Short Form Order Index No. 631610/2024

SUPREME COURT – STATE OF NEW YORK
PART 78 – SUFFOLK COUNTY

P R E S E N T:
Hon. Maureen T. Liccione
Justice Supreme Court

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TOWN OF SOUTHAMPTON, NEW YORK and CHARLES MCARDLE in his official capacity as Superintendent of Highways,

Plaintiffs,

-against-

LISA GOREE, LANCE GUMBS, SENECA BOWEN, BIANCA COLLINS, GERMAIN SMITH, DANIEL COLLINS, SR., and LINDA FRANKLIN, in their official capacities as members of the Council of Trustees of the Shinnecock Indian Nation,

Defendants.

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DECISION AND PRELIMINARY INJUNCTION ORDER

Mot. Seq. No. 002 – MG
Orig. Return Date: 02/19/2025
Mot. Submit Date: 03/10/2025

PLAINTIFFS' ATTORNEY
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New York, NY 10178

DEFENDANTS' ATTORNEY
BIG FIRE LAW & POLICY GROUP, LLP
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Akwesasne, NY 13655

Upon the e-filed documents numbered 8 to 15, 74 to 84, the oral argument held on March 10, 2025, and upon deliberation, it is hereby:

ORDERED that Plaintiffs' motion for an order preliminarily restraining and enjoining the Defendants in their official capacities as members of the Council of Trustees of the Shinnecock Indian Nation from continuing during the pendency of this action to direct and supervise the construction of a large travel plaza, including a gas station and convenience store, on the 80-acre residential parcel of non-reservation land known as "Westwoods" located in the Hampton Bays area of the Town of Southampton, in violation of Town Codes and New York State law, is granted; and it is further

ORDERED that Defendants hereby are enjoined from directing and supervising all activities in furtherance of construction of a travel plaza, gas station, convenience store, petroleum storage tanks, and appurtenant structures, including but not limited to excavation and paving, on the land known as "Westwoods" located in the Hampton Bays area of the Town of Southampton; and it is further

ORDERED that all activities in furtherance of construction of a travel plaza, gas station, convenience store, retail store, smoke shop, petroleum storage tanks, and appurtenant structures, including, but not limited to, excavation and paving on the land known as "Westwoods" located in the Hampton Bays area of the Town of Southampton are hereby enjoined during the pendency of this action and must cease immediately.

Procedural History

Plaintiffs, the Town of Southampton and Charles McArdle in his official capacity as Superintendent of Highways (collectively Town or Plaintiffs) bring this action for declaratory and injunctive relief against the defendants Lisa Goree, Lance Gumbs, Seneca Bowen, Bianca Collins, Germain Smith, Daniel Collins, Sr., and Linda Franklin (Trustees or Defendants) in their official capacities as members of the Council of Trustees of the Shinnecock Indian Nation (Nation) for violations of State and local laws and regulations in connection with the development of a travel plaza (Travel Plaza) on property owned by the Nation known as Westwoods. The Nation is a federally recognized Indian tribe as of October 1, 2010 and occupies and controls the Shinnecock Reservation (Reservation) in the Town of Southampton, Suffolk County.

On December 20, 2024, Plaintiffs filed their summons and verified complaint. The verified complaint included three causes of action: violation of zoning ordinances and State and local laws concerning the development of the Travel Plaza, public nuisance, and violation of the New York Highway Law. On January 27, 2025, Defendants filed their motion to dismiss for lack of personal jurisdiction. The personal jurisdictional issues were resolved by stipulation, and as a result, the motion to dismiss was denied as moot by this Court's February 20, 2025 Order.

Plaintiffs now move for a preliminary injunction, pursuant to CPLR 6301, 6311 and 6312, to enjoin the Trustees in their official capacity as members of the Council of Trustees of the Nation from continuing to direct and supervise the construction of a commercial gas and retail development, the Travel Plaza, on the Westwoods parcel in violation of the Town Code and New

York State law. The Trustees oppose the motion. Oral argument on the preliminary injunction application was held on March 10, 2025.

Westwoods

Westwoods consists of approximately 80 acres and is bordered to the north by the Great Peconic Bay, extends over Newtown Road, and ends just south of the Sunrise Highway, all west of the Shinnecock Canal. Westwoods is not part of the Reservation, which is located east of the Shinnecock Canal. Nor is it held in trust by the federal Bureau of Indian Affairs (*Commr. of New York State Dept. of Transportation v Polite*, 225 NYS 3d 106, 116 [2d Dept 2024]). Westwoods is not a "dependent Indian community" within the meaning of 18 USC § 1151, the significance of which is explained below. No property taxes have been assessed or imposed on Westwoods.

