UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

RED CLIFF BAND OF LAKE SUPERIOR CHIPPEWA INDIANS,

Plaintiff,

Case No. 18-cv-828-wmc

v.

BAYFIELD COUNTY, WISCONSIN,

Defendant.

DEFENDANT'S RESPONSE BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on Plaintiff's Motion for Summary Judgment seeking a declaration that Bayfield County has no authority to regulate land use on fee simple land owned by Tribal members within the confines of the Red Cliff Band of Lake Superior Chippewa Indians' Reservation land, which is otherwise located within the jurisdictional boundaries of Bayfield County, Wisconsin. Correspondingly, Plaintiff seeks a permanent injunction precluding Bayfield County from regulating land use through its comprehensive zoning code on Tribal member-owned land within the confines of the Red Cliff Band of Lake Superior Chippewa Indians' Reservation (generally, the "Reservation").

Plaintiff claims that Bayfield County is not authorized to apply its comprehensive zoning ordinance to certain lands located in Bayfield County that are also physically located on the Red Cliff Reservation. To be clear, the Tribe is not contending that the County is precluded from applying its comprehensive zoning ordinance to lands on the Reservation that are either held in fee simple by non-tribal members (14.4% of reservation lands) or forest land owned by Bayfield

County (11.7% of reservation land).[1] Additionally, Bayfield County does not apply its comprehensive zoning ordinance to trust land owned by the Tribe (49.6% of reservation land) or land that is part of the United States Apostle Island Lakeshore. What the Tribe is asking the Court to decide as a matter of law is whether Bayfield County can continue to apply its comprehensive zoning ordinance to lands held in fee simple by the Tribe or Tribal members (12.2% of reservation land). The United States Supreme Court, as well as decisions by Wisconsin District Courts, confirm that Bayfield County's application of its comprehensive zoning ordinance to land owned in fee simple by the Tribe, tribal members and non-tribal members is lawful. Additionally, given the critical importance of comprehensive zoning, allowing the patchwork zoning scheme that the Tribe contends is necessary, would create inconsistent and incompatible zoning decisions. Adopting the Tribe's position would result in zoning regulation changing every time a fee simple parcel of land on the Reservation is sold where the sale involved a tribal member and non-tribal member.

Defendant respectfully requests that the Court deny Plaintiff's Motion for Summary Judgment for the following reasons. First, Plaintiff has failed to comply with this Court's long-established procedure governing motions for summary judgment – it has not submitted any proposed findings of fact. Second, to the extent the Court considers Plaintiff's motion despite this failure, Defendant respectfully requests the Court, based on existing law, deny Plaintiff's request for a declaration and corresponding injunctive relief precluding the County from applying its

[1] These figures come from page 5 of Plaintiff's opening summary judgment brief (Dkt. 11). Bayfield County is not aware of what land is included in "trust or restricted fee lands owned by tribal members"; accordingly, that category has not been included in the County's numbers. Generally speaking, if land is held in fee simple, whether by the Tribe, its members, or non-tribal members, such parcels are subject to the County's comprehensive zoning ordinance. Conversely, if reservation land is held in trust or is part of the United States Apostle Islands Lakeshore, such lands are not subject to Bayfield County's comprehensive zoning ordinance.

comprehensive zoning code on land held by Tribal members in fee simple status within the boundaries of the Reservation and enter judgment regarding the same in the County's favor.

FACTUAL BACKGROUND

See Defendant's Proposed Findings of Fact, filed separately in accordance with the Court's Preliminary Pretrial Conference Order and applicable attachments thereto.

ARGUMENT AND AUTHORITY

I. THE COURT SHOULD DENY PLAINTIFF'S RULE 56 MOTION BECAUSE IT IS FACIALLY DEFICIENT.

Rule 56 provides that a "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "The court should state on the record the reasons for granting or denying the motion." *Id.* A party moving for summary judgment bears "an initial burden of production" requiring the movant "to inform the district court why a trial is not necessary." *Modrowski v. Pigatto*, 712 F.3d 1166, 1168 (7th Cir. 2013).

