realize was inadvertently omitted from Plaintiffs’ Initial Judgment when it was filed on November 7th, should be attached to the judgment and its terms incorporated by reference therein so any and all upon whom the Judgment is served will be clear about the uses that are and are not enjoined and prohibited at Westwoods. That Table is part of Pltfs. Revised Judgment (Exhibit E).

We note also that the comments made previously by defendants with regard to the issues of nonconforming uses and potential variances (see Defs. Nov. 14 Ltr., at pp. 2-3) appear to be moot, in light of defendants’ proposal for an inappropriately restrictive scope of subparagraph 1(e), and their abandonment of language addressed explicitly to nonconforming uses and/or variances.

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To the extent this Court were to consider those issues (as they related to Defendants' Initial Judgment, but not to Defs. Revised Judgment), we respectfully invite the attention of this Court to pages 4-5 of plaintiff's November 30, 2007 letter to defense counsel (Exhibit A).³

Injunction Subparagraph 1(f):

Defendants have also flip-flopped as to subparagraph 1(f), in much the same manner they have regarding subparagraph 1(e). After proposing modifications to the originally-proposed subparagraph 1(f) (see Plaintiffs' Initial Judgment, at ¶ 1(f)), to which plaintiffs responded in their November 30, 2007 letter (Exhibit A), defendants now propose to eliminate, in its entirety, this subparagraph dealing with "special exception uses" under the Town Code. Obviously, plaintiffs object to the wholesale elimination of this provision. Plaintiffs believe it is perfectly appropriate to set forth in this injunction that defendants cannot engage in uses which are designated as "special exception uses" in the Town's Table of Use Regulations (Residence Districts), set forth at Town Code § 330-10, in the absence of a special exception use permit. This is all that subparagraph 1(f), as proposed by plaintiffs, is intended to accomplish.

For these reasons, as well as those expressed above, and in plaintiffs' November 30, 2007 letter (Exhibit A), regarding subparagraph 1(e), plaintiffs believe that the judgment should include the language now proposed by plaintiffs for subparagraph 1(f). See Pltfs. Revised Judgment at subparagraph 1(f).

Injunctive Paragraph 2

The parties are in full agreement on the language of this subparagraph, which defines "Westwoods," as reflected in Pltfs. Revised Judgment, at ¶ 2 (and also in Defs. Revised Judgment, at ¶ 2).

Injunctive Paragraph 3 [in Pltfs. Revised Judgment and Defs. Initial Judgment]

The parties are in full agreement on the language of this subparagraph, as reflected in Pltfs. Revised Judgment, at ¶ 3 (and also in Defs. Revised Judgment, at ¶ 3).

³ In addition to the referenced contents of plaintiffs' November 30, 2007 letter (Exhibit A), plaintiffs also point out that even if the "nonconforming use" aspect of Defs. Initial Judgment were otherwise appropriate, defendants fail to particularize the pre-existing, nonconforming uses to which they refer, instead using such vague references as "outings," "ceremonial and recreational uses" and "related tribal activities." Moreover, defendants' inclusion of the language "including but not limited to" (Defs. Initial Judgment at subparagraph 1(e)) also would leave the judgment entirely open-ended in this respect.

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Injunctive Paragraph 4 [in Pltfs. Revised Judgment and Defs. Proposed Judgment]

The parties are in full agreement on the language of this subparagraph, as reflected in Pltfs. Revised Judgment, at ¶ 4 (and also in Defs. Revised Judgment, at ¶ 4).

Injunctive Subparagraph 5 [in Defs. Initial and Revised Judgments]:

Plaintiffs have numerous objections to defendants' proposed addition of this paragraph to the judgment, which provides that the injunction expires when the Shinnecock Indian Nation "becomes an 'Indian Tribe'" under IGRA, and at such time as the Shinnecock Indian Nation appears on the Bureau of Indian Affairs' ("BIA") list of federally acknowledged tribes. See Defs. Initial and Revised Judgments at ¶ 5.

First, and foremost, the legal premise upon which defendants apparently base this provision -- once the Shinnecock are federally acknowledged by BIA they have the right to engage in gaming at Westwoods and otherwise to engage in conduct beyond the reach of state and local law -- is absolutely incorrect. Indeed, defendants' position disregards the fact that the Memorandum and Order includes a Sherrill determination of unacceptably disruptive impacts and a determination that Westwoods is subject to State and local jurisdiction. In addition, even if the Nation were placed on the BIA list, we believe the injunction would continue in effect until such time, if any, that Westwoods becomes "Indian Country," "Indian lands" under IGRA, and/or is taken into trust by the federal government. Moreover, plaintiffs see no basis to curtail the effect of the injunction before all requirements of IGRA are satisfied, including matters other than the placement of the Nation on the BIA list and/or the taking of Westwoods into trust (e.g., execution of a compact between the Nation and New York State for Class III gaming).

Finally, plaintiffs are aware of no requirement that permanent injunctions be self-limiting in terms of duration, and certainly nothing in the Memorandum and Order suggests that such a limitation is appropriate here. If and when there comes about a change in circumstances regarding the Shinnecock Nation's federal acknowledgement status and/or the status of Westwoods under federal law, defendants can apply to this Court for an appropriate modification of the judgment.

Plaintiffs' Response to Defendants' Blanket Objection to Inclusion of Declaratory Paragraphs in the Judgment

Defendants do not believe that the series of declaratory paragraphs, as initially proposed by plaintiffs for inclusion in the judgment, is "necessary or proper". See Defs. Nov. 14 Ltr., at p. 5; Defs. December 18, 2007 Ltr., at p. 4; Pltfs. Initial Judgment at ¶¶ A-N. As noted herein (see infra), plaintiffs sought all manner of declaratory relief in their complaints, including but not limited to, that defendants had violated various provisions of the Town Code by their clearing and development-related activities at Westwoods (see Town Complaint at WHEREFORE clause, page 7, at ¶¶ "A" and "B."), that Westwoods does not constitute "Indian lands" under IGRA, and

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that defendants lack sovereign immunity with respect to the operation of State gambling laws at Westwoods (see State Complaint at WHEREFORE clause, at ¶¶ “i” through “u.”) Neither of the cases cited by defendants (see Defs. Nov. 14 Ltr., at p. 5), nor any other authority of which plaintiffs are aware, stands for the proposition that including declaratory relief in a judgment is inappropriate in a case where plaintiffs sought in their pleadings and ultimately obtained declaratory relief following a trial on the merits. That, however, is the misguided position taken by defendants, which should be rejected by the Court.

Since defendants also raise objections to the specific declaratory paragraphs proposed by plaintiffs, we proceed to address those specific objections below.

Preamble to Declaratory Paragraphs:

In the preamble to the declaratory subparagraphs in Defs. Revised Judgment, defendants propose globally to include the words “at the present time,” which is intended to modify each and all of the specific declaratory paragraphs which follow. Plaintiffs object to this modification. In the first place, “at the present time” is a limitation that does not appear in the language of the Memorandum and Order. In addition, the limitation makes no sense with regard to the declarations which reference matters that occurred in the past (e.g., the 17th century extinguishment of aboriginal title; defendants’ 2003 violation of Town Code provisions). The reference to the “present time” is vague and superfluous, in any event.

Defendants’ Proposed Declaratory Paragraph A:

Plaintiffs object to defendants’ proposed inclusion of a statement regarding the Court’s “acknowledgment” of the Shinnecock as an Indian tribe. See Defs. Initial Judgment at ¶ A; Defs. Revised Judgment at ¶ A. At a minimum, the declaration is superfluous, for there has already been an order entered by the court on the subject. We see no basis upon which defendants are now entitled to the explicit conversion of that prior order into a final judgment on the merits. In addition, defendants sought no declaratory relief in this action by counterclaim or otherwise, further making this declaration inappropriate.

Plaintiffs’ Proposed Declaratory Paragraph A/Defendants’ Proposed Declaratory Paragraph B:

The parties are in full agreement on the language of this paragraph, reflecting the extinguishment of the Shinnecock Indian Nation’s aboriginal title to Westwoods, as reflected in Pltfs. Revised Judgment at ¶ A (and also in Defs. Revised Judgment at ¶ B).

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Plaintiffs' Proposed Declaratory Paragraph B/ Defendants' Proposed Declaratory Paragraph C:

Defendants object to the inclusion of the declaration that "Westwoods is non-reservation land," which mirrors precisely the language of the Court's Memorandum and Order (at page 3), they have deleted this declaration in its entirety, and replaced it with language appearing at ¶ C of Defs. Revised Judgment. That new language inappropriately limits this declaration in a manner not contemplated in the Memorandum and Order (i.e., it provides only that Westwoods is not an Indian reservation under the jurisdiction of the United States Government). Plaintiffs understand this Court's ruling to be that Westwoods is not a reservation under the jurisdiction of either the United States Government or the State of New York, and thus this declaration simply recites, as the court did, that Westwoods is "non-reservation land."

Plaintiffs' Proposed Declaratory Paragraph C/ Defendants' Proposed Declaratory Subparagraph D

The parties are in full agreement on the language of this subparagraph, reflecting that the Shinnecock Indian Nation does not appear on the Bureau of Indian Affairs' list of tribal entities, as reflected in Pltfs. Revised Judgment at ¶ C (and also in Defs. Revised Judgment, at ¶ D).

Plaintiffs' Proposed Declaratory Paragraph D/Defendants' Proposed Declaratory Paragraph E

Based on the conclusion that defendants have deleted the words "at present" from their proposed declaratory paragraph E because they propose to include "at present" as a modifier to all declaratory paragraphs by including such language in the preamble, the parties are in agreement as to the substance of this paragraph. As the Pltfs. Revised Judgment indicates, plaintiffs agree to include the words "at present" in this particular paragraph, notwithstanding their objection to the use of the modifier in the preamble.

Plaintiffs' Proposed Declaratory Paragraph E/Defendants' Proposed Declaratory Paragraph F

The parties are in full agreement on the language of this subparagraph, declaring that Westwoods is not "Indian lands" under IGRA, as reflected in ¶ E of Pltfs. Revised Judgment (and also in Defs. Revised Judgment, at ¶ F).

Plaintiffs' Proposed Declaratory Paragraph F/Defendants' Proposed Declaratory Paragraph G

While the parties are in agreement on the language of this paragraph, which declares that "Westwoods is not "Indian Country," as defined by 18 U.S.C. § 1151," defendants have objected to plaintiffs' proposed inclusion of the words "or as otherwise defined under federal law." See

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Pltfs. Revised Judgment at ¶ F and Defs. Revised Judgment at ¶ G. Plaintiffs believe that this additional language is appropriate considering that defendants, in this litigation, advanced the position that there is a federal, common-law definition of “Indian Country,” which preceded the enactment of 18 U.S.C. § 1151, and continues to exist notwithstanding the enactment of § 1151. See Defs. Mem. of Law in Opp. to Town’s Mot. For Partial Summary Judgment [Doc. 141] at p. 25, n. 35.

Plaintiffs’ Proposed Declaratory Paragraph G

Plaintiffs’ proposed declaratory paragraph G provides that the Shinnecock Indian Nation is not recognized by the United States Department of the Interior, Bureau of Indian Affairs, in accordance with Fact Stipulation No. 9, which appears in the parties’ Joint Pretrial Order [Doc. 245]. Defendants propose to eliminate this declaratory paragraph presumably for the reasons they have articulated in support of their Letter Motion to be relieved from that fact stipulation. For the reasons discussed below in response to the Letter Motion, defendants are not entitled to the relief they seek, and plaintiffs proposed declaratory paragraph G is perfectly appropriate and consistent with this Court’s factual finding based upon the aforesaid stipulation. See Memorandum and Order at p. 8; Letter Motion at p. 1, n. 2.

Proposed Declaratory Paragraph H

The parties are in full agreement on the language of this paragraph, pertaining to the Shinnecock Indian Nation’s fee ownership of Westwoods, as reflected in ¶ H of Pltfs. Revised Judgment (and also in Defs. Revised Judgment, at ¶ H).

Proposed Declaratory Paragraph I

The parties are in full agreement on the language of this paragraph, as reflected in ¶ I of Pltfs. Revised Judgment (and also in Defs. Revised Judgment, at ¶ I).

Proposed Declaratory Paragraph J

The parties are in full agreement on the language of this paragraph, confirming that the Shinnecock Indian Nation is subject to New York State and Town laws, etc., in connection with its use and/or development of Westwoods, as reflected in ¶ J of Pltfs. Revised Judgment (and also in Defs. Revised Judgment at ¶ J).

Proposed Declaratory Paragraph K

The parties are in full agreement on the language of this paragraph, confirming that the Shinnecock Indian Nation may not invoke sovereign immunity with respect to any use or development of Westwoods, as reflected in ¶ K of Pltfs. Revised Judgment (and also in Defs. Revised Judgment, at ¶ K).

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Proposed Declaratory Paragraph L

Plaintiffs' proposed declaratory paragraph L is predicated on the Court's finding that Westwoods is zoned "R-60" under the Southampton Town Code, and is therefore subject to the use restrictions applicable to such properties under the Code. See Memorandum and Order at p. 67. Defendants previously attempted to include language that purported to exempt from this declaration certain uses of Westwoods which defendants contend constitute "nonconforming uses" of that property, and which purported to allow for the possibility that a variance might be granted in the future to authorize an otherwise prohibited use at Westwoods. See Defs. Initial Judgment at ¶ I. Plaintiffs objected to this effort, in their November 30, 2007 letter:

We object to your effort to explicitly exempt "any pre-existing nonconforming use of Westwoods" from the injunctive provisions of the judgment. In this action, defendants neither sought nor established their entitlement to a judgment declaring that (a) they have engaged in any use that is "pre-existing" and/or "nonconforming" with respect to the Southampton Town Code; and/or that (b) they have the right to continue to engage in such uses or activities. Moreover, defendants offered no proof at trial regarding the uses to which Westwoods was actually put immediately before the Town adopted its first zoning code in 1957, nor did they introduce any legal argument on their entitlement to such a determination. In short, the issue of whether any use of Westwoods qualifies as a "nonconforming use" under the Southampton Town Code was not remotely litigated in this case. In view of the foregoing, the Town is not prepared to concede or acknowledge today that there in fact exists "any pre-existing nonconforming use of Westwoods" of any sort. Defendants otherwise have available the appropriate avenues of review (Zoning Board, state court, etc.) to pursue relief relating to any claimed non-conforming use at Westwoods. That relief, however, certainly is not appropriate in this action on this record.

Pltfs. Nov. 30 Ltr., at p. 5, 8.

Plaintiffs also proposed that the provision at issue could address the future possibility of a variance or other relief, in a more general, and appropriate, manner, and therefore proposed the following language for defendants' consideration: "nothing in this subparagraph shall be deemed to enjoin or restrain any person . . . from seeking appropriate relief from the Town of Southampton, as to any proposed use of Westwoods." Id. at p. 4.

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Defendants have not agreed to this suggestion. Instead, in Defs. Revised Judgment (at ¶ L), defendants propose to exempt from any limitation or restriction, various uses of Westwoods which they identify in varying degrees of specificity. For example, defendants propose language that would authorize them to engage in “periodic recreational activities” at Westwoods. Plaintiffs’ view is that this Court, in its Memorandum and Order, did not declare any particular use of, or activity at, Westwoods as permissible under the Town Code, and/or that any such use or activity should otherwise be explicitly exempted from the use restrictions which appear in the Town Code. Moreover, defendants did not seek any such relief from this Court. Like any other landowner in the Town, defendants certainly have the right to argue that certain uses of Westwoods are not prohibited or regulated by the Town, and/or, if desired, to pursue any and all available avenues of relief with respect to those use restrictions that appear in the Town Code. Nothing the Town has proposed in any of the iterations of its proposed judgment has sought to deprive defendants of these arguments or remedies. Moreover, notwithstanding defendants’ conspiracy theories and articulated concerns about the Town’s alleged intention “to try to prohibit the Nation from continuing to engage in these historical uses of Westwoods at all,” to our knowledge, the Town has never taken the position that any recreational or cultural use of Westwoods necessarily runs afoul of the Town Code. Nevertheless, we believe it would be inappropriate for the Town to make prospective land use determinations in the abstract, particularly where none of those issues were litigated in this action. We believe that Declaratory Paragraph L in Pltfs. Revised Judgment is appropriate and embodies this Court’s determinations, as reflected in the Memorandum and Order, at page 67.

Proposed Declaratory Paragraph M

The parties are in full agreement on the language of this paragraph, which acknowledges the Shinnecock Indian Nation’s violation of Town Code § 330-184(I), as reflected in ¶ M of Pltfs. Revised Judgment (and also in Defs. Revised Judgment, at ¶ M).

Proposed Declaratory Paragraph N

The parties are in full agreement on the language of this paragraph, which acknowledges the Shinnecock Indian Nation’s violation of Town Code § 123-9, as reflected in ¶ N of Pltfs. Revised Judgment (and also in Defs. Revised Judgment, at ¶ N).

Proposed Declaratory Paragraph O

Plaintiffs’ proposed declaratory paragraph O is virtually identical to this Court’s holding that “the Nation’s proposed casino development violates the Town’s zoning law.” See Memorandum and Order at p. 67. Defendants’ proposal to eliminate the word “proposed” and to change “violates” to “would violate” (see Defs. Revised Judgment at ¶ O) is inconsistent with this Court’s determination that a violation of the Town Code §§ 330-6 and 330-10 has actually occurred. Plaintiffs’ proposed paragraph O therefore should be adopted.