The Nation was in possession of the lands in and around the Town of Southampton, including Westwoods, when the first European settlers arrived in 1640 (*New York v Shinnecock Indian Nation*, 523 F Supp 2d 185, 196 [ED NY 2007], as amended [Feb 7, 2008], *vacated and remanded*, 686 F 3d 133 [2d Cir 2012]).

In the 17th century, there were two transactions in which the Nation sold lands west of Canoe Place, including Westwoods, to non-Indians and the Town subsequently acquired those lands. More specifically, on May 12, 1659, Sachem (Chief) Wyandanch and his son, on behalf of the Nation, conveyed the lands west of Canoe Place, including what is now known as Westwoods, to the European settler John Ogden (Ogden Deed) (NYSCEF Doc No. 10). On April 10, 1662, Sachem Wyandanch's successor, Weany Sunk Squaw, and others, on behalf of the Shinnecocks, sold and conveyed lands west of Canoe Place to the European settler Thomas Topping (Topping Deed), also now Westwoods (*id.*).

On October 3, 1666, Governor Nicolls of the Province of New York issued a determination recognizing the validity of the Topping Deed, the extinguishment of the Nation's title to the land now known as Westwoods, and the ownership of this land exclusively by the Town (*id.* ["all the right and interest that ye said Capt Thomas Topping" had by virtue of the Topping Deed "is belonging, doth and shall belong unto the town of Southampton ... and their successors forever"]) (Nicolls Determination) (*id.*).[1]

[1] The Trustees provided as an exhibit Professor Katherine Hermes' research report, in which she contended that the Topping and Ogden Deeds were invalid as a result of the laws of the Colony of Connecticut, under whose jurisdiction the Town operated at the time of these transactions. Professor Hermes argued that those conveyances were void because of a pre–1650 order of the Connecticut General Court, which required the General Court's approval of any

New York v Shinnecock Indian Nation

Casino Construction at Westwoods

Westwoods has been undeveloped forest for centuries with no permanent residents. In 2003, the Nation intended to build a casino at Westwoods. New York State and the Town sued, seeking to permanently enjoin the Nation from constructing a casino and conducting certain gaming at Westwoods. After a 30 day bench trial, which included over 20 witnesses, over 600 exhibits, and over 4,000 pages of transcripts, the Eastern District of New York determined that the evidence "overwhelmingly demonstrated" that aboriginal title held by the Nation to Westwoods was extinguished in the 17th century when the Nation sold the land to non-Native Americans (Topping and Ogden), and further determined that the absence of current aboriginal title to Westwoods subjected the potential development of a casino to New York State law (*New York v Shinnecock Indian Nation*, 523 F Supp 2d 185) (Federal Action). The Federal Court (Bianco, J.) also noted that "(1) there is no reliable evidence of use and occupancy of land west of Canoe Place by the Shinnecock Tribe from about 1675 until the 1800s; and [that] (2) 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" (*id.* at 278).

The Eastern District of New York held that the proposed casino development was barred under the Supreme Court's decision in the *City of Sherrill v Oneida Indian Nation* because of the "highly disruptive consequences the development and operation of a casino would have on the neighboring landowners, as well as the Town and the greater Suffolk County community" (*id.* at 189). The Federal Court concluded that the plaintiffs had demonstrated that they were entitled to a permanent injunction that prevented the development of a casino at Westwoods that was not in full compliance with New York and Town laws and regulations. The decision was later vacated by the Second Circuit in 2012 not on the merits, but rather, for lack of subject matter jurisdiction

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transactions between settlers and Indians, and that no such approval was located. In *New York v Shinnecock Indian Nation,* Judge Bianco concluded that the pre–1650 order did not provide a sufficient legal basis to declare these transactions void as a matter of historical fact or as a matter of law and detailed the "significant weaknesses" of Professor Hermes' research (523 F Supp at 268). There is no discussion of the report by the Trustees in their memorandum in opposition to the preliminary injunction motion. Judge Bianco's order was reversed solely for the lack of a Federal question and not on the merits. While the exhibits upon which Judge Bianco relied were not submitted by the State in *Polite,* causing the Appellate Division to disregard the factual findings, here, those exhibits were submitted by both parties.

because no federal question had been pled. Although it cannot be considered binding precedent, the merits of the factual findings and the legal ruling in the Federal Action decision have never been challenged.