There are two ways for a movant to carry its initial burden of demonstrating why a trial is unnecessary. The first is to proffer "affirmative evidence that negates an essential element of the opposing party's claim." *Modrowski*, 712 F.3d at 1169 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986) (Brennan, J., dissenting)). The second, "somewhat trickier" path is by showing that the opposing party's *evidence* is "insufficient to establish an essential element of the non-moving party's claim." *Id.*

Here, the Court should deny Plaintiff's motion for summary judgment because it has failed to proffer the requisite "affirmative evidence" by not presenting proposed findings of fact in support of its Motion.

The Seventh Circuit has "consistently and repeatedly upheld a district court's discretion to require strict compliance with its local rules governing summary judgment." *Koszola v. Board of Educ. of City of Chicago*, 385 F.3d 1104, 1109 (7th Cir. 2004) (quoting *Metro. Life Ins. Co. v. Johnson*, 297 F.3d 558, 562 (7th Cir. 2002)); *see also Bordelon v. Chicago School Reform Board of Trustees*, 233 F.3d 524, 527 (7th Cir. 2000) (holding that a district court can require "strict compliance" with local rules governing summary judgment). This Court has established — and docketed for the parties — detailed procedures governing motions for summary judgment. (Dkt. 9 at 1 ("[T]he parties . . . conduct throughout this case is governed by this pretrial conference order and its attachments . . . .); s*ee generally* Preliminary Pretrial Packet at 9 ("All facts necessary to sustain a party's position on a motion for summary judgment must be explicitly proposed as findings of fact.").)

The Preliminary Pretrial Packet requires that a motion for summary judgment be filed along with a separate document containing the moving party's "statement of proposed findings of fact or a stipulation of fact between or among the parties to the action, or both; and [e]videntiary materials; and [a] supporting brief." (Dkt. 9, Preliminary Pretrial Packet at 3 (emphasis in original).) In the proposed findings of fact, the moving party is required to "include ALL factual propositions the moving party considers necessary for judgment in the party's favor. For example, the proposed findings shall include factual statements relating to jurisdiction, the identity of the parties, the dispute, and the context of the dispute." (*Id.*) Statements of proposed findings of fact are necessary to show the admissibility of evidence supporting "all facts necessary to sustain the motion." (*See id.* at 3 ("Each factual proposition must be followed by a reference to evidence supporting the proposed fact.").) Further, the "court will not consider facts contained only in a brief." (*Id.*)

Here, Plaintiff's motion for summary judgment is facially defective, in part because it fails to include any statement of proposed findings of fact. It is unclear from Plaintiff's papers which factual or quasi-factual assertions they view as "necessary to sustain the motion for summary judgment." (*Id.* at 3.) It is also unclear whether many of Plaintiff's assertions are "supported by admissible evidence." (*Id.* at 3 ("[E]ach proposed finding must be supported by admissible evidence.") The plethora of interwoven facts, opinions, legal conclusions, and general historical notes scattered throughout Plaintiff's papers leave the Court (and the County) to guess which "material facts" Plaintiff is ultimately relying upon in support of a final judgment. (*See, e.g.*, Dkt. 11 at 1-9; *see also*, 10-11 (citing to prior litigation and related correspondence between counsel for Bayfield County and the Bureau of Indian Affairs).)

Plaintiff's factual corner-cutting is improper at this stage, and prejudicial to the County. It leaves the Court and the County at a disadvantage in discerning which "material" assertions or evidence Plaintiff is ultimately relying on in support of summary judgment. Fed. R. Civ. P. 56(a). The County would have to parse out each line of Plaintiff's briefing, declaration, and supporting exhibits, and guess which assertions of fact or opinion are intended as "material" facts justifying a final judgment. *Id.* That would not be practicable, nor helpful to the Court. *Waldridge*, 24 F.3d at 923 (7th Cir. 1994) (proposed findings of fact "are, in short, roadmaps, and without them the court should not have to proceed further, regardless of how readily it might be able to distill the relevant information from the record on its own").

This Court has repeatedly denied motions for summary judgment that fail to adhere to its requirements for submitting properly delineated, proposed findings of fact. *Lust v. Sealy, Inc.*, 234 F. Supp. 2d 908, 910 (W.D.Wis., 2002); *Memon v. Waukesha County Technical College*, No. 13-cv-704-jdp, 2015 WL 505668, *2 (W.D.Wis., Feb. 6, 2015); *Anderson v. Olson*, No. 13-cv-561-

wmc, 2014 WL 5167610, *1 (W.D.Wis., Oct. 14, 2014); *Retzlaff v. City of Cumberland and Officer John Smith*, No. 09-cv-692-slc, 2010 WL 1280330, *2 (W.D.Wis., 2010). The Court may similarly exercise its discretion in this case to deny Plaintiff's motion as defective. *Modrowski*, 712 F.3d at 1169.