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Proposed Declaratory Paragraph P

The parties are in full agreement on the language of this paragraph, which confirms the finding that the northern tax lot of Westwoods contains or lies adjacent to wetlands, as reflected in ¶ P of Pltfs. Revised Judgment (and also in Defs. Revised Judgment, at ¶ P).

Plaintiffs' Proposed Declaratory Paragraph Q

Plaintiffs object to defendants' most recent effort to excise completely this provision of the judgment embodying this Court's determination that "any development of Westwoods within 200 feet of the wetlands on its northern boundary . . . would implicate Chapter 325 of the Town Code." Memorandum and Order at p. 67. Plaintiffs reject defendants' utterly baseless and new-found contention that this determination by the Court represents "a *dictum*" which does not belong in the judgment. See Defs. December 18, 2007 Ltr. (Exhibit C) at p. 5

Defendants' New Penultimate Paragraph

By their inclusion of this new paragraph defendants once again attempt to secure relief relating to possible uses of Westwoods when such relief was neither sought or granted in this action. Plaintiffs object to the inclusion of this paragraph for the same reasons they object to this misguided effort by defendants elsewhere in the judgment. See supra Discussion of Proposed Declaratory Paragraph L.

Based on the foregoing, plaintiffs respectfully request that the Court enter the judgment submitted herewith as Exhibit E.

Plaintiffs' Response to Defendants' Letter Motion Regarding Stipulation #9

Although defendants' Letter Motion makes no reference to a rule, it appears to be a motion for relief from the Memorandum and Order under Federal Rules of Civil Procedure, Rule 60(b)(2), which provides in pertinent part as follows:

On motion and upon such terms as are just, a court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: ... (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)... .

"Since [Rule] 60(b) allows extraordinary judicial relief, it is invoked only upon a showing of exceptional circumstances." Nemaizer v. Baker, 793 F.2d 58, 61 (2d Cir. 1986); see Plisco v. Union Railroad Company, 379 F.2d 15, 16 (3d Cir. 1967). As a result, the movant must show that it has made a diligent effort to discover the evidence prior to the end of the trial but was unable to do so, that the evidence would produce a different result, and that the evidence is

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not merely cumulative. In affirming the denial of such a motion, the Second Circuit has stated, “[t]here is no indication that [movant] could not have discovered this evidence earlier, and, in any event, the evidence bore on a matter that was entirely collateral to the merits of the litigation.” Schwartz v. Capital Liquidators, 984 F.2d 53, 54 (2d Cir. 1993). See also United States v. Walus, 616 F.2d 283, 287-288 (7th Cir. 1980) (prerequisites for relief from judgment under Rule 60(b) are: evidence is discovered following trial; due diligence on part of movant to discover evidence is shown or may be inferred; evidence is not merely cumulative or impeaching; evidence is material; and evidence is such that new trial would probably produce new result). The “fair ground for litigation” standard referred to by defendants, (Ltr. Mot. at p. 1), has no application to a Rule 60(b)(2) motion.

While defendants’ motion technically does not seek to be relieved of the permanent injunctive and declaratory relief awarded to plaintiffs by the Memorandum and Order, the basic logic of Rule 60(b)(2) must nevertheless apply here, requiring defendants to show that the evidence they proffer is “newly discovered evidence which by due diligence could not have been discovered” before the conclusion of trial. Defendants’ letter motion makes absolutely no showing of defendants’ due diligence and does not explain whether or why the documents offered now by defendants were not discovered before the trial record closed. In fact, neither the letter motion itself nor the Affidavit of Christopher H. Lunding dated November 14, 2007 (“Lunding Aff.”), alleges that this evidence was not discovered until after the close of the trial (May 10, 2007) or after this Court issued its Memorandum and Order (October 30, 2007). The documents attached to the Lunding Aff. predate the trial in this matter by decades and are from obvious public sources. These documents could have, and should have, been discovered well before the Stipulation in question was entered into, the trial record was closed, or the Court’s Memorandum and Order was issued. In fact, it appears that some of these documents may have been discovered by defendants long before trial. For example, Exhibit D to the Lunding Aff. is an excerpt from Indians of New York, Hearings before the Committee on Indian Affairs, House of Representatives on H.R. 9720, H. Doc. No. 592, 71st Cong., 2d Sess. (1930). See Lunding Aff. at ¶ 8. In December of 2004, defendants offered an excerpt from this very same source in support of their motion for summary judgment. See Affidavit of S. Christopher Provenzano in Support of Defendants’ Motion for Summary Judgment with Respect to all Plaintiffs, dated December 22, 2004 (“Provenzano Aff.”) [Document #124] at Exhibit KK.

Even assuming that defendants’ “new” evidence were material to an issue in this case, it would not produce a new result, as defendants apparently concede by the fact that they are not seeking to be relieved from any portion of the Memorandum and Order that grants plaintiffs the declaratory and injunctive relief they sought. Defendants’ concern over Stipulation #9 appears to arise not from its impact on this case, but from the possible impact it might have in the future on positions the Shinnecock may take or be faced with in other litigation or proceedings, including the possible collateral estoppel effect this Stipulation and the Court’s finding of fact based thereon could have. See Lunding Ltr. at p. 2. Yet defendants themselves dismiss the possibility of potential prejudice from this Stipulation and the Court’s finding, stating that “it is unlikely that this statement could be used to attempt to collaterally estop the Nation in other circumstances.”

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Ltr. Mot. at p. 2. Accepting that statement as true, it demonstrates that defendants do not need the relief sought on their motion, and that they (and their counsel) are eminently capable of arguing how or why the Stipulation and finding regarding federal recognition in this case does not bind them in the future. Under these circumstances, there is simply no basis for this Court to grant defendants' application.

In addition, the evidence presented by defendants does not mandate a new result on the discrete issue with respect to which it is presented – whether the Shinnecock have ever been recognized by the United States Department of Interior. Plaintiffs disagree that the selected documents attached to the Lunding Aff. “clearly and unambiguously [show] that the Nation recognized [sic] by the Department of the Interior as an Indian tribe and treated as an Indian tribe under federal jurisdiction for many years prior to the adoption of administrative procedures for the acknowledgment of Indian tribes in 1978.” Ltr. Mot. at p. 2. For example, the documents show no treaty relationship between the Nation and the United States. The mere estimated enumeration of Shinnecock Indians with footnoted caveats (see Lunding Aff., Ex. A at page 11 of 18) is not clear and unambiguous evidence of Federal recognition, nor is the description of the relations between the Shinnecock Indians and the Town of Southampton and State of New York in the 1914 Report of John R. T. Reeves (Lunding Aff., Ex. C at page 4 of 12; note absence of any Shinnecock treaty in Appendix to Reeves Report at page 12 of 12). If the Court were to entertain the proffered newly discovered evidence, a full development of the record regarding references (or the lack thereof) to the Shinnecock Indians in federal reports and other documents would be necessary. This record would necessarily have to include not only defendants' purported evidence, but the evidence plaintiffs have to rebut defendants' new contention that the Shinnecock may have been previously recognized by the Department of Interior. This rebuttal evidence is ample, and some was offered by plaintiffs in opposition to defendants' motion for partial summary judgment on the issue of tribal status. These documents, including numerous Department of Interior documents covering the latter part of the nineteenth century and the early twentieth century which did not list the Shinnecock as a tribe recognized by the United States, contradict defendants' effort to suggest the Shinnecock may have been recognized previously by the federal government. See Declaration of Robert Siegfried dated February 17, 2005 [Document 125], Exhibits A-M and State Plaintiffs' Responses to Defendants' Statement of Material Facts [Document 120] at ¶¶ 17-25, 32-44. Such a fulsome record obviously was never developed at trial because Stipulation #9 rendered that unnecessary.

Defendants' belated effort to revisit this issue and supplement the record on it now should not be countenanced by the Court. This is particularly so considering that defendants' attempt now to suggest that the Shinnecock were previously recognized by the federal government is contrary to the basic theory under which defendants litigated this case – that as a “common law” tribe not recognized by the Bureau of Indian Affairs, the Indian Gaming Regulatory Act did not apply to their effort to game, and that they enjoyed the right to engage in gaming beyond the reach of state and local law based on the tribe's purported inherent sovereignty and/or the Supreme Court's decision in Cabazon. To allow defendants now to be relieved of a stipulation that was central to their defense in this case – and upon which all parties and this Court relied at

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trial – would be unfair and prejudicial to plaintiffs. Indeed, defendants seek to undermine one of the bases for the Memorandum and Order. The Court’s entire analysis pertaining to IGRA is based on the undisputed fact that the Shinnecock have not been acknowledged by the federal government as a tribe. To change this fact by removing Stipulation #9 potentially alters that part of the Court’s analysis. Defendants’ motion is akin to defendants attempting to change the rules not in the middle of the game, but after the game has been played and lost. If the Shinnecock wish to assert that they were previously recognized by the federal government, they are free to do so in the future – but not within the context of this case after they agreed to remove that issue from the trial by Stipulation #9.

It is apparent that defendants’ true motive for this motion is to bolster their position in the case pending before this Court styled Shinnecock Indian Nation v. Kempthorne, et al., 06-cv-05013 (“List Act Action”). In the List Act Action, the Shinnecock have recently moved to amend their complaint and shifted their focus from arguing that they are entitled to be placed on the list of federally acknowledged tribes by virtue of Judge Platt’s November 7, 2005 Order in this case to arguing that the Department of Interior has previously acknowledged the Shinnecock as a tribe – based in large part on the documents defendants offer on this motion. See First Amended Complaint in List Act Action [Document No. 30] at ¶¶ 5-7. Defendants’ motion here attempts to place before this Court the documents that purportedly support the Shinnecock position in the List Act Action and otherwise bootstrap the Shinnecock effort to garner placement on the list of federally acknowledged tribes. The Shinnecock should confine their new position to the List Act Action.

Based on the foregoing, defendants’ Letter Motion under Rule 60(b)(2) should be denied in its entirety.

Respectfully,

/s/ Michael S. Cohen

Michael S. Cohen

Robert Siegfried

/s/ Robert Siegfried

Gordon J. Johnson

/s/ Gordon J. Johnson

Copies to All Counsel by ECF

EXHIBIT A

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November 30, 2007

VIA E-MAIL

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**Re: State of New York, et al. v. The Shinnecock Nation, et al.
03-Civ. 3243
Town of Southampton v. The Shinnecock Tribe, et al.
03-Civ. 3466 (TCP) (ARL)**

Dear Christopher:

Pursuant to the schedule we agreed upon during our conference call of November 16, 2007, I write on behalf of all plaintiffs to respond to defendants' proposed revisions to plaintiffs' proposed judgment, as set forth in your letter dated November 14, 2007. A paragraph by paragraph analysis of defendants' proposed revisions appears below. These comments track the paragraph designations in defendants' draft of the proposed judgment.

Introductory Paragraph:

We object to the proposed reference to the order issued by Judge Platt on November 7, 2005. There is no need to reference any of the numerous orders entered previously in this litigation, including the order issued by Judge Platt on November 7, 2005. Defendants did not seek any declaratory relief in this action, and this proposed declaration is not necessary, nor even pertinent, to the relief sought by plaintiffs.

Injunctive Subparagraph 1:

We object to the language regarding actions "in their official capacity." Although you indicate that you have amended this provision to make it consistent with FRCP 65(d), that rule says nothing about officers, agents, employees, etc. "acting in their official capacity."

We would agree with your proposed deletion of the words "chairpersons" and "contractors" if the defined term "Shinnecock Indian Nation" appears after the word "attorneys" on the fourth line of paragraph "1."

We object to the language "from time to time" in the fifth and seventh lines of this paragraph. While that language may be appropriate when referencing the Nation's "trustees" and "chairman," since those offices will be filled by different people at different times, the language has no applicability to "all persons in active concert or participating with the Shinnecock Indian Nation."

Injunctive Subparagraph 1(a)(i):

We agree with your correction to § 435 of the General Municipal Law. Our earlier general reference to § 481(1) is appropriate, and should not be changed because it covers both forms of bingo allowed by law.

The "as, when and to the extent required under such laws" language you propose adds an unwarranted limitation or modifier, to which we object. Those laws cannot be read in any way to allow bingo, so the limitation is inappropriate. It also would allow for argument about what the law does and does not require, unnecessarily complicating enforcement of the injunction. Simply put, the laws cited in paragraph 1(a)(i) of plaintiffs' version of the proposed judgment require the bingo identification number and bingo license referenced in that paragraph for bingo to legally occur and this additional language defendants propose is unnecessary, confusing and misleading – and is therefore unacceptable to plaintiffs.

Injunctive Subparagraph 1(a)(ii):

The reference to § 191(1)(a) should be changed to "§ 191(1)." Plaintiffs object to your inclusion of the "as, when and to the extent required under such laws," language here for the same reasons as set forth above. See Injunctive Subparagraph 1(a)(i), supra.

Injunctive Subparagraph 1(a)(iii)(1):

We object to your suggested use of the word "constructs," since NYSDEC permitting obligations are triggered before construction, *i.e.*, one cannot begin construction without first obtaining a permit. Use of the word "constructs" could be deemed to allow substantial completion of a facility before the injunction would be triggered since here "constructs" implies a completed construction.

Your alteration of this paragraph to reference NYECL § 17-0803 is inappropriate, for the section does not describe a SPDES permit, but a host of other provisions of Article 17 do. We

believe the original language regarding "Article 17, Titles 7 and 8 and N.Y.C.R.R. Parts 750-757" is more accurate and should be retained.

Injunctive Subparagraph 1(a)(iii)(3):

After consultation with NYSDEC, it is plaintiffs' preference that this subparagraph list all the regulated activities and set forth the pertinent statutory and regulatory sections in the manner plaintiffs proposed in their proposed judgment.

In addition, we object to the language in this subparagraph purporting to define the area of wetlands subject to the tidal wetlands permitting requirements under the NYECL (*i.e.* "within the area between the shore of Great Peconic Bay and the topographical crest of the bluff adjacent to the Great Peconic Bay located within the portion of Westwoods shown on the Suffolk County Tax Map. As District No. 0900, Section 186, Block No. 2, Lot No. 38 . . . ") because the term "shore" is ambiguous as it relates to the tidal wetlands at issue. Plaintiffs therefore prefer to leave this language as we had previously drafted it.

Substituting "to the extent required" again raises the problem of leaving judgment to the potential violator of what is and what is not required, and we therefore object to that language.

Injunctive Subparagraph 1(b):

We object to your proposed limitation of this paragraph to "any facility for the conduct of bingo or any other game of chance." In the Town Complaint, the Town sought a declaration that defendants had violated Southampton Town Code § 330-184(I), and a permanent injunction restraining defendants from "taking any steps to clear, excavate, grade . . . or to otherwise engage in any other actions or work at the Property in violation of the Town Code" (emphasis added). The injunctive relief sought was not limited to activities in furtherance of construction of a facility "for the conduct of bingo or any other game of chance."

We object also to your proposed language "to the extent and as and when required," since this undermines the express finding of the court as to what this Town Code § 330-184(I) actually provides/prohibits, and that defendants have, in fact, violated that section. See page 66 of Memorandum and Order ("Thus, these July 12 activities were not in compliance with § 330-184(I) of the Town Code.")

Injunctive Subparagraph 1(c):

Again, we object to your proposed language "to the extent and as and when." This language disregards the court's determination of what Town Code § 123-9(A) requires and/or prohibits, and also restricts the express determination of the court that defendants have, in fact,

violated Town Code § 123-9(A). See Memorandum and Order at p. 67. (" . . . the Town also established at trial defendants' violations of Town Code Section 123-9A.")

Injunctive Subparagraph 1(d):

We object to the effort to limit this injunctive provision to activities in connection with the "development or construction of a facility for the conduct of bingo or any other game of chance." With respect to defendants' alleged violations of Southampton Town Code § 325-6(A), the Town Complaint sought to restrain and enjoin all violations of the Code, not just violations which result from the development or construction of facilities for "bingo or any other game of chance." The provisions of Town Code § 325 address any and all development activities in violation of its terms, not just development of facilities for the conduct of bingo or any other game of chance.

We have no objection to your proposed insertion of "(A)" after § 123-9.

We accept your deletion of the references to specific construction-related activities in this paragraph, in favor of your insertion of the language "any activity for which"

We object to your effort to generically describe a wetland boundary at Westwoods, in this paragraph and in Declarations Subparagraph "L," infra. There is no existing map which delineates the wetlands or wetland boundary at Westwoods, and such a delineation (*i.e.*, the flagging of the wetlands and wetland boundaries) would occur only upon a site inspection. Accordingly, instead of adopting your proposed definition/description of the wetland boundary, we propose that this paragraph provide simply that defendants are enjoined from: "Engaging in any of the activities prohibited by Town Code § 325-6(A) within a "wetland area" at Westwoods or within 200 feet of a "wetland boundary" at Westwoods, as those terms are defined at Town Code § 325-3." A similar change should be applied to Declarations Subparagraph "L," infra.

Injunctive Subparagraph 1(e):

We object to your effort to omit the attachment of the Town's Table of Use Regulations (Residence Districts), set forth at Town Code § 330-10. In light of the settled requirement that an injunction be clear on its face as to the activities it purports to restrain, we believe that it is appropriate to incorporate and attach the Table of Use Regulations (Residence Districts) to the judgment.