Commissioner of the New York State Department of Transportation v Polite

Billboard Construction at Westwoods

On December 4, 2024, the Appellate Division, Second Department issued a detailed decision and order in *Commissioner of the New York State Dept of Transp. v Polite*, 225 NYS3d 106 [2d Dept 2024] (*Polite*) concerning the construction of billboards at Westwoods and held, among other things, that the Trustees did not enjoy the exemptions from State law that they claimed.

In *Polite,* the Department of Transportation (State) sought money damages, as well as preliminary and permanent injunctions, against the construction of two LED billboards on structures 60 feet high and 20 feet wide on a portion of Westwoods which is along the Sunrise Highway's (Route 27) right of-way. It was conceded that the billboards had been erected without obtaining the necessary State permits. The State alleged that the billboards were not constructed in compliance with applicable highway laws and raised safety concerns. In the amended complaint, the State contended that the Nation owned Westwoods in fee simple and that Westwoods was not within the borders of the Reservation.

The Supreme Court, Suffolk County (Berland, A.J.S.C.), denied the Trustees defendants' motion to dismiss, as well as the State's motion for preliminary injunction. On appeal, the Appellate Division reversed the Supreme Court insofar as it dismissed the State's claims for money damages but upheld the denial of the Trustees' motion to dismiss the remaining claims, including for a permanent injunction. Notably, the Appellate Division also reversed the Suffolk Supreme Court's denial of the State's preliminary injunction motion, finding that the State was likely to succeed on the merits, the balance of equities favored the State, and that there was a danger of irreparable harm.

The Appellate Division found that Westwoods did not enjoy exemptions from State law and regulations governing the erection of the structures because it was not "Indian Country" as defined in 25 USC § 1151 (*see Alaska v Native Village of Venetie Tribal Government*, 522 US 520, 527 [1998]). The *Polite* Court held that Westwoods, located on the west side of the Shinnecock Canal, was not part of the Reservation located on the east side of the Shinnecock

Canal, which benefits from such exemptions. The Appellate Division also noted that Westwoods was not owned by the Federal government in trust for the Shinnecock Nation, which might have exempted it from State regulation. The Appellate Division also emphasized that Westwoods had no "federally recognized status" (*Polite*, 225 NYS3d at 138). Finally, the Appellate Division declined to review whether Westwoods was exempt from State regulation because it was held in "aboriginal title," as the Nation had argued, because the record was deficient. Although the State had contended that aboriginal title held by the Nation was extinguished in the 17th century when the Nation sold the land to non-Native Americans, the relevant deeds and title documents had not been put in evidence, as they had been in the Federal Action.

The *Polite* Court went on to rule that regardless of the federal or aboriginal title status of Westwoods, the State was likely to succeed on the merits on its claim for a preliminary injunction because "a recognition of the Nation's ability to assert sovereign power over the subject property for purposes of constructing, maintaining, and/or operating the structures in the highway right-of-way would likely be highly disruptive of settled expectations" (*Polite*, 225 NYS3d at 137; *see City of Sherrill v Oneida Indian Nation of N.Y.*, 544 US 197, 202 [2005]; *Oneida Indian Nation of N.Y. v County of Oneida*, 617 F3d 114 [2d Cir 2010]; *Cayuga Indian Nation of N.Y. v Pataki*, 413 F3d 266, 277 [2d Cir 2005]; *Shinnecock Indian Nation v New York*, 2006 WL 3501099, *5, 2006 US Dist LEXIS 87516, *17-18 [ED NY 2006]).

January 2, 2025 Federal Bureau of Indian Affairs (BIA) Letter

On the heels of the *Polite* decision, on January 2, 2025, the Town Board received a one-page letter from Bryan Newland, Assistant Secretary (Assistant Secretary) of the United States Department of Interior, Bureau of Indian Affairs (BIA Letter). The Assistant Secretary informed the Town Board that that the BIA approved the Nation's request to record the Westwoods parcel as "restricted fee land held by the Nation" (NYSCEF Doc No. 10). The BIA Letter stated that:

> The Department examined the land title status of the Westwoods parcel and determined that it is within the Nation's aboriginal territory, that the Nation has resided within its aboriginal territory since time immemorial and has never removed therefrom, and that Westwoods is within the purview of the Nonintercourse Act and is therefore restricted against alienation absent consent of the United States.
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> (*id.*).