The broad-sweeping mixtures of factual assertions, opinions, legal conclusions, and inadmissible "evidence" scattered across Plaintiff's moving papers do not constitute "affirmative evidence" supporting its claims. *Modrowski*, 712 F.3d at 1169; *see also* Dkt. 182 at 3 ("The court will not search the record for facts or evidence."). Thus, Plaintiff has not satisfied its initial burden of production under Rule 56 and Defendant respectfully requests that the Court deny Plaintiff's motion in its entirety on this basis.

II. PLAINTIFF CANNOT MEET ITS BURDEN UNDER RULE 56 WITH RESPECT TO LAND USE REGULATION OF RESERVATION LAND HELD IN FEE SIMPLE, AND DEFENDANT IS ENTITLED TO A GRANT OF SUMMARY JUDGMENT ON THIS ISSUE.

Without waiving the foregoing arguments regarding the facially deficient nature of Plaintiff's Motion for Summary Judgment, Defendant will also address the merits of Plaintiff's argument regarding the County's enforcement of land use regulations over lands held in fee simple status within the boundaries of the Reservation. In support of its position, Plaintiff either ignores or seeks to differentiate the United States Supreme Court and related appellate case law that has upheld the authority of local municipalities to regulate land use through comprehensive zoning ordinances and other similar regulations on parcels on reservation land held in fee simple. (*See, e.g.*, Dkt. 11 at 9-11.) For the reasons addressed more fully below, the referenced case law supports the County's position in this matter, not only refuting the basis for Plaintiff's Motion for Summary Judgment with regard to fee simple parcels owned by the Tribe or Tribal members, but supporting a grant of summary judgment in Defendant's favor.

A. The Logical Consequence of Plaintiff's Requested Relief is an Untenable Patchwork of Ever-Changing Regulation Over Fee Lands Located Within the Reservation's Boundaries.

It is undisputed that trust lands on the Reservation are not subject to the County's zoning code. 25 C.F.R. § 1.4; *see also Santa Rosa Band of Indians v. Kings Cty.*, 532 F.2d 655 (9th Cir. 1976); *Snohomish Cty. v. Seattle Disposal Co.*, 425 P.2d 22 (Wash. 1967). However, a similar outright prohibition does not exist with respect to the County's authority to subject fee lands located on the Reservation to local zoning authority. *Compare Gobin v. Snohomish Cty.*, 304 F.3d 909 (9th Cir. 2002) *with Cayuga Indian Nation of N.Y. v. Village of Union Springs*, 390 F. Supp. 2d 203 (N.D.N.Y. 2005) (holding that the Tribe was not entitled to immunity from state and local zoning and land use laws in light of the United States Supreme Court's decision in *City of Sherrill, New York v. Oneida Indian Nation of New York*, 544 U.S. 197, 219, 125 S. Ct. 1478 (2005).)

While the Court did not squarely address the issue of zoning authority in *City of Sherrill, New York*, the principles set forth therein are instructive with respect to the authority of the County to regulate land use of fee simple parcels located within the Reservation's boundaries or otherwise acquired by the Tribe or Tribal members outside of those boundaries. Specifically, the Court noted that "[a] checkerboard of alternating state and tribal jurisdiction . . . would 'seriously burde[n] the administration of state and local governments' and would adversely affect landowners neighboring the tribal patches." *Id.* at 219-20 (citing *Hagen v. Utah*, 510 U.S. 399, 421 (1994)). While the *Sherrill* Court was analyzing the issue of taxation, it went on to note that "little would prevent the Tribe from initiating a new generation of litigation to free the [fee] parcels from local zoning or other regulatory controls that protect all landowners in the area." *Id.* at 220 (citing *Felix v. Patrick*,

145 U.S. 317, 335 (1892) and *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 433-37 (1989) (opinion of STEVENS, J. discussing tribal land-use controls)).