We object to your explicit reference to possible applications for a "variance." Instead, we believe that it would be appropriate to replace your proposed language with the following: "nothing in this subparagraph shall be deemed to enjoin or restrain any person . . . from seeking appropriate relief from the Town of Southampton, as to any proposed use of Westwoods."

We object to your effort to explicitly exempt "any pre-existing nonconforming use of Westwoods" from the injunctive provisions of the judgment. In this action, defendants neither sought nor established their entitlement to a judgment declaring that (a) they have engaged in any use that is "pre-existing" and/or "nonconforming" with respect to the Southampton Town Code; and/or that (b) they have the right to continue to engage in such uses or activities. Moreover, defendants offered no proof at trial regarding the uses to which Westwoods was actually put immediately before the Town adopted its first zoning code in 1957, nor did they introduce any legal argument on their entitlement to such a determination. In short, the issue of whether any use of Westwoods qualifies as a "nonconforming use" under the Southampton Town Code was not remotely litigated in this case. In view of the foregoing, the Town is not prepared to concede or acknowledge today that there in fact exists "any pre-existing nonconforming use of Westwoods" of any sort. Defendants otherwise have available the appropriate avenues of review (Zoning Board, state court, etc.) to pursue relief relating to any claimed non-conforming use at Westwoods. That relief, however, certainly is not appropriate in this action on this record.

In addition, although defendants do not wish to be treated worse than any other landowner in the Town, as far as "limitations and exemptions from the Town's zoning power" are concerned (see Lunding Ltr. of November 14, 2007, at p. 2), this proposed provision would appear to actually treat defendants better than other landowners in the Town, for it would give defendants the benefit of a judgment declaring their right to continue allegedly pre-existing specific, identified non-conforming uses. Furthermore, even if this aspect of the judgment were otherwise appropriate, defendants fail to particularize the pre-existing, nonconforming uses to which they refer, and the language "including but not limited to" would leave the judgment open-ended in this respect, *i.e.*, could open up a plethora of possible uses of Westwoods, including those which defendants may not have established prior to entry of the judgment. The similar language at Injunctive Subparagraph 1(f) and Declaration Subparagraph "I," *infra*, also needs to be deleted.

Injunctive Subparagraph 3:

We object to your proposed reference to the "findings of fact and holdings" of the Memorandum and Order, and propose instead that this paragraph refer simply to the Memorandum and Order itself. In particular, reference to the "holdings" of the Memorandum and Order could introduce uncertainty if there are any minor inconsistencies between the injunction and "holdings" in the Memorandum and Order. We would have no objection to this clause if it simply provided that the reasons for issuance of this permanent injunction, as required by FRCP 65(d) "are contained and set forth in this Court's Memorandum and Order . . . which are incorporated in this permanent injunction by reference."

Injunctive Subparagraph 4:

We have no objection to this new paragraph.

Injunctive Subparagraph 5:

We object to your proposed addition of this paragraph. For one thing, providing that the injunction expires when the Nation appears on the BIA list disregards the fact that the Memorandum and Order includes a Sherrill determination of unacceptably disruptive impacts and a determination that Westwoods is subject to State and local jurisdiction. In addition, even if the Nation were placed on the BIA list, we believe the injunction would continue in effect until such time, if any, that Westwoods becomes "Indian Country," and/or is taken into trust by the federal government. Moreover, we see no basis to curtail the effect of the injunction before all requirements of IGRA are satisfied, including matters other than the placement of the Nation on the BIA list and/or the taking of Westwoods into trust (e.g., execution of a compact between the Nation and New York State). Finally, we are aware of no requirement that permanent injunctions be self-limiting in terms of duration.

Declaratory Subparagraph A:

We object to the inclusion of a statement regarding the court's "acknowledgment" of the Shinnecock as an Indian tribe. At a minimum, the declaration is superfluous, for there is already an order entered by the court on the subject. We see no basis upon which defendants are now entitled to the explicit conversion of that order into a final judgment on the merits. In addition, defendants sought no declaratory relief in this action by counterclaim or otherwise, further making this declaration inappropriate.

Declaratory Subparagraph B:

We object to your deletion of the language that "Westwoods is non-reservation land." The non-reservation status of Westwoods is relevant to the court's determinations and should remain as an explicit declaration. See Memorandum and Order at p. 3. We have no objection to the additional language you propose to add to this subparagraph, other than the words "[a]t present," which is a limitation that does not appear in the language of the Memorandum and Order. The reference is unnecessary as well because that determination obviously refers accurately to the current state of affairs, and to the extent the status of Westwoods might somehow change in the future, that status would be whatever it becomes irrespective of what this judgment entered in 2007 states. If your concern relates to the past status of Westwoods, it seems obvious that Westwoods never has been a reservation based on the record adduced at trial and defendants' admissions and stipulations, so such a concern does not provide a basis to include the "at present" language.

Declaratory Subparagraph C (new):

We have no objection to your proposed new subparagraph "C."

Declaratory Subparagraph D (new):

We have no objection to the language you propose to add to this subparagraph, other than the words "[a]t present," which is a limitation that does not appear in the language of the Memorandum and Order.

Declaratory Subparagraph D (old):

We object to your proposed deletion of this paragraph (regarding "Indian Country"). The statement we proposed is accurate, and appears in the Memorandum and Order (p. 118, note 69).

Declaratory Subparagraph E:

We object to your proposed modification of this subparagraph, which effectively mirrors Stipulated Fact No. 9. The reasons for our objection will be spelled out in more detail in plaintiffs' opposition to defendants' Letter Motion dated November 14, 2007.

We have no objection to your proposed statement that the Nation is "the owner of Westwoods and has fee simple title to Westwoods," since those determinations appear in the Memorandum and Order (at p. 9).

Declaratory Subparagraph F:

We see no reason for your proposal to relocate the declaration regarding the extinguishment of aboriginal title to Westwoods to this paragraph. Furthermore, we object to your proposal to delete the language we previously proposed. That language is consistent with the findings and conclusions in the Memorandum and Order (see pp. 2, 3, 64, 115-122).

Declaratory Subparagraph G:

We object to your proposal to insert the following limitation into this paragraph: "for the purpose of constructing a facility for the conduct of bingo or any other game of chance." The Memorandum and Order makes it quite clear that the Nation is subject to State and Town laws,

Christopher H. Lunding, Esq.

November 30, 2007

Page 8

statutes, ordinances, and regulations in its development at Westwoods, not that it is subject to such laws, etc. only in connection with developing a gaming facility.

In addition, we object to your insertion of the phrase "[a]t present," since that is a limitation which does not appear in the Memorandum and Order.

Declaratory Subparagraph H:

For the same reasons as those expressed with regard to Declaratory Subparagraph "G," supra, we object to your proposal to insert the following limitation into this paragraph: "for the conduct of bingo or any other game of chance or in connection with the construction or operation of any facility at Westwoods for any such purpose." The Memorandum and Order determines that the Nation cannot assert sovereign immunity from local and state law with respect to its activities at Westwoods, not simply that it may not assert such immunity as to gaming activities.

In addition, we object to your insertion of the phrase "[a]t present," since that is a limitation which does not appear in the Memorandum and Order.

Declaratory Subparagraph I:

We object to your proposed modifications to this paragraph, for the same reasons specified with regard to Injunctive Subparagraph "1(e)."

In addition, we object to your insertion of the phrase "[a]t present," since that is a limitation which does not appear in the Memorandum and Order.

Declaratory Subparagraph J (old):

We object to your proposed deletion of this paragraph. The Town sued explicitly for a declaration that defendants violated Town Code § 330-184(I). See Town Complaint at p. 7 (Subparagraph "A" of "Wherefore" clause). The Memorandum and Order expressly found such a violation. See pp. 5, 66.

Declaratory Subparagraph K (old):

We object to your proposed deletion of this paragraph. At trial the Town established defendants' violation of Town Code § 123-9, and Judge Bianco expressly found such violation. See Memorandum and Order at p. 68 ("Thus the activity at Westwoods violates Section 123-9 of the Town Code.")

Christopher H. Lunding, Esq.

November 30, 2007

Page 9

Declaratory Subparagraph J (new):

We object to your alteration of this paragraph to eliminate the reference to defendants' "violation" of Town Code §§ 330-6 and 330-10, and to substitute a reference to what those provisions "prohibit[.]" The Memorandum and Order determines that "the Nation's proposed casino development violates the Town's zoning law as set forth in § 330-6 and the related 'Residence Districts Table of Use Regulations' as set forth in § 330-10." See Memorandum and Order at p. 67 (emphasis added). The reference to "the conduct of gambling or games of chance" instead of "gaming facility" is not objectionable to us.

In addition, we object to your insertion of the phrase "[a]t present," since that is a limitation which does not appear in the Memorandum and Order.

Declaratory Subparagraph K (new):

We object to your proposed changes to this paragraph, for they disregard the Court's express finding that "[t]he northern parcel of Westwoods contains or lies adjacent to wetlands, as the Great Peconic Bay system is regulated as wetlands under Chapter 325 of the Southampton Town Code. Thus any development of Westwoods within 200 feet of the wetlands on its northern boundary also would implicate Chapter 325 of the Town Code." See Memorandum and Order at p. 67 (emphasis added). The Memorandum and Order says nothing about "tidal wetlands," and your proposed language also omits the reference to the northern parcel of Westwoods being "adjacent" to wetlands.

Declaratory Subparagraph L (new):

We object to your proposed modifications to this paragraph, for the same reasons set forth with respect to Injunctive Subparagraph "1(d)." In addition, the reference to "development or construction" is not a satisfactory substitute for the explicit reference to the various activities specified by Chapter 325 of the Town Code.

Final Paragraph

We have no objection to your proposed final paragraph.

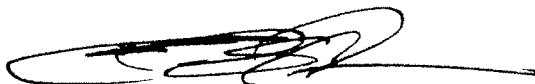
Christopher H. Lunding, Esq.

November 30, 2007

Page 10

As was agreed during our last conference call, all counsel will need to agree on a day and time during next week to "meet and confer" regarding the foregoing. As you will recall, we are obliged to provide a letter to Judge Bianco by December 12th regarding the contents of the judgment as to which the parties cannot reach agreement.

Very truly yours,

A handwritten signature in black ink, appearing to read "Michael S. Cohen", with a long horizontal flourish extending to the right.

Michael S. Cohen

cc Robert Siegfried, Esq.
Gordon J. Johnson, Esq.
Lisa Feiner, Esq.

10818988

EXHIBIT B

Porzio, Christopher

From: Porzio, Christopher
Sent: Tuesday, December 11, 2007 7:48 PM
To: 'Christopher H LUNDING'
Cc: 'Gordon Johnson'; Robert Siegfried; Lisa Feiner; Cohen, Michael; Schraever, David; Christopher Provenzano
Attachments: FIRM_DM-10834910-v1-revised_plaintiffs__proposed_judgment.DOC

Chris:

After consultation with the Town Board this evening, I attach a copy of plaintiffs' proposed judgment which we intend to submit to the Court. This has been approved by the State as well. The red-lining shows the comparison between plaintiffs' initial proposed judgment and the current version. This current version obviously includes (but is not limited to) portions of defendants' proposed judgment plaintiffs have agreed to incorporate and language to which the parties have otherwise agreed (e.g., the language to which you and Gordon reached agreement earlier today). Please confirm for us the portions of the attached judgment to which defendants consent and those to which they continue to have objections. This will enable us to recount accurately what remains outstanding in the letter to Judge Bianco.

To the extent you need time to analyze this and/or to the extent any further discussion is necessary, we may need to seek additional time from the Court to submit the letter that currently is due to be filed tomorrow.

In addition, the Town will not be consenting to the relief sought in defendants' letter motion of November 14th, and our letter to Judge Bianco will include plaintiffs' opposition to that motion.

Thanks,

Christopher J. Porzio
Counsel

NIXON PEABODY...

50 Jericho Quadrangle
Suite 300
Jericho, NY 11753-2728
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C (516) 524-3398
F (866) 947-2024
cporzio@nixonpeabody.com
www.nixonpeabody.com

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12/11/2007

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

STATE OF NEW YORK, NEW YORK STATE RACING AND
WAGERING BOARD, NEW YORK STATE DEPT. OF
ENVIRONMENTAL CONSERVATION, AND TOWN OF
SOUTHAMPTON,

Plaintiffs,

-against-

THE SHINNECOCK INDIAN NATION, FREDERICK C. BESS,
LANCE A. GUMBS, RANDALL KING, AND KAREN
HUNTER,

Defendants.

03 CIV. 3243
(JFB)(ARL)

CONSOLIDATED

03 CIV. 3466
(JFB)(ARL)

TOWN OF SOUTHAMPTON,

Plaintiff,

-against-

THE SHINNECOCK TRIBE A/K/A THE SHINNECOCK
INDIAN NATION, FREDERICK C. BESS, LANCE A. GUMBS,
and RANDALL KING,

Defendants.

**JUDGMENT AND
PERMANENT
INJUNCTION**

These consolidated actions having come on for trial before the Court, the Honorable Joseph F. Bianco, United States District Judge, presiding, and the issues having been tried and a Memorandum and Order constituting the Court's decision after trial having been filed on October 30, 2007 (docket no. 372 in 03 CIV 3243), which is incorporated by reference herein, it is hereby

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ORDERED AND ADJUDGED that:

1. Defendants, and their chairpersons, trustees, officers, agents, servants, employees, representatives, attorneys, and contractors, including but not limited to the Shinnecock Nation Gaming Authority, and its trustees, officers, agents, servants, employees, representatives, and attorneys (hereinafter together referred to as "Shinnecock Indian Nation"), and all persons in active concert or participation with the Shinnecock Indian

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Nation who receive actual notice of this judgment by personal service or otherwise, are hereby permanently enjoined and restrained from:

- a. engaging in gambling, or constructing or operating a facility in which it is intended that the conduct of bingo or any other game of chance will occur, including clearing, excavating, grading, regrading, bulldozing, removing trees, or other activities preparatory to the construction of such a facility and related facilities, at the property known and hereafter referred to as "Westwoods," as defined in paragraph 2 below, or any portion thereof, without first:

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- i. in the case of bingo, obtaining a bingo identification number from the New York State Racing and Wagering Board, as described in § 435(1)(i) of the New York Executive Law, and bingo license from the Town of Southampton, as described in § 481(1) of the New York General Municipal Law;

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- ii. in the case of other games of chance, obtaining a game of chance identification number from New York State Racing and Wagering Board, as described in § 188-a(8) of the General Municipal Law, and a license for the conduct of games of chance from the Town of Southampton, as described in § 191(1) of the General Municipal Law;

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- iii. obtaining from the New York State Department of Environmental Conservation ("NYS DEC"), when required by the New York State Environmental Conservation Law ("NYECL"), such permits or other written authorizations as are required by the NYECL, including without limitation:

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- (1) in the event that the Shinnecock Indian Nation proposes, in connection with such a facility, construction of any facility that will discharge sewage, treated sewage, or other pollutants or contaminants into the surface or groundwater of the State of New York, a State Pollutant Discharge Elimination System permit, as described at NYECL Article 17, Titles 7 and 8 and 6 N.Y.C.R.R. Parts 750-757;

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- (2) in the event that the Shinnecock Indian Nation proposes, in connection with such a facility, the installation of a groundwater well with an installed pumping capacity in excess of forty-five gallons per minute, a Long Island well permit, as described at NYECL § 15-1527, and 6 N.Y.C.R.R. Part 602;

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- (3) in the event that the Shinnecock Indian Nation proposes, in connection with such a facility, any form of draining, dredging, excavation or removal, either directly or indirectly, of soil, mud, sand, shells or other aggregate; any form of dumping, filling or depositing, either directly or indirectly, of any soil, stones, sand,

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gravel, mud, rubbish or fill of any kind; the erection of any structures or construction of any facilities or roads, the driving of any pilings or placing of any other obstructions, whether or not changing the ebb and flow of the tide; any form of pollution; any other new activity which directly or indirectly may substantially alter or impair the natural condition or function of any tidal wetland within either of the following areas: (a) the tidal wetlands along the northern boundary of Westwoods, which tidal wetlands extend northward from the mean high water mark on the shore of Great Peconic Bay to the points within the littoral zone at which lands under tidal waters are deeper than six feet at mean low water; or (b) the area from the southern edge of such tidal wetlands southward to the topographical crest of the bluff adjacent to the Great Peconic Bay, in each case located within the portion of Westwoods shown on the Suffolk County Tax Map as District No. 0900, Section 186, Block No. 2, Lot No. 38, a tidal wetlands permit, as described at NYECL Article 25 and 6 N.Y.C.R.R. Part 661; provided that nothing in this subsection (3) shall require a tidal wetlands permit for a use not requiring one under 6 N.Y.C.R.R. § 661.4 or 6 N.Y.C.R.R. § 661.7(a);

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- iv. in the event that the Shinnecock Indian Nation proposes, in connection with such a facility, any construction activity that disturbs more than one acre of land at Westwoods, submitting to NYS DEC a Notice of Intent to obtain coverage of General Permit GP-02-01 for Stormwater Discharges from Construction Activity, provided that coverage following such submission is not suspended or denied by the NYS DEC;

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- b. clearing, excavating, grading, regrading, bulldozing, removing trees, or engaging in any other work in preparation for the future use of Westwoods or any portion thereof, without prior site plan approval or written permission of the Southampton Town Planning Board, as required under Southampton Town Code § 330-184(I); provided, however, that nothing in this subparagraph "b" shall be construed to require any person otherwise enjoined or restrained hereby to obtain prior site plan approval or written permission of the Town Planning Board in order to engage in any activity, use or construction to which the site plan review process does not apply under Southampton Town Code § 330-181(A).