The BIA Letter indicated that this recordation was prompted by the Nation's request to the BIA to record and reaffirm its land as restricted fee status. The Town had no notice of this request and, therefore, made no presentation to the BIA. The BIA Letter refers to no legal authority supporting this determination and does not shed any light onto what documents or other evidence may have been examined by the BIA in arriving at this determination.[2]

The BIA Letter invoked a December 23, 2024 "memorandum" in which the Assistant Secretary directed the recordation of Westwoods as "restricted fee" (December 23 Memorandum). The December 23 Memorandum indicated:

> Following that legal review, the Solicitor's Office determined that Westwoods is within the Nation's aboriginal territory which encompasses the Town of Southampton and other lands on eastern Long Island, NY. The Nation has resided within its aboriginal territory since time immemorial and has never been removed therefrom. Based on its legal review, the Solicitor's Office concluded that Westwoods is within the purview of the Nonintercourse Act and is therefore restricted against alienation absent consent of the United States. As such, title to Westwoods should be recorded as restricted fee land in the Bureau of Indian Affairs Trust Asset and Accounting Management System (TAAMS).
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> (NYSCEF Doc No. 84).

The December 23 Memorandum further stated that "[t]he Nation was adjudicated to be the fee owner of Westwoods as of approximately 1830" by way of adverse possession, which extinguished the Town's title as recognized by Governor Nicolls, and cited to two cases in support of such statement:

> *Trustees of Tribe of Shinnecock Indians v. Cassady* (Suffolk Cnty. Sup. Ct. July 19, 1890) ("The tribe of Shinnecock Indians have been in quiet and peaceable possession of the premises . . . for upward of sixty years."); *Shinnecock Tribe of Indians v. Hubbard* (Suffolk Cnty. Sup. Ct. Dec. 24, 1922) (holding that the Nation "has good title" to Westwoods by means of adverse possession).
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> (NYSCEF Doc No. 84).
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> The BIA Letter is being administratively appealed by both the State and the Town.

[2] As indicated, *infra*, however, NYSCEF Doc No. 80 contains the documents the Nation submitted to the BIA when it made its request. Only documents supporting the Nation's claim of restricted fee status are included. None of the expert materials upon which Judge Bianco relied on in the Federal Action are included.

Construction of the Travel Plaza at Westwoods

In April 2024, the Nation began excavation and other preliminary construction work for a Travel Plaza at Westwoods, south of Newtown Road and north of Sunrise Highway, in a previously forested and undeveloped area. The Travel Plaza is slated to have gasoline pumps for 20 vehicles, 56 parking spaces, a commercial kitchen, a smoke shop, retail, and "drive-thru" areas. The Travel Plaza is the first phase of an extended development plan by which the Trustees intend to build a resort on Westwoods. Prior to the commencement of the construction, Westwoods was not subject to any vehicular or foot traffic. Westwoods is zoned residential and is surrounded by lands zoned as residential. There is no commercial activity in the area and no commercial site is accessible from Newtown Road, which is a Town road maintained by the Town. Before construction started, Nation officials met with the Town officials several times to discuss the project.

Photographs provided by the Plaintiffs show that significant forested land has been cleared at the proposed site abutting numerous residential properties on Quail Run, which is located on the west side of Westwoods. A 1,000-foot length of forest was cleared of trees and bushes for a road being constructed along the backyards of the residences to connect the Travel Plaza to Newtown Road, and which will provide the only egress and ingress to the Travel Plaza. Paving of this 1,000 foot road has started. In order to connect this new road to the Travel Plaza, a portion of Newtown Road's right of way was removed, and two curb cuts were installed, without permission from the Town Superintendent of Highways. Furthermore, the Nation and its contractors, also under the direction of the Trustees, removed pre-existing concrete barriers that for decades had prevented vehicular traffic from entering Westwoods.

On August 23, 2024, having observed the excavation and clearing of vegetation at Westwoods, the Town issued a stop work order to stop the construction, which was displayed on a wooden post at the site of the Travel Plaza. The stop work order stated: "It shall be unlawful for any person, firm or corporation, or their agents or other servants, to resume work without receiving a Stop Work Lift Letter from the Building Department" (NYSCEF Doc No. 1). The post was knocked down, unheeded, while construction work continued at the site. The Town then returned and re-posted the stop work order at the site. The Nation and its agents and contractors disregarded this second stop work order.