In support of its concern, the Court cited to two pending lower-court cases involving the applicability of local zoning authority on tribal fee land. After the Court issued its decision in *Sherrill*, those two lower court cases were decided in favor of the local governments seeking to subject tribal fee land to the local governments' land-use regulations. *See Cayuga Indian Nation of N.Y. v. Village of Union Springs*, 390 F. Supp. 2d 203 (N.D. N.Y. 2005); *Seneca-Cayuga Tribe of Okla. v. Town of Aurelius*, 233 F.R.D. 278 (N.D. N.Y. 2006).

In this case, it is undisputed that the Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin, a federally-recognized sovereign Indian nation, has a Reservation with boundaries that are otherwise located within the boundaries of Bayfield County. (Proposed Findings of Fact ("PFOF") ¶¶ 1-4.) Land within the Reservation is held in various forms of legal ownership, including trust land and fee land owned by the Tribe, Tribal members, and nonmembers, as well as the County. (PFOF ¶ 5.) As noted by Plaintiff in its moving brief, the County and the Tribe have both enacted land use regulatory schemes that are in conflict as to their respective procedural rules, fee structures, and overall regulations. (Dkt. 11 at 6-9; PFOF ¶¶ 6-7.) Plaintiff concedes that the present-day ownership pattern existing on the Reservation creates a "checkerboard" effect – a lack of congruity that is common to many reservations, as discussed in the case law referenced above. (Dkt. 11 at 4-5.)

It is this existing checkerboard that creates an impracticability in Plaintiff's requested relief. As noted by the Court in *Sherrill*, and by those lower courts subsequently applying *Sherrill*, the "checkerboard of alternating state and tribal jurisdiction . . . would seriously burden the administration of state and local governments and would adversely affect landowners neighboring

the tribal patches." *See supra* (internal citations omitted). If this Court were to grant Plaintiff's requested relief, every time a parcel of land within the Reservation boundaries is sold, the governments would have to determine whether the new owner is or is not a Tribal member, and the zoning requirements for a particular parcel could change every time a parcel of land changes hands. The importance of comprehensive land use regulation in this regard cannot be overlooked.

The County codified its intentions in adopting its current zoning ordinance to include curbing the pollution of lakes in Bayfield County and uncontrolled development that adversely affects the public health, safety, convenience, and general welfare, as well as the associated impairment of the property tax base of the County that comes from those adverse effects. (Title 13, Ch. 1, § 13-1-2, Code of Ordinances, Bayfield Cty., Wis.) Similarly, the County codified the purpose of its land use scheme as:

> . . . promoting and protecting the public health, safety, convenience and general welfare, to further the maintenance of safe and healthful conditions, to prevent and control water pollution, to protect spawning grounds, fish, and aquatic life, to control building sites, placement of structures and land uses, to prevent overcrowding of any natural resource such as a lake, to preserve shorecover and natural beauty, and to promote the better uses of scenic resources.

(*Id.* at § 13-1-3.) If the County is precluded from implementing its zoning regulations over Tribal members who own land in fee simple within both the County and Reservation boundaries, those interests of neighboring landowners who fall just outside the Tribe's jurisdiction would be seriously impaired. Conflicting allowable uses and regulations on those uses could significantly impair the value of both the land being transferred and the value of adjacent parcels. Further questions arise to the extent that land is jointly owned by both Tribal members and nonmembers or parcels that may be owned by someone who is Indian, but not a Tribal member, or perhaps a member of another Tribe. In short, Plaintiff's requested relief creates the exact seriously

burdensome situation contemplated by the Court in *Sherrill* by negatively impacting the County's capacity to efficiently and adequately administer and effectuate the purpose of its zoning code for the protection of all its constituents.

B. Local Federal Case Law Supports the Authority of Local Government Land Use Regulation on Reservation Land Held in Fee.