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- c. the erecting, constructing, enlarging, altering, removing, improving, demolishing, converting or changing, the use or nature of the occupancy of any building or structure at Westwoods or causing same to be done without first obtaining a building permit from the Town of Southampton, as required under Southampton Town Code § 123-9(A)(1);

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- d. engaging in any activity within "wetlands" located on Westwoods or within 200 feet of a "wetlands boundary" at Westwoods, as those terms are defined in § 325-3 of the Southampton Town Code, for which a building permit or administrative

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wetlands permit is required by § 123-9(A)(2) and/or § 325-6 of the Southampton Town Code;

- e. utilizing Westwoods, or any portion thereof, for any use other than those uses which are permitted uses for properties classified as R-60 zoning districts under Southampton Town Code § 330-6 and the Table of Use Regulations (Residence Districts) set forth at Southampton Town Code § 330-10, a copy of which is attached hereto and incorporated herein by reference; provided that nothing in this subparagraph (e) shall be deemed to enjoin or restrain any person otherwise enjoined or restrained hereby from seeking appropriate relief from the Town of Southampton as to any proposed use of Westwoods;
- f. utilizing Westwoods, or any portion thereof, for any use that is identified as a special exception use for properties classified as R-60 zoning districts under Southampton Town Code § 330-6 and the Table of Use Regulations (Residence Districts) currently set forth at Southampton Town Code § 330-10, a copy of which is attached hereto and incorporated herein by reference, without first obtaining a special exception use permit from the Town of Southampton Planning Board; provided that nothing in this subparagraph (f) shall be deemed to enjoin or restrain any person otherwise enjoined or restrained hereby from seeking appropriate relief from the Town of Southampton as to any proposed use of Westwoods.

- 2. "Westwoods" is a parcel of land approximately 80 acres in total area, located in the Hampton Bays area of the Town of Southampton, New York, and consists of the following three tax lots: (i) Suffolk County Tax Map, District No. 0900, Section 186, Block No. 2, Lot No. 38; (ii) Suffolk County Tax Map, District No. 0900, Section 187, Block No. 2, Lot No. 78; and (iii) Suffolk County Tax Map, District No. 0900, Section 207, Block No. 1, Lot No. 1.
- 3. The reasons for issuance of this permanent injunction, required by Federal Rule of Civil Procedure 65(d), are contained and set forth in this Court's Memorandum and Order filed on October 30, 2007 (docket no. 372 in 03 CIV. 3243), which is incorporated in this permanent injunction by reference.
- 4. From and after the entry of this permanent injunction, the preliminary injunction heretofore entered in Civil Action No. 03 CIV. 3243 shall be dissolved and shall cease to have any force or effect.

AND IT IS FURTHER DECLARED, ADJUDGED AND DECREED, pursuant to 28 U.S.C. § 2201, that:

- A. The Shinnecock Indian Nation's aboriginal title to Westwoods was extinguished in the 17th century.
- B. Westwoods is non-reservation land.

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Deleted: (1) place or deposit, or permit to be placed or deposited, any debris, fill, sand, gravel or other material; (2) clear, dig, dredge or in any other way add to, alter or remove any material; (3) plant, seed, cultivate or maintain with the use of fertilizers, any lands, other than agricultural land by an occupier of agricultural land who has a soil and water conservation plan pursuant to § 9 of the Soil and Water Conservation Districts Law, provided that the plan has been filed with the Conservation Board and a staff member for the Conservation Board has certified that the plan is being implemented by the occupier of the agricultural land, unless the occupier of the land maintains a natural seventy-five-foot buffer from any wetlands boundary; (4) erect, construct, reconstruct or enlarge a structure; (5) build, create or install any cesspool, septic tank, leaching field or other in-ground sewage or other waste disposal or storage system, including any pipe, conduit or other part thereof; (6) construct, create, eliminate, enlarge or diminish in size any wetland by filling, dredging, damming or any other method;

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C. The Shinnecock Indian Nation does not appear on the list of "tribal entities recognized and eligible for funding and services from the United States Bureau of Indian Affairs by virtue of their status as Indian tribes" as most recently published by the Department of the Interior in the Federal Register.

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D. At present, the Shinnecock Indian Tribe is not an "Indian Tribe," as defined in the Indian Gaming Regulatory Act, 25 U.S.C. § 2703(5).

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E. Westwoods is not "Indian Lands," as defined by the Indian Gaming Regulatory Act, 25 U.S.C. § 2703(4)

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F. Westwoods is not "Indian Country," as defined by 18 U.S.C. § 1151, or as otherwise defined under federal law.

G. The Shinnecock Indian Nation is not recognized by the United States Department of the Interior, Bureau of Indian Affairs.

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H. The Shinnecock Indian Nation is the owner of Westwoods and has fee simple title to Westwoods.

I. The Shinnecock Indian Nation is not an "authorized organization" under either New York General Municipal Law §§ 186(4) or 476(4) and does not qualify to be licensed to conduct bingo or "games of chance" under New York General Municipal Law §§ 191(a) or 481, respectively, and any gaming activity conducted at Westwoods by the Shinnecock Indian Nation would constitute gaming for profit in New York that would violate New York's criminal laws and is against public policy pursuant to New York General Municipal Law §§ 189(14), 195-k, 479.9, 495-a and New York Penal Law § 225.30.

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J. The Shinnecock Indian Nation is subject to the application of New York State and Town of Southampton laws, statutes, ordinances, and regulations in connection with any use or development of Westwoods, including but not limited to the development and operation of a gaming facility.

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K. The Shinnecock Indian Nation may not invoke sovereign immunity from New York State and/or Town of Southampton laws, statutes, ordinances, and regulations in connection with any use or development of Westwoods, including but not limited to the development and operation of a gaming facility, and/or any suit, action, proceeding, or claim of the State of New York and/or the Town of Southampton, seeking enforcement and/or enjoining violations of such laws, statutes, ordinances, and regulations.

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L. As land which carries a residential zoning classification under the Town of Southampton Zoning Code, specifically "R-60," Westwoods may be used only for the purposes identified and specified at §§ 330-6 and 330-10 of the Southampton Town Code.

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M. The Shinnecock Indian Nation violated Southampton Town Code § 330-184(I) by failing to apply for and receive site plan approval or written permission of the Southampton Planning Board before engaging in the following activities at Westwoods in July 2003:

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clearing of land, removal of trees, grading, regrading, bulldozing, and/or excavating (the "site preparation activities").

- N. The Shinnecock Indian Nation violated Southampton Town Code § 123-9 by failing to obtain a building permit from the Town of Southampton prior to engaging in the aforementioned site preparation activities in July 2003.

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- Q. The Shinnecock Indian Nation's proposed use of Westwoods as a site for, the conduct of gambling or games of chance violates Southampton Town Code §§ 330-6 and 330-10.

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- P. The northern tax lot of Westwoods (Suffolk County Tax Map, District No. 0900, Section 186, Block No. 2, Lot No. 38) contains or lies adjacent to wetlands which are regulated as wetlands under Chapter 325 of the Southampton Town Code.

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- Q. Any construction or development on "wetlands" located on Westwoods or within 200 feet of a "wetlands boundary" at Westwoods, as those terms are defined in § 325-3 of the Southampton Town Code, would implicate Chapter 325 of the Southampton Town Code.

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AND IT IS FURTHER ORDERED, that this is the final judgment of this Court, this case is closed and the Clerk of the United States District Court for the Eastern District of New York shall enter this final judgment in the Civil Docket of the United States District Court for the Eastern District of New York.

DATED: December __, 2007

Joseph F. Bianco
United States District Judge

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EXHIBIT C

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December 18, 2007

VIA EMAIL



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Assistant Attorney General
N.Y. Office of the Attorney General
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Gordon Johnson, Esq.
Office of the Attorney General
Environmental Protection Bureau
120 Broadway
New York, NY 10271

Re: State of New York, et al. v. The Shinnecock Indian Nation, et al., 03 Civ. 3243; Town of Southampton v. The Shinnecock Indian Tribe, et al., 03 Civ. 3466 (Consolidated)

Dear Counsel:

This letter responds to the email sent by Chris Porzio on December 11, 2007, and to the new draft "Judgment and Permanent Injunction" as proposed by the State and the Town attached to it. While evidently we have made significant progress in reaching agreement on a number of drafting issues (particularly with the State), unfortunately a number of important issues remain in contention.

The defendants still object to the inclusion of selective "declaratory judgments" in this document, for the reasons expressed in their letter to the Court of November 14, 2007, at p. 5. The defendants believe that all of these "declaratory judgments" are unnecessary and inappropriate in the context of the permanent injunction to be issued. The comments and textual changes suggested by the defendants are illustrative of their major concerns, but should not be read to suggest that, even if adopted in their entirety,

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the defendants consent to the entry of the resulting injunction. More generally, the defendants' participation in this process of discussion is of course without prejudice to any right of objection, reargument or appeal, all of which the defendants expressly preserve.

Turning to defendants' specific objections to the form of Judgment and Permanent Injunction proposed by the State and the Town on December 11, 2007, the defendants' remaining textual objections are as follows. For ease of reference and discussion, I attach a revised version of your December 11, 2007 draft of the Judgment and the Permanent Injunction (in both a clean version and one marked to show changes), reflecting the defendants' remaining specific textual objections.

Introductory Paragraph

The defendants continue to believe there should be a reference in this paragraph to Judge Platt's Opinion and Order of November 7, 2005, and have reinserted it.

Injunctive Paragraph 1

In the first sentence of Paragraph 1, the defendants have revised the language to make it clear that as to the individual named defendants, the injunction applies only to them for their official acts (or, theoretically, to acts they take after leaving office "in active concert or participation" with other named parties who are bound). The Court was very clear that its holdings apply, as to individual defendants, only to acts undertaken in an official capacity (see Memorandum and Order at p. 2, referring to tribal officials as being "sued in their official capacity"). The scope of the injunction should not be broader than the Court intended.

Subsection b., et seq., of Paragraph 1

Defendants remaining objections to Paragraph 1 all concern subsections b., c., d., e. and f., that is, the sections of the injunction proposed by the Town. As you will see, the objections are significant and arise chiefly from the position taken by Chris Porzio in recent discussions – and yesterday by the Town Supervisor-elect – regarding the very strong desire of the Shinnecock Indian Nation to continue to use Westwoods as a woodlot and for traditional tribal recreational activities. In the State and Town's letter to me of November 30, 2007 (at p. 5), the Town expressed the view that none of these uses had been proved at trial by defendants to be pre-existing nonconforming uses and that it would not consent to their being so described and denominated.

The defendants believe the Town's position to be incorrect in light of the clear language of the Court's opinion. The defendants also regard subsequent actions by the Town regarding zoning and land use issues as unfortunate and unhelpful in reaching any sensible resolution of the outstanding issues in that regard. Late in the day on Friday, December 7, 2007, Linda Kabot, the Town-Supervisor-elect, canceled a meeting

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with the Nation's trustees intended to address land use issues that had been scheduled for Monday, December 10. On December 12, 2007, during a conference call Chris Porzio indicated that the Town would decline to commit itself on the ground that it will not provide an "advisory opinion" as to whether the Nation's uses of Westwoods prior to July, 2003, are permitted uses under R-60 zoning.

Finally, yesterday Ms. Kabot was reported in Newsday as stating that the Nation's pre-existing uses of Westwoods (as a woodlot and for periodic recreational activities) do not conform to the existing zoning of that property and that the Nation's desire to continue them constitutes "over-reaching." See attached Newsday web posting of 9:53 p.m.

These legal positions taken by the Town are disappointing and surprising, and (most importantly for present purposes) entirely inconsistent with the Town's prior representations to the Court. Understandably, they have led to significant concern by the trustees of the Nation about the Town's intentions. Indeed, the Town's recent actions have caused the Nation's leadership to conclude that the Town likely has an undisclosed objective of "punishing" the Nation through use of the injunctive relief to be entered by the Court.¹ This, in turn, has influenced the defendants' objections to the text of the permanent injunction, in the form most recently proposed by the State and the Town.

As you will see, the result of these recent events is that the defendants now object to the injunction extending beyond restraint of the Nation in relation to construction of a casino at Westwoods (a limitation to which, as to state laws, the State long has agreed).

Specifically, you will note that the defendants now propose that the sections of the injunction addressing the Town Code, including its zoning and wetlands provisions, be limited to activities in relation to future use of Westwoods for gaming purposes. The Memorandum and Order plainly seems to contemplate this – see, for example, the Court's emphasis on "anticipated construction and operation of a casino" and "proposed gaming" in its discussion of why the irreparable harm requirement has been met (Memorandum and Order at p. 127), and its discussion of estoppel and analysis of "disruption" under Sherrill as a basis for its holdings.

In short, it appears to the defendants that the Court had in mind enjoining only the proposed development of Westwoods that gave rise to these lawsuits, that is, construction or operation of a gaming facility there, rather than to federalize the

¹ This concern is heightened by the State and the Town's attempt to incorporate the entirety of the "Table of Use Regulations" for R-60 zoned properties into the injunction without ever providing a copy of that document to date for review by the Court (except buried in trial exhibit T-267 at pps. 456-458). The defendants evidently object to this stratagem and to inclusion of these "Table of Use Regulations" in the injunction by any means.

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Gordon Johnson, Esq., p. 4

enforcement at Westwoods of the entire Town Code. Accordingly, the defendants have limited the sections of the permanent injunction resting on the Town Code to a gaming context and object to any broader reach for these provisions.

In addition, as the testimony at trial (Trial Tr. at 282-283) identified only one wetland at Westwoods, that wetland being tidal and adjacent to the Great Peconic Bay, the defendants have revised proposed subsection 1(d) of the permanent injunction to refer only to that wetland, doing so in the exact terms of description for such a wetland used in the Town Code.

Finally, the defendants have reinserted a "sunset" provision into the injunction (section 5), for the reasons discussed in our letter to the Court of November 14, 2007, at pps. 4-5.

Declaratory Judgments

Turning to the "declaratory judgments" the State and the Town propose, if they are to be included at all, the defendants continue to believe that a declaratory judgment regarding tribal status should be among them, and have inserted it. While the defendants do not believe that such declarations are necessary or proper in this context, the tribal status of the Nation was unquestionably one of the major issues raised by the State and the Town and resolved in this litigation.

We have taken to heart Michael Cohen's comment in your November 30, 2007 letter that the various additions we proposed of the words "at present" as a preface to several of the lettered paragraphs containing declaratory judgments are both repetitive and unnecessary because those paragraphs by their nature refer to the current state of affairs, that is, speak only as of the date of their issuance, and thus these repeated additions are surplus. However, in light of that expressed reality, we have added "at the present time" as a preface to all of the declaratory judgments, to underline this uncontroversial point.

The defendants also continue to object to proposed declaratory judgment "B.," ("Westwoods is non-reservation land"), as it is at once both significantly broader and more vague than the Court's holdings. Indeed, it goes beyond any relief sought by the State or the Town. See Plaintiffs' Post-Trial Proposed Conclusions of Law at p. 45: "The Relevant Inquiry as to the Applicability of Local and State Law at Westwoods is Whether Westwoods Qualifies as 'Indian Country' under 18 U.S.C. § 1151" and at p. 47: "Defendants' concession that Westwoods does not satisfy the definition of 'Indian Country' under 18 U.S.C. § 1151 should be the end of the relevant inquiry."

The Court's entire holding on the subject of reservation status is in footnote 69 of the Memorandum and Order, which holds that Westwoods is not "Indian Country" under 18 U.S.C. § 1151 (and thus necessarily not a reservation under the jurisdiction of the United States Government) and has never been set aside and superintended by the

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Gordon Johnson, Esq., p. 5

federal government. The Court goes no further than that and neither should any "declaratory judgment." We thus have rewritten the text of proposed declaratory judgment "B." to conform to these holdings.

The defendants also regard proposed declaratory judgment "B." as entirely irrelevant because it amounts to no more than a lesser included case of proposed declaratory judgment "F.," which repeats the Court's holding that Westwoods is not "Indian Country" under § 1151. If, however, the subject of its reservation status is to be specifically addressed in any declaratory judgment, that should be done accurately. Otherwise, one might use this declaratory judgment to argue that the Court adjudicated the status of Westwoods as an Indian reservation under myriad other federal – and state – statutes, subjects never put in issue or briefed.

We also have stricken the words "or as otherwise defined under federal law" from proposed declaratory judgment "F.," as adjudication of the status of Westwoods as Indian Country under any statute other than § 1151 was never requested by the State or the Town or ruled upon by the Court.

You will note as well that the defendants continue to object to proposed declaratory judgment "G." The reasons for this are set out in our letter to the Court of November 14, 2007, at pps. 5-6, and in the defendants' pending motion before the Court. The defendants also object to proposed declaratory judgment "Q." (on the subject of development of wetlands at Westwoods "implicating" chapter 325 of the Town Code), as we regard that declaratory judgment as having its basis in a *dictum* and being imprecise.

New "Ordered" Paragraph

This brings us to a new paragraph we have added at the end of the document, immediately following the proposed "declaratory judgments." That paragraph is designed to make it perfectly clear that the Shinnecocks may continue using Westwoods as they had done prior to July 2003. Defendants believe this paragraph is particularly necessary in light of the Town's recent activities noted above. In addition, it is entirely consistent with the Town's own representations to the Court and with the Memorandum and Order.

In Plaintiffs' Proposed Conclusions of Law, the Town made quite clear that the uses to which the Nation put Westwoods prior to July 2003 were entirely consistent with, and did not violate, the Southampton Town Code. For example, at page 42 of that pleading, the Town states this:

"[N]othing occurred at Westwoods prior to the Tribe's July, 2003 activities which potentially violated the Town Code."

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Then, immediately after discussing testimony by Lance Gumbs about the existence of an unpaved parking lot at Westwoods to the north of Newtown Road, the plaintiffs' proposed post-trial conclusions of law say this:

"[T]here is no proof of any actions by the Shinnecock which violated or threatened to violate the [Town] Code prior to 2003 with respect to which the Town failed to enforce the code." p. 43.

Consistent with these unequivocal statements, proposed finding no. 602 of Plaintiffs' Post-Trial Proposed Findings of Fact says this:

"No evidence was presented at trial by defendants that the Shinnecoaks had engaged in any activity or use of Westwoods prior to their 2003 clearing of land for a casino with respect to which the Town of Southampton could have enforced any of its zoning or land use laws, but did not." p. 109.

The Town is bound by each of these statements, particularly since it is evident that the Court relied upon and adopted them in its holding in the Memorandum and Order that the Town was not estopped by its failure to take any action to enforce Town zoning at Westwoods prior to July 2003. For example, at p. 68, the Court holds as follows:

"[A]ny argument that the Town should be estopped because it failed to enforce the zoning law is . . . factually flawed because, prior to the Nation's July 2003 activities, Westwoods had essentially remained in its natural state as a woodlot and, therefore, there was no reason for the Town to seek to enforce any provision of the Town Code or zoning laws prior to that time."

The Court also specifically held, at p. 100 of the Memorandum and Order that:

". . . at some point in the 1800s, the Shinnecock Tribe was using land west of Canoe Place (which may have included Westwoods) for timber and, since that time, the Tribe has used such land for timber and other recreational uses, such as picnics."

Finally, ***"the Nation's lack of use of this land [Westwoods] for centuries for anything other than cutting timber and periodic recreational events"*** is the factual basis for the Court's legal conclusion that use of Westwoods for a casino would be disruptive and violate Sherrill. Memorandum and Order, p. 107. Indeed, it would be fair to say that without that factual basis, this portion of the Memorandum and Order (with which the defendants, of course, respectfully disagree on its merits) would lack any context.

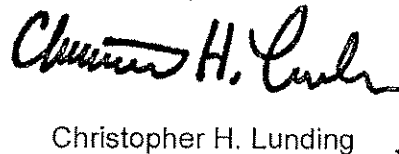
In short, both the Town in its submissions to the Court and the Court in its opinion have firmly established that the use of Westwoods by the Nation as a woodlot, for periodic recreational activities and for parking in the dirt parking lot located to the north of Newtown Road in that context are perfectly legal. The Permanent Injunction and Judgment clearly should make this clear, a purpose that the paragraph the defendants' propose be inserted in it accomplishes.

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We remain willing to discuss all of the points made above with you in the hope that by doing so we may further narrow the issues remaining between the parties. Please let me know promptly if you would like to engage in further discussions and I will attempt to make myself promptly available to do so.

In any event, when you have settled upon the final form of proposed Permanent Injunction and Judgment you intend to provide to the Court, I would appreciate receiving that so I may see what issues remain and advise you of the remaining objections that the defendants wish to bring to the Court's attention. The most sensible way to do that seems to us to be for the defendants to prepare a "mark-up" for the Court to review, along with their own statement of what their objections are, so as to avoid the possible necessity of further submissions to the Court.

Very truly yours,

A handwritten signature in black ink, appearing to read "Christopher H. Lunding". The signature is fluid and cursive, with a large, stylized "L" at the end.

Christopher H. Lunding
Senior Counsel

Attachments (3)

DRAFT SUBMITTED BY DEFENDANTS DECEMBER 18, 2007
WITHOUT PREJUDICE TO ANY RIGHT OF APPEAL OR CONSENT TO ISSUANCE
OR ENTRY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X
STATE OF NEW YORK, NEW YORK STATE
RACING AND WAGERING BOARD, NEW YORK
STATE DEPT. OF ENVIRONMENTAL
CONSERVATION, AND TOWN OF
SOUTHAMPTON,

Plaintiffs,

- against -

THE SHINNECOCK INDIAN NATION, FREDERICK
C. BESS, LANCE A. GUMBS, RANDALL KING, AND
KAREN HUNTER,

Defendants.
----- X

03 CIV. 3243
(JFB)(ARL)

CONSOLIDATED

TOWN OF SOUTHAMPTON,

Plaintiff,

- against -

THE SHINNECOCK TRIBE A/K/A THE
SHINNECOCK INDIAN NATION, FREDERICK C.
BESS, LANCE A. GUMBS, and RANDALL KING,

Defendants.
----- X

**JUDGMENT AND
PERMANENT
INJUNCTION**

03 CIV. 3466
(JFB)(ARL)

These consolidated actions having come on for trial before the Court, the Honorable Joseph F. Bianco, United States District Judge, presiding, and the issues having been tried and a Memorandum and Order constituting the Court's decision after trial having been filed on October 30, 2007(docket no. 372 in 03 CIV. 3243) and the Court by prior Memorandum and Order filed on November 7, 2005 (docket no. 181 in 03 CIV. 3243) having determined and adjudicated the status of the Shinnecock Indian Nation as an Indian tribe under federal common law, it is hereby

ORDERED AND ADJUDGED that:

1. Defendant the Shinnecock Indian Nation, the individual defendants acting in an official capacity, and their chairpersons, trustees, officers, agents, servants, employees, representatives, attorneys, and contractors, including but not limited to the Shinnecock Nation Gaming Authority, and its trustees, officers, agents, servants, employees, representatives and attorneys (hereinafter together referred to as "Shinnecock Indian Nation"), and all persons in active concert or participation with the Shinnecock Indian Nation who receive actual notice of this judgment by personal service or otherwise, are hereby permanently enjoined and restrained from:
 - a. engaging in gambling, or constructing or operating a facility in which it is intended that the conduct of bingo or any other game of chance will occur, including clearing, excavating, grading, regrading, bulldozing, removing trees, or other activities preparatory to the construction of such a facility and related facilities, at the property known and hereafter referred to as "Westwoods," as defined in paragraph 2 below, or any portion thereof, without first:
 - i. in the case of bingo, obtaining a bingo identification number from the New York State Racing and Wagering Board, as described in § 435(1)(i) of the New York Executive Law, and bingo license from the Town of Southampton, as described in § 481(1) of the New York General Municipal Law;
 - ii. in the case of other games of chance, obtaining a game of chance identification number from New York State Racing and Wagering Board, as described in § 188-a(8) of the General Municipal Law, and a license for the conduct of games of chance from the Town of Southampton, as described in § 191(1) of the General Municipal Law;
 - iii. obtaining from the New York State Department of Environmental Conservation ("NYS DEC"), when required by the New York State Environmental Conservation Law ("NYECL"), such permits or other written authorizations as are required by the NYECL, including without limitation:
 - (1) in the event that the Shinnecock Indian Nation proposes, in connection with such a facility, construction of any facility that will discharge sewage, treated sewage, or other pollutants or contaminants into the surface or groundwater of the State of New York, a State Pollutant Discharge Elimination System permit, as described at NYECL Article 17, Titles 7 and 8 and 6 N.Y.C.R.R. Parts 750-757;

- (2) in the event that the Shinnecock Indian Nation proposes, in connection with such a facility, the installation of a groundwater well with an installed pumping capacity in excess of forty-five gallons per minute, a Long Island well permit, as described at NYECL § 15-1527 and 6 N.Y.C.R.R. Part 602;
 - (3) in the event that the Shinnecock Indian Nation proposes, in connection with such a facility, any form of draining, dredging, excavation or removal, either directly or indirectly, of soil, mud, sand, shells or other aggregate; any form of dumping, filling or depositing, either directly or indirectly, of any soil, stones, sand, gravel, mud, rubbish or fill of any kind; the erection of any structures or construction of any facilities or roads, the driving of any pilings or placing of any other obstructions, whether or not changing the ebb and flow of the tide; any form of pollution; any other new activity which directly or indirectly may substantially alter or impair the natural condition or function of any tidal wetland within either of the following areas: (a) the tidal wetlands along the northern boundary of Westwoods, which tidal wetlands extend northward from the mean high water mark on the shore of Great Peconic Bay to the points within the littoral zone at which lands under tidal waters are deeper than six feet at mean low water; or (b) the area from the southern edge of such tidal wetlands southward to the topographical crest of the bluff adjacent to the Great Peconic Bay, in each case located within the portion of Westwoods shown on the Suffolk County Tax Map as District No. 0900, Section 186, Block No. 2, Lot No. 38, a tidal wetlands permit, as described at NYECL Article 25 and 6 N.Y.C.R.R. Part 661; provided that nothing in this subsection (3) shall require a tidal wetlands permit for a use not requiring one under 6 N.Y.C.R.R. § 661.4 or 6 N.Y.C.R.R. § 661.7(a);
- iv. in the event that the Shinnecock Indian Nation proposes, in connection with such a facility, any construction activity that disturbs more than one acre of land at Westwoods, submitting to NYS DEC a Notice of Intent to obtain coverage of General Permit GP-02-01 for Stormwater Discharges from Construction Activity, provided that coverage following such submission is not suspended or denied by the NYS DEC;
- b. clearing, excavating, grading, regrading, bulldozing, removing trees, or engaging in any other work in preparation for the future use of Westwoods or any portion thereof as a facility in which it is intended that the conduct

of bingo or any other game of chance will occur, without prior site plan approval or written permission of the Southampton Town Planning Board, as required under Southampton Town Code § 330-184(l); provided, however, that nothing in this subparagraph "b" shall be construed to require any person otherwise enjoined or restrained hereby to obtain prior site plan approval or written permission of the Town Planning Board in order to engage in any activity, use or construction to which the site plan review process does not apply under Southampton Town Code § 330-181(A);

- c. erecting, constructing, enlarging, altering, removing, improving, demolishing, converting or changing the use or nature of the occupancy of any building or structure at Westwoods as a facility in which it is intended that the conduct of bingo or any other game of chance will occur or causing same to be done without first obtaining a building permit from the Town of Southampton, as required under Southampton Town Code § 123-9(A)(1);
 - d. clearing, excavating, grading, regrading, bulldozing, removing trees, or engaging in any other work in preparation for the future use of Westwoods or any portion thereof as a facility in which it is intended that the conduct of bingo or any other game of chance will occur, within 200 feet south of the area inundated by tidal action and/or peak lunar tides on the shore of the Great Peconic Bay within the portion of Westwoods shown on the Suffolk County Tax Map as District No. 0900, Section 186, Block No. 2, Lot No. 38 for which a building permit or administrative wetlands permit is required by § 123-9(A)(2) and/or § 325-6 of the Southampton Town Code, without first obtaining such required permits;
 - e. clearing, excavating, grading, regrading, bulldozing, removing trees, or engaging in any other work in preparation for the future use of Westwoods or any portion thereof as a facility in which it is intended that the conduct of bingo or any other game of chance will occur, unless and until permission to do so first is obtained from the Town of Southampton acting through its authorized instrumentalities and relief is granted by the Town of Southampton acting through its authorized instrumentalities from the restrictions of R-60 zoning under Southampton Town Code § 330-6 and the Table of Use Regulations (Residence Districts) set forth at Southampton Town Code § 330-10.
2. "Westwoods" is a parcel of land approximately 80 acres in total area, located in the Hampton Bays area of the Town of Southampton, New York, and consists of the following three tax lots: (i) Suffolk County Tax Map, District No. 0900, Section 186, Block No. 2, Lot No. 38; (ii) Suffolk County Tax Map, District No. 0900, Section 187, Block No. 2, Lot No. 78; and (iii) Suffolk County Tax Map, District No. 0900, Section 207, Block No. 1, Lot No. 1.

3. The reasons for issuance of this permanent injunction, required by Federal Rule of Civil Procedure 65(d), are contained and set forth in this Court's Memorandum and Order filed on October 30, 2007 (docket no. 372 in 03 CIV. 3243), which is incorporated in this permanent injunction by reference.
4. From and after the entry of this permanent injunction, the preliminary injunction heretofore entered in Civil Action No. 03 CIV. 3243 shall be dissolved and shall cease to have any force or effect.
5. This permanent injunction (A) shall cease to have any force or effect as to the regulation or prohibition of gaming or the conduct of any game of chance by the Shinnecock Indian Nation at such time as the Shinnecock Indian Nation becomes an "Indian Tribe" as defined in the Indian Gaming Regulatory Act, 25 U.S.C. § 2703(5), and (B) shall cease otherwise to have any force or effect, to the extent federal law pre-empts the plaintiffs from regulating the conduct enjoined hereby, at such time as (i) the Shinnecock Indian Nation appears on the list of "tribal entities recognized and eligible for funding and services from the United States Bureau of Indian Affairs by virtue of their status as Indian tribes" published by the Department of the Interior in the Federal Register or (ii) the Congress of the United States enacts a statute relating to the status of the Shinnecock Indian Nation having that effect.

AND IT IS FURTHER DECLARED, ADJUDGED AND DECREED, pursuant to 28 U.S.C. § 2201, that at the present time:

- A. The Shinnecock Indian Nation is an Indian tribe and is acknowledged and recognized as such by this Court under the Federal common law.
- B. The Shinnecock Indian Nation's aboriginal title to Westwoods was extinguished in the 17th century.
- C. Westwoods is not an Indian reservation under the jurisdiction of the United States Government and has never been set aside and superintended by the United States Government.
- D. The Shinnecock Indian Nation does not appear on the list of "tribal entities recognized and eligible for funding and services from the United States Bureau of Indian Affairs by virtue of their status as Indian tribes" as most recently published by the Department of the Interior in the Federal Register.
- E. The Shinnecock Indian Tribe is not an "Indian Tribe," as defined in the Indian Gaming Regulatory Act, 25 U.S.C. § 2703(5).
- F. Westwoods is not "Indian Lands," as defined by the Indian Gaming Regulatory Act, 25 U.S.C. § 2703(4).
- G. Westwoods is not "Indian Country," as defined by 18 U.S.C. § 1151.

- H. The Shinnecock Indian Nation is the owner of Westwoods and has fee simple title to Westwoods.
- I. The Shinnecock Indian Nation is not an "authorized organization" under either New York General Municipal Law §§ 186(4) or 476(4) and does not qualify to be licensed to conduct bingo or "games of chance" under New York General Municipal Law §§ 191(a) or 481, respectively, and any gaming activity conducted at Westwoods by the Shinnecock Indian Nation would constitute gaming for profit in New York that would violate New York's criminal laws and is against public policy pursuant to New York General Municipal Law §§ 189(14), 195-k, 479.9, 495-a and New York Penal Law § 225.30.
- J. The Shinnecock Indian Nation is subject to the application of New York State and Town of Southampton laws, statutes, ordinances, and regulations in connection with any use or development of Westwoods, including but not limited to the development and operation of a gaming facility.
- K. The Shinnecock Indian Nation may not invoke sovereign immunity from New York State and/or Town of Southampton laws, statutes, ordinances, and regulations in connection with any use or development of Westwoods, including but not limited to the development and operation of a gaming facility, and/or any suit, action, proceeding, or claim of the State of New York and/or the Town of Southampton, seeking enforcement and/or enjoining violations of such laws, statutes, ordinances, and regulations in connection with any such use or development.
- L. Westwoods is land which carries a residential zoning classification under the Town of Southampton Zoning Code, specifically "R-60," and may be used only for the purposes identified and specified at §§ 330-6 and 330-10 of the Southampton Town Code; provided that nothing in this paragraph "L" shall limit or restrict the use of Westwoods as a woodlot, for parking in the unpaved parking lot currently located to the north of Newtown Road within the northern tax lot of Westwoods (Suffolk County Tax Map, District No. 0900, Section 186, Block No. 2, Lot No. 38), or for periodic recreational activities, all to the extent engaged in prior to July 2003.
- M. The Shinnecock Indian Nation violated Southampton Town Code § 330-184(l) by failing to apply for and receive site plan approval or written permission of the Southampton Planning Board before engaging in the following activities at Westwoods in July 2003: clearing of land, removal of trees, grading, regrading, bulldozing, and/or excavating (the "site preparation activities").
- N. The Shinnecock Indian Nation violated Southampton Town Code § 123-9 by failing to obtain a building permit from the Town of Southampton prior to engaging in the aforementioned site preparation activities in July 2003.

- O. The Shinnecock Indian Nation's use of Westwoods as a site for the conduct of gambling or games of chance would violate Southampton Town Code §§ 330-6 and 330-10.
- P. The northern tax lot of Westwoods (Suffolk County Tax Map, District No. 0900, Section 186, Block No. 2, Lot No. 38) contains or lies adjacent to wetlands which are regulated as wetlands under Chapter 325 of the Southampton Town Code.