The Eastern District of Wisconsin has also relied on the reasoning in *Sherrill* to uphold the authority of a local municipality to exercise its eminent domain power to take certain lands held in fee by the Oneida Tribe of Indians of Wisconsin for purposes of constructing a road. *Oneida Tribe of Indians of Wisconsin v. Village of Hobart, Wis.*, 542 F. Supp. 2d 908 (E.D. Wis. 2008). The court noted that the land at issue in the case was not held in trust for the benefit of the Tribe by the United States, but rather, was owned in fee by both Indians and non-Indians as a result of patents distributed during the allotment era. *Id.* at 916. In *Oneida*, the Tribe argued that *Yakima* and *Cass County* were distinguishable on the grounds that they only addressed the assessment of property taxes on fee-patented lands within the reservation boundaries and that *Sherrill* provided even less support because it was based on equitable considerations, much like Plaintiff argues in this case. However, the court noted that the Tribe was reading *Yakima*, *Cass County*, and *Sherrill* too narrowly, overlooking the underlying principle that when federal protection against property tax was withdrawn, the protection from other, similar assessment or alienation by way of condemnation or foreclosure was also withdrawn. *Id.* at 920-21. As such, the court concluded that, "if Indian lands are not exempt from forced alienation for nonpayment of state or local property taxes, it also follows that they are not exempt from the Village's power to condemn such land for a public highway and, further, to assess such property for the cost of improvements that specially benefit the property." *Id.* at 921.

This holding from the Eastern District of Wisconsin with respect to the power of condemnation is significant due to the fact that it authorizes a local municipality to reach far beyond land-use regulation to exercise it power to effectuate *a taking of the fee land*, a far greater infringement on the sovereignty of the Oneida Tribe of Indians of Wisconsin. It is also significant to note that the court came to this conclusion after extensive consideration of the various mechanisms by which the land within the original boundaries of the Tribe's reservation had changed status through the course of the Tribe's treaty history with the United States and the changes in federal policies with respect to Indian land ownership, including those extensively outlined in Plaintiff's brief.

C. The Importance of a Comprehensive Zoning Plan Supports Bayfield County's Application of its Zoning Ordinance to Reservation Land Owned in Fee Simple by Tribal and Non-Tribal Members.

There is no longer room for doubt that the general rule is that the inherent sovereign powers of an Indian tribe do not extend to non-members of the tribe. *Montana v. United States*, 450 U.S. 544 (1981); *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008). The United States Supreme Court has applied this general rule to zoning decisions involving reservation land held in fee simple by non-tribal members. *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989); *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008). This is significant because the Red Cliff Tribe, in the present case, lacks authority to subject land owned by non-tribal members to the Tribe's zoning regulation. Accordingly, comprehensive land-use regulation on the Reservation would be impossible, given the Tribe's position. Moreover, every time a parcel of land is sold and the buyer and seller are a tribal and non-tribal member, the zoning law that would apply to the parcel would change. The benefits of comprehensive zoning would be lost.

The constitutional importance of comprehensive zoning has been recognized by the United States Supreme Court for more than 90 years. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Comprehensive zoning furthers the following important objectives: preservation of the character of an area, protection of natural resources, protection of property values, and protection of public health and safety. To accomplish these important goals, a single entity must have authority over all parcels of land included within its comprehensive zoning plan. Comprehensive zoning is key to economic development, which benefits the Tribe and its members.

There is no question that the Red Cliff Tribe lacks authority to subject Reservation lands owned by non-tribal members to the Tribe's zoning regulations. The only other alternative for accomplishing comprehensive zoning on reservation land is through use of Bayfield County's comprehensive zoning ordinance, which, as previously discussed, can lawfully be applied to fee simple land on the reservation whether owned by Tribal members or nonmembers. Assuming the "exceptional circumstances" exception referenced by Plaintiff in its opening brief is even applicable, the importance of comprehensive zoning regulation would satisfy this exception.

CONCLUSION

For the reasons stated above, Defendant respectfully requests Plaintiff's Motion for Summary Judgment be denied as it is facially defective. Further, to the extent this Court considers Plaintiff's motion, it should be denied on the merits with respect to the parcels owned in fee simple by the Tribe or Tribal members located within the Reservation boundaries. Plaintiff is not entitled to judgment as a matter of law, as the inevitable result would be a checkerboard of back-and-forth regulation over the parcels in question – the exact concern expressed by the *Sherrill* Court and those decisions outlined above. Rather, consistent with the relevant federal court precedent and in accordance with Rule 56(f)(1), Defendant requests this Court grant summary judgment in favor of

Defendant declaring that the County has the authority to regulate parcels held in fee simple within the boundaries of the Reservation through its comprehensive zoning code, regardless of whether they are owned by the Tribe, Tribal members, or otherwise.

Dated this 16th day of September, 2019.

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