AND IT IS FURTHER ORDERED, that notwithstanding any other provision of this Judgment and Permanent Injunction, no use of Westwoods by the Shinnecock Indian Nation as a woodlot, for parking in the unpaved parking lot currently located to the north of Newtown Road within the northern tax lot of Westwoods (Suffolk County Tax Map, District No. 0900, Section 186, Block No. 2, Lot No. 38), or for periodic recreational activities, all to the extent engaged in prior to July 2003, shall be deemed to have been enjoined by or to violate the Permanent Injunction contained herein or to have been held by this Court to violate any provision of the Southampton Town Code including, without limitation, the Town of Southampton Zoning Code, this Court having determined that no such use of Westwoods is actionable under the Southampton Town Code.

AND IT IS FURTHER ORDERED, that this is the final judgment of this Court, this case is closed and the Clerk of the United States District Court for the Eastern District of New York shall enter this final judgment in the Civil Docket of the United States District Court for the Eastern District of New York.

DATED: December __, 2007

Joseph F. Bianco
United States District Judge

DRAFT SUBMITTED BY DEFENDANTS DECEMBER 18, 2007
WITHOUT PREJUDICE TO ANY RIGHT OF APPEAL OR CONSENT TO ISSUANCE
OR ENTRY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X
STATE OF NEW YORK, NEW YORK STATE
RACING AND WAGERING BOARD, NEW YORK
STATE DEPT. OF ENVIRONMENTAL
CONSERVATION, AND TOWN OF
SOUTHAMPTON,

Plaintiffs,

- against -

THE SHINNECOCK INDIAN NATION, FREDERICK
C. BESS, LANCE A. GUMBS, RANDALL KING, AND
KAREN HUNTER,

Defendants.

03 CIV. 324**3243**
(JFB)(ARL)

CONSOLIDATED

03 CIV. 3466
(JFB)(ARL)

----- X
TOWN OF SOUTHAMPTON,

Plaintiff,

- against -

THE SHINNECOCK TRIBE A/K/A THE
SHINNECOCK INDIAN NATION, FREDERICK C.
BESS, LANCE A. GUMBS, and RANDALL KING,

Defendants.

JUDGMENT AND
PERMANENT
INJUNCTION

03 CIV. 3466
(JFB)(ARL)

----- X
These consolidated actions having come on for trial before the Court, the Honorable Joseph F. Bianco, United States District Judge, presiding, and the issues having been tried and a Memorandum and Order constituting the Court's decision after trial having been filed on October 30, 2007 (docket no. 372 in 03 CIV. 3243), which is incorporated by reference herein, and the Court by prior Memorandum and Order filed on November 7, 2005 (docket no. 181 in 03 CIV. 3243) having determined and adjudicated the status of the Shinnecock Indian Nation as an Indian tribe under federal common law, it is hereby

ORDERED AND ADJUDGED that:

1. ~~Defendants~~ **Defendant the Shinnecock Indian Nation, the individual defendants acting in an official capacity**, and their chairpersons, trustees, officers, agents, servants, employees, representatives, attorneys, and contractors, including but not limited to the Shinnecock Nation Gaming Authority, and its trustees, officers, agents, servants, employees, representatives and attorneys (hereinafter together referred to as "Shinnecock Indian Nation"), and all persons in active concert or participation with the Shinnecock Indian Nation who receive actual notice of this judgment by personal service or otherwise, are hereby permanently enjoined and restrained from:
 - a. engaging in gambling, or constructing or operating a facility in which it is intended that the conduct of bingo or any other game of chance will occur, including clearing, excavating, grading, regrading, bulldozing, removing trees, or other activities preparatory to the construction of such a facility and related facilities, at the property known and hereafter referred to as "Westwoods," as defined in paragraph 2 below, or any portion thereof, without first:
 - i. in the case of bingo, obtaining a bingo identification number from the New York State Racing and Wagering Board, as described in § 435(1)(i) of the New York Executive Law, and bingo license from the Town of Southampton, as described in § 481(1) of the New York General Municipal Law;
 - ii. in the case of other games of chance, obtaining a game of chance identification number from New York State Racing and Wagering Board, as described in § 188-a(8) of the General Municipal Law, and a license for the conduct of games of chance from the Town of Southampton, as described in § 191(1) of the General Municipal Law;
 - iii. obtaining from the New York State Department of Environmental Conservation ("NYS DEC"), when required by the New York State Environmental Conservation Law ("NYECL"), such permits or other written authorizations as are required by the NYECL, including without limitation:
 - (1) in the event that the Shinnecock Indian Nation proposes, in connection with such a facility, construction of any facility that will discharge sewage, treated sewage, or other pollutants or contaminants into the surface or groundwater of the State of New York, a State Pollutant Discharge Elimination System permit, as described at NYECL Article 17, Titles 7 and 8 and 6 N.Y.C.R.R. Parts 750-757;

- (2) in the event that the Shinnecock Indian Nation proposes, in connection with such a facility, the installation of a groundwater well with an installed pumping capacity in excess of forty-five gallons per minute, a Long Island well permit, as described at NYECL § 15-1527 and 6 N.Y.C.R.R. Part 602;
 - (3) in the event that the Shinnecock Indian Nation proposes, in connection with such a facility, any form of draining, dredging, excavation or removal, either directly or indirectly, of soil, mud, sand, shells or other aggregate; any form of dumping, filling or depositing, either directly or indirectly, of any soil, stones, sand, gravel, mud, rubbish or fill of any kind; the erection of any structures or construction of any facilities or roads, the driving of any pilings or placing of any other obstructions, whether or not changing the ebb and flow of the tide; any form of pollution; any other new activity which directly or indirectly may substantially alter or impair the natural condition or function of any tidal wetland within either of the following areas: (a) the tidal wetlands along the northern boundary of Westwoods, which tidal wetlands extend northward from the mean high water mark on the shore of Great Peconic Bay to the points within the littoral zone at which lands under tidal waters are deeper than six feet at mean low water; or (b) the area from the southern edge of such tidal wetlands southward to the topographical crest of the bluff adjacent to the Great Peconic Bay, in each case located within the portion of Westwoods shown on the Suffolk County Tax Map as District No. 0900, Section 186, Block No. 2, Lot No. 38, a tidal wetlands permit, as described at NYECL Article 25 and 6 N.Y.C.R.R. Part 661; provided that nothing in this subsection (3) shall require a tidal wetlands permit for a use not requiring one under 6 N.Y.C.R.R. § 661.4 or 6 N.Y.C.R.R. § 661.7(a);
- iv. in the event that the Shinnecock Indian Nation proposes, in connection with such a facility, any construction activity that disturbs more than one acre of land at Westwoods, submitting to NYS DEC a Notice of Intent to obtain coverage of General Permit GP-02-01 for Stormwater Discharges from Construction Activity, provided that coverage following such submission is not suspended or denied by the NYS DEC;
- b. clearing, excavating, grading, regrading, bulldozing, removing trees, or engaging in any other work in preparation for the future use of Westwoods or any portion thereof as a facility in which it is intended that the

conduct of bingo or any other game of chance will occur, without prior site plan approval or written permission of the Southampton Town Planning Board, as required under Southampton Town Code § 330-184(I); provided, however, that nothing in this subparagraph "b" shall be construed to require any person otherwise enjoined or restrained hereby to obtain prior site plan approval or written permission of the Town Planning Board in order to engage in any activity, use or construction to which the site plan review process does not apply under Southampton Town Code § 330-181(A);

- c. ~~the erecting, constructing, enlarging, altering, removing, improving, demolishing, converting or changing the use or nature of the occupancy of any building or structure at Westwoods~~ as a facility in which it is intended that the conduct of bingo or any other game of chance will occur or causing same to be done without first obtaining a building permit from the Town of Southampton, as required under Southampton Town Code § 123-9(A)(1);
- d. clearing, excavating, grading, regrading, bulldozing, removing trees, or engaging in any activity within "wetlands" located on Westwoods or within 200 feet of a "wetlands boundary" at Westwoods, as those terms are defined in § 325-3 of the Southampton Town Code, other work in preparation for the future use of Westwoods or any portion thereof as a facility in which it is intended that the conduct of bingo or any other game of chance will occur, within 200 feet south of the area inundated by tidal action and/or peak lunar tides on the shore of the Great Peconic Bay within the portion of Westwoods shown on the Suffolk County Tax Map as District No. 0900, Section 186, Block No. 2, Lot No. 38 for which a building permit or administrative wetlands permit is required by § 123-9(A)(2) and/or § 325-6 of the Southampton Town Code, without first obtaining such required permits;
- e. ~~utilizing~~ clearing, excavating, grading, regrading, bulldozing, removing trees, or engaging in any other work in preparation for the future use of Westwoods, or any portion thereof, for any use other than those uses which are permitted uses for properties classified as R-60 zoning districts or any portion thereof as a facility in which it is intended that the conduct of bingo or any other game of chance will occur, unless and until permission to do so first is obtained from the Town of Southampton acting through its authorized instrumentalities and relief is granted by the Town of Southampton acting through its authorized instrumentalities from the restrictions of R-60 zoning under Southampton Town Code § 330-6 and the Table of Use Regulations (Residence Districts) set forth at Southampton Town Code § 330-1010, a copy of which is attached hereto and incorporated herein by reference; provided that nothing in this subparagraph (e) shall be deemed to enjoin or restrain any

~~person otherwise enjoined or restrained hereby from seeking appropriate relief from the Town of Southampton as to any proposed use of Westwoods;~~

- ~~f. — utilizing Westwoods, or any portion thereof, for any use that is identified as a special exception use for properties classified as R-60 zoning districts under Southampton Town Code § 330-6 and the Table of Use Regulations (Residence Districts) currently set forth at Southampton Town Code § 330-10, a copy of which is attached hereto and incorporated herein by reference, without first obtaining a special exception use permit from the Town of Southampton Planning Board; provided that nothing in this subparagraph (f) shall be deemed to enjoin or restrain any person otherwise enjoined or restrained hereby from seeking appropriate relief from the Town of Southampton as to any proposed use of Westwoods.~~
2. "Westwoods" is a parcel of land approximately 80 acres in total area, located in the Hampton Bays area of the Town of Southampton, New York, and consists of the following three tax lots: (i) Suffolk County Tax Map, District No. 0900, Section 186, Block No. 2, Lot No. 38; (ii) Suffolk County Tax Map, District No. 0900, Section 187, Block No. 2, Lot No. 78; and (iii) Suffolk County Tax Map, District No. 0900, Section 207, Block No. 1, Lot No. 1.
3. The reasons for issuance of this permanent injunction, required by Federal Rule of Civil Procedure 65(d), are contained and set forth in this Court's Memorandum and Order filed on October 30, 2007 (docket no. 372 in 03 CIV. 3243), which is incorporated in this permanent injunction by reference.
4. From and after the entry of this permanent injunction, the preliminary injunction heretofore entered in Civil Action No. 03 CIV. 3243 shall be dissolved and shall cease to have any force or effect.
5. **This permanent injunction (A) shall cease to have any force or effect as to the regulation or prohibition of gaming or the conduct of any game of chance by the Shinnecock Indian Nation at such time as the Shinnecock Indian Nation becomes an "Indian Tribe" as defined in the Indian Gaming Regulatory Act, 25 U.S.C. § 2703(5), and (B) shall cease otherwise to have any force or effect, to the extent federal law pre-empts the plaintiffs from regulating the conduct enjoined hereby, at such time as (i) the Shinnecock Indian Nation appears on the list of "tribal entities recognized and eligible for funding and services from the United States Bureau of Indian Affairs by virtue of their status as Indian tribes" published by the Department of the Interior in the Federal Register or (ii) the Congress of the United States enacts a statute relating to the status of the Shinnecock Indian Nation having that effect.**

AND IT IS FURTHER DECLARED, ADJUDGED AND DECREED, pursuant to 28 U.S.C. § 2201, that at the present time:

- A. The Shinnecock Indian Nation is an Indian tribe and is acknowledged and recognized as such by this Court under the Federal common law.
- B. ~~A.~~ The Shinnecock Indian Nation's aboriginal title to Westwoods was extinguished in the 17th century.
- C. ~~B. Westwoods is non-reservation land~~ Westwoods is not an Indian reservation under the jurisdiction of the United States Government and has never been set aside and superintended by the United States Government.
- D. ~~C.~~ The Shinnecock Indian Nation does not appear on the list of "tribal entities recognized and eligible for funding and services from the United States Bureau of Indian Affairs by virtue of their status as Indian tribes" as most recently published by the Department of the Interior in the Federal Register.
- E. ~~D. At present, the~~ The Shinnecock Indian Tribe is not an "Indian Tribe," as defined in the Indian Gaming Regulatory Act, 25 U.S.C. § 2703(5).
- F. ~~E.~~ Westwoods is not "Indian Lands," as defined by the Indian Gaming Regulatory Act, 25 U.S.C. § 2703(4).
- G. ~~F.~~ Westwoods is not "Indian Country," as defined by 18 U.S.C. § 1151, ~~or as otherwise defined under federal law.~~
- ~~G.~~ ~~The Shinnecock Indian Nation is not recognized by the United States Department of the Interior, Bureau of Indian Affairs.~~
- H. The Shinnecock Indian Nation is the owner of Westwoods and has fee simple title to Westwoods.
- I. The Shinnecock Indian Nation is not an "authorized organization" under either New York General Municipal Law §§ 186(4) or 476(4) and does not qualify to be licensed to conduct bingo or "games of chance" under New York General Municipal Law §§ 191(a) or 481, respectively, and any gaming activity conducted at Westwoods by the Shinnecock Indian Nation would constitute gaming for profit in New York that would violate New York's criminal laws and is against public policy pursuant to New York General Municipal Law §§ 189(14), 195-k, 479.9, 495-a and New York Penal Law § 225.30.
- J. The Shinnecock Indian Nation is subject to the application of New York State and Town of Southampton laws, statutes, ordinances, and regulations in connection with any use or development of Westwoods, including but not limited to the development and operation of a gaming facility.
- K. The Shinnecock Indian Nation may not invoke sovereign immunity from New York State and/or Town of Southampton laws, statutes, ordinances, and regulations in connection with any use or development of Westwoods, including

but not limited to the development and operation of a gaming facility, and/or any suit, action, proceeding, or claim of the State of New York and/or the Town of Southampton, seeking enforcement and/or enjoining violations of such laws, statutes, ordinances, and regulations in connection with any such use or development.

- L. As Westwoods is land which carries a residential zoning classification under the Town of Southampton Zoning Code, specifically "R-60," Westwoods and may be used only for the purposes identified and specified at §§ 330-6 and 330-10 of the Southampton Town Code; provided that nothing in this paragraph "L" shall limit or restrict the use of Westwoods as a woodlot, for parking in the unpaved parking lot currently located to the north of Newtown Road within the northern tax lot of Westwoods (Suffolk County Tax Map, District No. 0900, Section 186, Block No. 2, Lot No. 38), or for periodic recreational activities, all to the extent engaged in prior to July 2003.
- M. The Shinnecock Indian Nation violated Southampton Town Code § 330-184(I) by failing to apply for and receive site plan approval or written permission of the Southampton Planning Board before engaging in the following activities at Westwoods in July 2003: clearing of land, removal of trees, grading, regrading, bulldozing, and/or excavating (the "site preparation activities").
- N. The Shinnecock Indian Nation violated Southampton Town Code § 123-9 by failing to obtain a building permit from the Town of Southampton prior to engaging in the aforementioned site preparation activities in July 2003.
- O. The Shinnecock Indian Nation's ~~proposed use of Westwoods as a site for the conduct of gambling or games of chance~~ would violate Southampton Town Code §§ 330-6 and 330-10.
- P. The northern tax lot of Westwoods (Suffolk County Tax Map, District No. 0900, Section 186, Block No. 2, Lot No. 38) contains or lies adjacent to wetlands which are regulated as wetlands under Chapter 325 of the Southampton Town Code.

~~Q. Any construction or development on "wetlands" located on Westwoods or within 200 feet of a "wetlands boundary" at Westwoods, as those terms are defined in § 325-3 of the Southampton Town Code, would implicate Chapter 325 of~~ AND IT IS FURTHER ORDERED, that notwithstanding any other provision of this Judgment and Permanent Injunction, no use of Westwoods by the Shinnecock Indian Nation as a woodlot, for parking in the unpaved parking lot currently located to the north of Newtown Road within the northern tax lot of Westwoods (Suffolk County Tax Map, District No. 0900, Section 186, Block No. 2, Lot No. 38), or for periodic recreational activities, all to the extent engaged in prior to July 2003, shall be deemed to have been enjoined by or to violate the Permanent Injunction contained herein or to have been held by this Court to violate any provision of the Southampton Town Code including, without limitation, the Town of Southampton Zoning Code, this

Court having determined that no such use of Westwoods is actionable under the Southampton Town Code.

AND IT IS FURTHER ORDERED, that this is the final judgment of this Court, this case is closed and the Clerk of the United States District Court for the Eastern District of New York shall enter this final judgment in the Civil Docket of the United States District Court for the Eastern District of New York.

DATED: December __, 2007

Joseph F. Bianco
United States District Judge

Shinnecocks irked by Southampton blocking casino

BY MITCHELL FREEDMAN | mitch.freedman@newsday.com
9:53 PM EST, December 17, 2007

Tribal Trustees of the Shinnecock Indian tribe Monday charged that Southampton Town was committing "cultural genocide" by insisting that the residentially-zoned land should be used only to build houses.

The charge by tribal trustees, during an interview on the reservation, comes a few days before a federal court was to accept the wording of a permanent injunction barring the Shinnecock from developing a casino on nearly 80 acres of land in Hampton Bays.

Southampton won its lawsuit to block the tribe from building a casino.

Trustee Frederick C. Bess said Monday that generations of Shinnecocks have taken part in weddings, dances and other community rituals on the tribe's Westwoods property.

"They can't tell us if we're breaking the law or not," he said. "Do we have to get a permit to build a bonfire?"

Trustee Lance Gumbs said that the traditional uses of the land would not be stopped. "We are going to continue to do them," he said. "If we have to go to jail, we will."

The Tribal Trustees also complained that the proposed injunction drawn up by the town contains language opposing any federal recognition of the tribe. They say such a clause would make it difficult to gain that status, which would allow the tribe to apply for special federal aid programs.

U.S. District Court Judge Joseph Bianco ruled in October that the Shinnecock Tribe did not have the right to build a casino on the Westwoods land, where its members have hunted, celebrated and conducted different ceremonies for generations.

The land, off Newtown Road, is several miles from the Shinnecock Indian Reservation on Shinnecock Bay.

After ruling in favor of the town, Judge Bianco ordered the two sides to come up with the wording for a permanent injunction to bar casino construction by Dec. 12. When they failed to reach an agreement on the language, he extended the deadline to Thursday.

Town Board member Linda Kabot, who will become supervisor, had scheduled a meeting with the Tribal Trustees last week, but canceled it.

Kabot said the Shinnecoeks wanted to include language in the court order that spelled out the tribe's pre-existing uses of the land, uses which did not conform to existing zoning. "It was over-reaching," she said.

Kabot said that there are no town regulations that deal with tribal ceremonies or similar cultural events. "We only cover big activities like the Hampton Classic," she said.

EXHIBIT D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

STATE OF NEW YORK, NEW YORK STATE RACING AND
WAGERING BOARD, NEW YORK STATE DEPT. OF
ENVIRONMENTAL CONSERVATION, AND TOWN OF
SOUTHAMPTON,

Plaintiffs,

-against-

THE SHINNECOCK INDIAN NATION, FREDERICK C. BESS,
LANCE A. GUMBS, RANDALL KING, AND KAREN
HUNTER,

Defendants.

03 CIV. 3243
(JFB)(ARL)

CONSOLIDATED

03 CIV. 3466
(JFB)(ARL)

**JUDGMENT AND
PERMANENT
INJUNCTION**

TOWN OF SOUTHAMPTON,

Plaintiff,

-against-

THE SHINNECOCK TRIBE A/K/A THE SHINNECOCK
INDIAN NATION, FREDERICK C. BESS, LANCE A. GUMBS,
and RANDALL KING,

Defendants.

These consolidated actions having come on for trial before the Court, the Honorable Joseph F. Bianco, United States District Judge, presiding, and the issues having been tried and a Memorandum and Order constituting the Court's decision after trial having been filed on October 30, 2007(docket no. 372 in 03 CIV 3243), which is incorporated by reference herein, it is hereby

ORDERED AND ADJUDGED that:

1. Defendants, and their trustees, officers, agents, servants, employees, representatives, and attorneys, including but not limited to the Shinnecock Nation Gaming Authority, and its trustees, officers, agents, servants, employees, representatives, and attorneys (hereinafter together referred to as "Shinnecock Indian Nation"), and all persons in active concert or participation with the Shinnecock Indian Nation who receive actual notice of this

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judgment by personal service or otherwise, are hereby permanently enjoined and restrained from:

- a. engaging in gambling, or constructing or operating a facility in which it is intended that the conduct of bingo or any other game of chance will occur, including clearing, excavating, grading, regrading, bulldozing, removing trees, or other activities preparatory to the construction of such a facility and related facilities, at the property known and hereafter referred to as "Westwoods," as defined in paragraph 2 below, or any portion thereof, without first:
 - i. in the case of bingo, obtaining a bingo identification number from the New York State Racing and Wagering Board, as described in § 435(1)(i) of the New York Executive Law, and bingo license from the Town of Southampton, as described in § 481(1) of the New York General Municipal Law;
 - ii. in the case of other games of chance, obtaining a game of chance identification number from New York State Racing and Wagering Board, as described in § 188-a(8) of the General Municipal Law, and a license for the conduct of games of chance from the Town of Southampton, as described in § 191(1) of the General Municipal Law;
 - iii. obtaining from the New York State Department of Environmental Conservation ("NYS DEC"), when required by the New York State Environmental Conservation Law ("NYECL"), such permits or other written authorizations as are required by the NYECL, including without limitation:
 - (1) in the event that the Shinnecock Indian Nation proposes, in connection with such a facility, construction of any facility that will discharge sewage, treated sewage, or other pollutants or contaminants into the surface or groundwater of the State of New York, a State Pollutant Discharge Elimination System permit, as described at NYECL Article 17, Titles 7 and 8 and 6 N.Y.C.R.R. Parts 750-757;
 - (2) in the event that the Shinnecock Indian Nation proposes, in connection with such a facility, the installation of a groundwater well with an installed pumping capacity in excess of forty-five gallons per minute, a Long Island well permit, as described at NYECL § 15-1527 and 6 N.Y.C.R.R. Part 602;
 - (3) in the event that the Shinnecock Indian Nation proposes, in connection with such a facility, any form of draining, dredging, excavation or removal, either directly or indirectly, of soil, mud, sand, shells or other aggregate; any form of dumping, filling or depositing, either directly or indirectly, of any soil, stones, sand,

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gravel, mud, rubbish or fill of any kind; the erection of any structures or construction of any facilities or roads, the driving of any pilings or placing of any other obstructions, whether or not changing the ebb and flow of the tide; any form of pollution; any other new activity which directly or indirectly may substantially alter or impair the natural condition or function of any tidal wetland within either of the following areas: (a) the tidal wetlands along the northern boundary of Westwoods, which tidal wetlands extend northward from the mean high water mark on the shore of Great Peconic Bay to the points within the littoral zone at which lands under tidal waters are deeper than six feet at mean low water; or (b) the area from the southern edge of such tidal wetlands southward to the topographical crest of the bluff adjacent to the Great Peconic Bay, in each case located within the portion of Westwoods shown on the Suffolk County Tax Map as District No. 0900, Section 186, Block No. 2, Lot No. 38, a tidal wetlands permit, as described at NYECL Article 25 and 6 N.Y.C.R.R. Part 661; provided that nothing in this subsection (3) shall require a tidal wetlands permit for a use not requiring one under 6 N.Y.C.R.R. § 661.4 or 6 N.Y.C.R.R. § 661.7(a);

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iv. in the event that the Shinnecock Indian Nation proposes, in connection with such a facility, any construction activity that disturbs more than one acre of land at Westwoods, submitting to NYS DEC a Notice of Intent to obtain coverage of General Permit GP-02-01 for Stormwater Discharges from Construction Activity, provided that coverage following such submission is not suspended or denied by the NYS DEC;

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b. clearing, excavating, grading, regrading, bulldozing, removing trees, or engaging in any other work in preparation for the future use of Westwoods or any portion thereof, without prior site plan approval or written permission of the Southampton Town Planning Board, as required under Southampton Town Code § 330-184(I); provided, however, that nothing in this subparagraph "b" shall be construed to require any person otherwise enjoined or restrained hereby to obtain prior site plan approval or written permission of the Town Planning Board in order to engage in any activity, use or construction to which the site plan review process does not apply under Southampton Town Code § 330-181(A).

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c. the erecting, constructing, enlarging, altering, removing, improving, demolishing, converting or changing, the use or nature of the occupancy of any building or structure at Westwoods or causing same to be done without first obtaining a building permit from the Town of Southampton, as required under Southampton Town Code § 123-9(A)(1);

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d. engaging in any activity within "wetlands" located on Westwoods or within 200 feet of a "wetlands boundary" at Westwoods, as those terms are defined in § 325-3 of the Southampton Town Code, for which a building permit or administrative

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wetlands permit is required by § 123-9(A)(2) and/or § 325-6 of the Southampton Town Code;

- e. utilizing Westwoods, or any portion thereof, for any use other than those uses which are permitted uses for properties classified as R-60 zoning districts under Southampton Town Code § 330-6 and the Table of Use Regulations (Residence Districts) set forth at Southampton Town Code § 330-10, a copy of which is attached hereto and incorporated herein by reference; provided that nothing in this subparagraph (e) shall be deemed to enjoin or restrain any person otherwise enjoined or restrained hereby from seeking appropriate relief from the Town of Southampton as to any proposed use of Westwoods;
- f. utilizing Westwoods, or any portion thereof, for any use that is identified as a special exception use for properties classified as R-60 zoning districts under Southampton Town Code § 330-6 and the Table of Use Regulations (Residence Districts) currently set forth at Southampton Town Code § 330-10, a copy of which is attached hereto and incorporated herein by reference, without first obtaining a special exception use permit from the Town of Southampton Planning Board; provided that nothing in this subparagraph (f) shall be deemed to enjoin or restrain any person otherwise enjoined or restrained hereby from seeking appropriate relief from the Town of Southampton as to any proposed use of Westwoods.

2. "Westwoods" is a parcel of land approximately 80 acres in total area, located in the Hampton Bays area of the Town of Southampton, New York, and consists of the following three tax lots: (i) Suffolk County Tax Map, District No. 0900, Section 186, Block No. 2, Lot No. 38; (ii) Suffolk County Tax Map, District No. 0900, Section 187, Block No. 2, Lot No. 78; and (iii) Suffolk County Tax Map, District No. 0900, Section 207, Block No. 1, Lot No. 1.

3. The reasons for issuance of this permanent injunction, required by Federal Rule of Civil Procedure 65(d), are contained and set forth in this Court's Memorandum and Order filed on October 30, 2007 (docket no. 372 in 03 CIV. 3243), which is incorporated in this permanent injunction by reference.

4. From and after the entry of this permanent injunction, the preliminary injunction heretofore entered in Civil Action No. 03 CIV. 3243 shall be dissolved and shall cease to have any force or effect.

AND IT IS FURTHER DECLARED, ADJUDGED AND DECREED, pursuant to 28 U.S.C. § 2201, that:

- A. The Shinnecock Indian Nation's aboriginal title to Westwoods was extinguished in the 17th century.
- B. Westwoods is non-reservation land.

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C. The Shinnecock Indian Nation does not appear on the list of "tribal entities recognized and eligible for funding and services from the United States Bureau of Indian Affairs by virtue of their status as Indian tribes" as most recently published by the Department of the Interior in the Federal Register.

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D. At present, the Shinnecock Indian Tribe is not an "Indian Tribe," as defined in the Indian Gaming Regulatory Act, 25 U.S.C. § 2703(5).

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E. Westwoods is not "Indian Lands," as defined by the Indian Gaming Regulatory Act, 25 U.S.C. § 2703(4)

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F. Westwoods is not "Indian Country," as defined by 18 U.S.C. § 1151, or as otherwise defined under federal law.

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G. The Shinnecock Indian Nation is not recognized by the United States Department of the Interior, Bureau of Indian Affairs.

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H. The Shinnecock Indian Nation is the owner of Westwoods and has fee simple title to Westwoods.

I. The Shinnecock Indian Nation is not an "authorized organization" under either New York General Municipal Law §§ 186(4) or 476(4) and does not qualify to be licensed to conduct bingo or "games of chance" under New York General Municipal Law §§ 191(a) or 481, respectively, and any gaming activity conducted at Westwoods by the Shinnecock Indian Nation would constitute gaming for profit in New York that would violate New York's criminal laws and is against public policy pursuant to New York General Municipal Law §§ 189(14), 195-k, 479.9, 495-a and New York Penal Law § 225.30.

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J. The Shinnecock Indian Nation is subject to the application of New York State and Town of Southampton laws, statutes, ordinances, and regulations in connection with any use or development of Westwoods, including but not limited to the development and operation of a gaming facility.

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K. The Shinnecock Indian Nation may not invoke sovereign immunity from New York State and/or Town of Southampton laws, statutes, ordinances, and regulations in connection with any use or development of Westwoods, including but not limited to the development and operation of a gaming facility, and/or any suit, action, proceeding, or claim of the State of New York and/or the Town of Southampton, seeking enforcement and/or enjoining violations of such laws, statutes, ordinances, and regulations, in connection with any such use or development.

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L. As land which carries a residential zoning classification under the Town of Southampton Zoning Code, specifically "R-60," Westwoods may be used only for the purposes identified and specified at §§ 330-6 and 330-10 of the Southampton Town Code.

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M. The Shinnecock Indian Nation violated Southampton Town Code § 330-184(I) by failing to apply for and receive site plan approval or written permission of the Southampton Planning Board before engaging in the following activities at Westwoods in July 2003:

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clearing of land, removal of trees, grading, regrading, bulldozing, and/or excavating (the "site preparation activities").

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N The Shinnecock Indian Nation violated Southampton Town Code § 123-9 by failing to obtain a building permit from the Town of Southampton prior to engaging in the aforementioned site preparation activities in July 2003.

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Q The Shinnecock Indian Nation's proposed use of Westwoods as a site for the conduct of gambling or games of chance violates Southampton Town Code §§ 330-6 and 330-10.

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P The northern tax lot of Westwoods (Suffolk County Tax Map, District No. 0900, Section 186, Block No. 2, Lot No. 38) contains or lies adjacent to wetlands which are regulated as wetlands under Chapter 325 of the Southampton Town Code.

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Q Any construction or development on "wetlands" located on Westwoods or within 200 feet of a "wetlands boundary" at Westwoods, as those terms are defined in § 325-3 of the Southampton Town Code, would implicate Chapter 325 of the Southampton Town Code.

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Deleted: (1) place or deposit, or permit to be placed or deposited, any debris, fill, sand, gravel or other material; (2) clear, dig, dredge or in any other way add to, alter or remove any material; (3) plant, seed, cultivate or maintain with the use of fertilizers, any lands, other than agricultural land by an occupier of agricultural land who has a soil and water conservation plan pursuant to § 9 of the Soil and Water Conservation Districts Law, provided that the plan has been filed with the Conservation Board and a staff member for the Conservation Board has certified that the plan is being implemented by the occupier of the agricultural land, unless the occupier of the land maintains a natural seventy-five-foot buffer from any wetlands boundary; (4) erect, construct, reconstruct or enlarge a structure; (5) build, create or install any cesspool, septic tank, leaching field or other in-ground sewage or other waste disposal or storage system, including any pipe, conduit or other part thereof; (6) construct, create, eliminate, enlarge or diminish in size any wetland by filling, dredging, damming or any other method.

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AND IT IS FURTHER ORDERED, that this is the final judgment of this Court, this case is closed and the Clerk of the United States District Court for the Eastern District of New York shall enter this final judgment in the Civil Docket of the United States District Court for the Eastern District of New York.

DATED: December , 2007

Joseph F. Bianco
United States District Judge

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EXHIBIT E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

STATE OF NEW YORK, NEW YORK STATE RACING AND
WAGERING BOARD, NEW YORK STATE DEPT. OF
ENVIRONMENTAL CONSERVATION, AND TOWN OF
SOUTHAMPTON,

Plaintiffs,

-against-

THE SHINNECOCK INDIAN NATION, FREDERICK C. BESS,
LANCE A. GUMBS, RANDALL KING, AND KAREN
HUNTER,

Defendants.

03 CIV. 3243
(JFB)(ARL)

CONSOLIDATED

03 CIV. 3466
(JFB)(ARL)

TOWN OF SOUTHAMPTON,

Plaintiff,

-against-

THE SHINNECOCK TRIBE A/K/A THE SHINNECOCK
INDIAN NATION, FREDERICK C. BESS, LANCE A. GUMBS,
and RANDALL KING,

Defendants.

**JUDGMENT AND
PERMANENT
INJUNCTION**

These consolidated actions having come on for trial before the Court, the Honorable Joseph F. Bianco, United States District Judge, presiding, and the issues having been tried and a Memorandum and Order constituting the Court's decision after trial having been filed on October 30, 2007(docket no. 372 in 03 CIV 3243), which is incorporated by reference herein, it is hereby

ORDERED AND ADJUDGED that:

1. Defendants, and their trustees, officers, agents, servants, employees, representatives, and attorneys, including but not limited to the Shinnecock Nation Gaming Authority, and its trustees, officers, agents, servants, employees, representatives and attorneys (hereinafter together referred to as "Shinnecock Indian Nation"), and all persons in active concert or participation with the Shinnecock Indian Nation who receive actual notice of this

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judgment by personal service or otherwise, are hereby permanently enjoined and restrained from:

- a. engaging in gambling, or constructing or operating a facility in which it is intended that the conduct of bingo or any other game of chance will occur, including clearing, excavating, grading, regrading, bulldozing, removing trees, or other activities preparatory to the construction of such a facility and related facilities, at the property known and hereafter referred to as "Westwoods," as defined in paragraph 2 below, or any portion thereof, without first:
 - i. in the case of bingo, obtaining a bingo identification number from the New York State Racing and Wagering Board, as described in § 435(1)(i) of the New York Executive Law, and bingo license from the Town of Southampton, as described in § 481(1) of the New York General Municipal Law;
 - ii. in the case of other games of chance, obtaining a game of chance identification number from New York State Racing and Wagering Board, as described in § 188-a(8) of the General Municipal Law, and a license for the conduct of games of chance from the Town of Southampton, as described in § 191(1) of the General Municipal Law;
 - iii. obtaining from the New York State Department of Environmental Conservation ("NYS DEC"), when required by the New York State Environmental Conservation Law ("NYECL"), such permits or other written authorizations as are required by the NYECL, including without limitation:
 - (1) in the event that the Shinnecock Indian Nation proposes, in connection with such a facility, construction of any facility that will discharge sewage, treated sewage, or other pollutants or contaminants into the surface or groundwater of the State of New York, a State Pollutant Discharge Elimination System permit, as described at NYECL Article 17, Titles 7 and 8 and 6 N.Y.C.R.R. Parts 750-757;
 - (2) in the event that the Shinnecock Indian Nation proposes, in connection with such a facility, the installation of a groundwater well with an installed pumping capacity in excess of forty-five gallons per minute, a Long Island well permit, as described at NYECL § 15-1527 and 6 N.Y.C.R.R. Part 602;
 - (3) in the event that the Shinnecock Indian Nation proposes, in connection with such a facility, any form of draining, dredging, excavation or removal, either directly or indirectly, of soil, mud, sand, shells or other aggregate; any form of dumping, filling or depositing, either directly or indirectly, of any soil, stones, sand,

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gravel, mud, rubbish or fill of any kind; the erection of any structures or construction of any facilities or roads, the driving of any pilings or placing of any other obstructions, whether or not changing the ebb and flow of the tide; any form of pollution; any other new activity which directly or indirectly may substantially alter or impair the natural condition or function of any tidal wetland within either of the following areas: (a) the tidal wetlands along the northern boundary of Westwoods, which tidal wetlands extend northward from the mean high water mark on the shore of Great Peconic Bay to the points within the littoral zone at which lands under tidal waters are deeper than six feet at mean low water; or (b) the area from the southern edge of such tidal wetlands southward to the topographical crest of the bluff adjacent to the Great Peconic Bay, in each case located within the portion of Westwoods shown on the Suffolk County Tax Map as District No. 0900, Section 186, Block No. 2, Lot No. 38, a tidal wetlands permit, as described at NYECL Article 25 and 6 N.Y.C.R.R. Part 661; provided that nothing in this subsection (3) shall require a tidal wetlands permit for a use not requiring one under 6 N.Y.C.R.R. § 661.4 or 6 N.Y.C.R.R. § 661.7(a);

- iv. in the event that the Shinnecock Indian Nation proposes, in connection with such a facility, any construction activity that disturbs more than one acre of land at Westwoods, submitting to NYS DEC a Notice of Intent to obtain coverage of General Permit GP-02-01 for Stormwater Discharges from Construction Activity, provided that coverage following such submission is not suspended or denied by the NYS DEC;
- b. clearing, excavating, grading, regrading, bulldozing, removing trees, or engaging in any other work in preparation for the future use of Westwoods or any portion thereof, without prior site plan approval or written permission of the Southampton Town Planning Board, as required under Southampton Town Code § 330-184(I); provided, however, that nothing in this subparagraph "b" shall be construed to require any person otherwise enjoined or restrained hereby to obtain prior site plan approval or written permission of the Town Planning Board in order to engage in any activity, use or construction to which the site plan review process does not apply under Southampton Town Code § 330-181(A).
- c. the erecting, constructing, enlarging, altering, removing, improving, demolishing, converting or changing the use or nature of the occupancy of any building or structure at Westwoods or causing same to be done without first obtaining a building permit from the Town of Southampton, as required under Southampton Town Code § 123-9(A)(1);
- d. engaging in any activity within "wetlands" located on Westwoods or within 200 feet of a "wetlands boundary" at Westwoods, as those terms are defined in § 325-3 of the Southampton Town Code, for which a building permit or administrative

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wetlands permit is required by § 123-9(A)(2) and/or § 325-6 of the Southampton Town Code;

- e. utilizing Westwoods, or any portion thereof, for any use other than those uses which are permitted uses for properties classified as R-60 zoning districts under Southampton Town Code § 330-6 and the Table of Use Regulations (Residence Districts) set forth at Southampton Town Code § 330-10, a copy of which is attached hereto and incorporated herein by reference; provided that nothing in this subparagraph (e) shall be deemed to enjoin or restrain any person otherwise enjoined or restrained hereby from seeking appropriate relief from the Town of Southampton as to any proposed use of Westwoods;
 - f. utilizing Westwoods, or any portion thereof, for any use that is identified as a special exception use for properties classified as R-60 zoning districts under Southampton Town Code § 330-6 and the Table of Use Regulations (Residence Districts) currently set forth at Southampton Town Code § 330-10, a copy of which is attached hereto and incorporated herein by reference, without first obtaining a special exception use permit from the Town of Southampton Planning Board; provided that nothing in this subparagraph (f) shall be deemed to enjoin or restrain any person otherwise enjoined or restrained hereby from seeking appropriate relief from the Town of Southampton as to any proposed use of Westwoods.
2. "Westwoods" is a parcel of land approximately 80 acres in total area, located in the Hampton Bays area of the Town of Southampton, New York, and consists of the following three tax lots: (i) Suffolk County Tax Map, District No. 0900, Section 186, Block No. 2, Lot No. 38; (ii) Suffolk County Tax Map, District No. 0900, Section 187, Block No. 2, Lot No. 78; and (iii) Suffolk County Tax Map, District No. 0900, Section 207, Block No. 1, Lot No. 1.
 3. The reasons for issuance of this permanent injunction, required by Federal Rule of Civil Procedure 65(d), are contained and set forth in this Court's Memorandum and Order filed on October 30, 2007 (docket no. 372 in 03 CIV. 3243), which is incorporated in this permanent injunction by reference.
 4. From and after the entry of this permanent injunction, the preliminary injunction heretofore entered in Civil Action No. 03 CIV. 3243 shall be dissolved and shall cease to have any force or effect.

AND IT IS FURTHER DECLARED, ADJUDGED AND DECREED, pursuant to 28 U.S.C. § 2201, that:

- A. The Shinnecock Indian Nation's aboriginal title to Westwoods was extinguished in the 17th century.
- B. Westwoods is non-reservation land.

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- C. The Shinnecock Indian Nation does not appear on the list of "tribal entities recognized and eligible for funding and services from the United States Bureau of Indian Affairs by virtue of their status as Indian tribes" as most recently published by the Department of the Interior in the Federal Register.
- D. At present, the Shinnecock Indian Tribe is not an "Indian Tribe," as defined in the Indian Gaming Regulatory Act, 25 U.S.C. § 2703(5).
- E. Westwoods is not "Indian Lands," as defined by the Indian Gaming Regulatory Act, 25 U.S.C. § 2703(4)
- F. Westwoods is not "Indian Country," as defined by 18 U.S.C. § 1151, or as otherwise defined under federal law.
- G. The Shinnecock Indian Nation is not recognized by the United States Department of the Interior, Bureau of Indian Affairs.
- H. The Shinnecock Indian Nation is the owner of Westwoods and has fee simple title to Westwoods.
- I. The Shinnecock Indian Nation is not an "authorized organization" under either New York General Municipal Law §§ 186(4) or 476(4) and does not qualify to be licensed to conduct bingo or "games of chance" under New York General Municipal Law §§ 191(a) or 481, respectively, and any gaming activity conducted at Westwoods by the Shinnecock Indian Nation would constitute gaming for profit in New York that would violate New York's criminal laws and is against public policy pursuant to New York General Municipal Law §§ 189(14), 195-k, 479.9, 495-a and New York Penal Law § 225.30.
- J. The Shinnecock Indian Nation is subject to the application of New York State and Town of Southampton laws, statutes, ordinances, and regulations in connection with any use or development of Westwoods, including but not limited to the development and operation of a gaming facility.
- K. The Shinnecock Indian Nation may not invoke sovereign immunity from New York State and/or Town of Southampton laws, statutes, ordinances, and regulations in connection with any use or development of Westwoods, including but not limited to the development and operation of a gaming facility, and/or any suit, action, proceeding, or claim of the State of New York and/or the Town of Southampton, seeking enforcement and/or enjoining violations of such laws, statutes, ordinances, and regulations, in connection with any such use or development.
- L. As land which carries a residential zoning classification under the Town of Southampton Zoning Code, specifically "R-60," Westwoods may be used only for the purposes identified and specified at §§ 330-6 and 330-10 of the Southampton Town Code.
- M. The Shinnecock Indian Nation violated Southampton Town Code § 330-184(I) by failing to apply for and receive site plan approval or written permission of the Southampton Planning Board before engaging in the following activities at Westwoods in July 2003:

- 6 -

clearing of land, removal of trees, grading, regrading, bulldozing, and/or excavating (the "site preparation activities").

- N. The Shinnecock Indian Nation violated Southampton Town Code § 123-9 by failing to obtain a building permit from the Town of Southampton prior to engaging in the aforementioned site preparation activities in July 2003.
- O. The Shinnecock Indian Nation's proposed use of Westwoods as a site for the conduct of gambling or games of chance violates Southampton Town Code §§ 330-6 and 330-10.
- P. The northern tax lot of Westwoods (Suffolk County Tax Map, District No. 0900, Section 186, Block No. 2, Lot No. 38) contains or lies adjacent to wetlands which are regulated as wetlands under Chapter 325 of the Southampton Town Code.
- Q. Any construction or development on "wetlands" located on Westwoods or within 200 feet of a "wetlands boundary" at Westwoods, as those terms are defined in § 325-3 of the Southampton Town Code, would implicate Chapter 325 of the Southampton Town Code.

AND IT IS FURTHER ORDERED, that this is the final judgment of this Court, this case is closed and the Clerk of the United States District Court for the Eastern District of New York shall enter this final judgment in the Civil Docket of the United States District Court for the Eastern District of New York.

DATED: December __, 2007

Joseph F. Bianco
United States District Judge

Town of Southampton
§ 330-10, Residence Districts
Table of Use Regulations: Part 1, A and B
[Amended last 11-13-2001 by L.L. No. 52-2001]

P = Permitted use
SE = Special exception use
X = Prohibited use

ALL UNLISTED USES ARE PROHIBITED IN ALL DISTRICTS

Use Classification	CR-200 Country Residence	CR-120 Country Residence	CR-80 Country Residence	CR-60 Country Residence	CR-40 Country Residence	R-120 Residence	R-80 Residence	R-60 Residence
A. Residential uses.								
(1) 1-family detached dwelling, new.	P	P	P	P	P	P	P	P
(2) 2-family detached dwelling, new.	X	X	X	X	X	X	X	X
(3) Multiple dwelling for 3 or more families.	X	X	X	X	X	X	X	X
(4) Conversion of existing single-family dwelling for 2 families.	SE	SE	SE	SE	SE	SE	SE	SE
(5) Dwelling lawfully existing prior to adoption of this chapter.	P	P	P	P	P	P	P	P
(6) Planned residential development.	P	P	P	P	P	P	P	P
(7) Camping ground.	SE	SE	SE	SE	SE	SE	SE	SE
(8) Mobile home.	X	X	X	X	X	X	X	X
(9) Senior citizen housing.	X	X	X	X	X	X	X	X
(10) Conversion into residential condominium or residential cooperative.	SE	SE	SE	SE	SE	SE	SE	SE
(11) Density incentive.	X	X	P	P	P	P	P	P
(12) Recreational vehicle parks.	X	X	X	X	X	X	X	X
B. Residential community facilities.								
(1) Church or similar place of worship or religious instruction, parish house rectory, seminary or convent.	SE	SE	SE	SE	SE	SE	SE	SE
(2) (Reserved)								
(3) Nursery school or child day care.	SE	SE	SE	SE	SE	SE	SE	SE
(4) Park, playground or recreational area when authorized or operated by the municipality.	P	P	P	P	P	P	P	P
(5) Public library or museum.	SE	SE	SE	SE	SE	SE	SE	SE
(6) Fire station, municipal office or any government building of similar character.	P	P	P	P	P	P	P	P
(7) School, elementary or high, public, denominational or private, operated or licensed by the New York State Education Department.	P	P	P	P	P	P	P	P
(8) School for the mentally retarded, public or private, nonprofit, for which a certificate of incorporation has been issued under Article 31 of the Mental Hygiene Law of the State of New York.	SE	SE	SE	SE	SE	SE	SE	SE
(9) Colleges and universities.	X	X	X	X	X	SE	SE	SE

Town of Southampton
§ 330-10, Residence Districts
Table of Use Regulations: Part 1, C and D
[Amended last 11-13-2001 by L.L. No. 52-2001]

P = Permitted use
SE = Special exception use
X = Prohibited use

ALL UNLISTED USES ARE PROHIBITED IN ALL DISTRICTS

Use Classification	CR-200 Country Residence	CR-120 Country Residence	CR-80 Country Residence	CR-60 Country Residence	CR-40 Country Residence	R-120 Residence	R-80 Residence	R-60 Residence
C. General community facilities.								
(1) Beach club, nonprofit.	SE	SE	SE	SE	SE	SE	SE	SE
(2) Bus passenger shelter.	SE	SE	SE	SE	SE	SE	SE	SE
(3) Cemetery.	SE	SE	SE	SE	SE	X	X	X
(a) Expansion of preexisting nonconforming cemetery.	SE	SE	SE	SE	SE	SE	SE	SE
(4) Helicopter landing area.	X	X	X	X	X	X	X	X
(5) (Reserved)								
(6) (Reserved) ¹								
(7) (Reserved)								
(8) Nursing home or proprietary rest home.	SE	SE	SE	SE	SE	X	X	X
(9) Philanthropic, fraternal, social or educational institutional office or meeting room, nonprofit.	SE	SE	SE	SE	SE	X	X	X
(10) Public utility structure or right-of-way, sewage treatment plant or water supply facility necessary to serve the municipality, except wireless communications towers and antennas.	SE	SE	SE	SE	SE	SE	SE	SE
(11) (Reserved)								
(12) Yacht club, nonprofit.	X	SE	SE	SE	SE	SE	SE	SE
(13) Wireless communications towers and antennas.	SE	SE	SE	SE	SE	SE	SE	SE
(14) Hospitals.	SE	SE	SE	SE	SE	SE	SE	SE
D. Business uses.								
(1) Agriculture, excluding animal husbandry.	P	P	P	P	P	P	P	P
(2) Animal husbandry, dairy and dairy products.	SE	SE	SE	SE	SE	X	X	X
(3) Greenhouse, agricultural.	SE	SE	SE	SE	SE	SE	SE	SE
(4) Horse farm, horse stabling facility or horseback riding academy.	SE	SE	SE	SE	SE	SE	SE	SE
(5) Plant nursery.	SE	P	P	P	P	P	P	P
(6) Winery.	SE	SE	SE	SE	SE	X	X	X

NOTES:

¹ Editor's Note: Former Subsection C(6), Medical arts building, was repealed 8-27-1999 by L.L. No. 26-1999. Said local law also provided that it would not apply to any application which had received site plan approval or special exception permission prior to the effective date of the local law.

Town of Southampton
§ 330-10, Residence Districts
Table of Use Regulations: Part 1, E and F
[Amended last 4-26-2005 by L.L. No. 15-2005]

P = Permitted use
SE = Special exception use
X = Prohibited use

ALL UNLISTED USES ARE PROHIBITED IN ALL DISTRICTS

Use Classification	CR-200 Country Residence	CR-120 Country Residence	CR-80 Country Residence	CR-60 Country Residence	CR-40 Country Residence	R-120 Residence	R-80 Residence	R-60 Residence
E. Industrial uses (none permitted).	X	X	X	X	X	X	X	X
F. Accessory uses.								
(1) Accommodations for not more than 2 roomers or boarders in a 1-family detached dwelling, provided that separate kitchen and entrance facilities shall not be provided.	X	X	X	X	X	P	P	P
(2) Customary accessory structure and/or use, except those prohibited by this chapter.	P	P	P	P	P	P	P	P
(3) Home occupation other than home professional office.	P	P	P	P	P	P	P	P
(4) Home professional office.	P	P	P	P	P	P	P	P
(5) Agricultural labor housing	SE	SE	SE	SE	SE	SE	SE	SE
(6) Private garage or private off-street parking area pursuant to §§ 330-92 through 330-101.	P	P	P	P	P	P	P	P
(7) Private mooring, dock or similar marine structure in a tidal wetland or walkway over the dunes on an ocean beach pursuant to § 330-39 et seq.	X	P	P	P	P	P	P	P
(8) Private swimming pool.	P	P	P	P	P	P	P	P
(9) Signs pursuant to §§ 330-85 through 330-91.	P	P	P	P	P	P	P	P
(10) Temporary roadside stand for sale at retail of fish and shellfish taken by the vendor from local waters.	SE	SE	SE	SE	SE	SE	SE	SE
(11) Temporary roadside stand for sale at retail of farm products grown on the premises.	P	P	P	P	P	P	P	P
(12) Wind energy conversion systems.	P	P	P	P	P	P	P	P
(13) Greenhouse, private.	P	P	P	P	P	P	P	P
(14) Accessory apartment pursuant to Article IIA of this chapter.	P	P	P	P	P	P	P	P
(15) Bed-and-breakfast in an accessory building.	SE	SE	SE	SE	SE	SE	SE	SE