On August 28, 2024, the Town issued complaints against the Nation and against one of its contractors for violations of Town Code § 287-7 and § 287-13 with respect to the installation of a driveway and curb cuts for the purpose of connecting Newtown Road to the Travel Plaza.

At the site of the Travel Plaza, gasoline storage tanks, steel columns, fuel pumps, and conduits for hazardous materials, have already been installed in violation of the stop work orders. The gasoline storage tanks are currently filled with water and have not been covered by concrete yet, as agreed by the parties pursuant to the So-Ordered Stipulation dated March 10, 2025. Contractors have been observed laying asphalt on portions of the parcel.

The Trustees have neither sought nor obtained the Town's permission to construct or operate the Travel Plaza at Westwoods. The Trustees have **not**: (1) applied for or received site plan approval for any activity at Westwoods from the Town in accordance with Town Code § 330-184; (2) sought the recommendation of the Fire Chief and Town Bureau of Fire Prevention prior to the installation of gas storage tanks at the site of the Travel Plaza as required by Town Code § 330-133; (3) submitted building permit applications to the Town showing compliance with Town zoning laws, fire code regulations, and New York environmental laws with respect to any building to be constructed at Westwoods pursuant to Town Code § 330-175 and Town Building Code § 123; (4) applied for or received any permit or approval from the Town for any activity conducted or to be conducted at Westwoods, including any application for a use variance; (5) sought the permission of the Town Superintendent of Highways prior to the installation of the road or curb cuts connecting Newtown Road to the new Travel Plaza roadway as required by Town Code § 287-7 and § 287-13.

The Trustees contend that they are constructing the Travel Plaza in accordance with a work permit issued by the Nation and in accordance with construction standards and specifications which meet or exceed the Federal, State, and local standards for a project of this type (NYSCEF Doc No. 74). A work permit was issued by the Nation to Eastern Woods Petroleum, Inc. and Moorefield Construction, Inc. regarding construction at the Travel Plaza. According to the Trustees, work at the Travel Plaza is conducted between 7:30 a.m. and 4:30 p.m.

The Town has received numerous complaints from the residents of the Town regarding the construction of the Travel Plaza. Photographs show the presence of heavy construction equipment in very close proximity to homes on Quail Run. Bulldozers, steam rollers, and large trucks are

constantly at the site. The Town indicated at the March 10, 2025 oral argument that stadium like lights have been installed at the construction site. Construction is ongoing.

Plaintiffs' Motion for Preliminary Injunction

Plaintiffs' notice of motion seeks to enjoin the Trustees from continuing to direct and supervise the construction of the Travel Plaza. Plaintiffs contend that the Westwoods is not "Indian Country" and that the Nation's aboriginal title in Westwoods was extinguished in the 17th century. Plaintiffs further contend that the Trustees have failed to comply with zoning ordinances and State and local laws by failing to obtain and apply for the appropriate permits and site plan approval and not constructing the Travel Plaza in accordance with applicable zoning ordinances and State and local laws, including the New York Highway Law. The Trustees oppose Plaintiffs' motion contending that Westwoods is "Indian Country" and that the Nation's aboriginal title to the Westwoods was not extinguished. The Trustees also argue that the Town does not have jurisdiction over the Trustees and that State and local laws are inapplicable on aboriginal restricted fee lands.

"The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor" (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]; *Aetna Ins. Co. v Capasso,* 75 NY2d 860, 862 [1990]; *see* CPLR 6301]). "However, to obtain preliminary injunctive relief based on a violation of its zoning ordinances, a town need only show that it has a likelihood of ultimate success on the merits and that the equities are balanced in its favor (*First Franklin Square Assocs., LLC v Franklin Square Prop. Acct.,* 15 AD3d 529, 533 [2d Dept 2005]).

"The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual" (*Perpignan v Persaud*, 91 AD3d 622, 622 [2d Dept 2012]; *Ying Fung Moy v Hohi Umeki*, 10 AD3d 604, 605 [2d Dept 2004]). The decision whether to grant or deny a preliminary injunction rests in the sound discretion of the hearing court (*see Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d at 840). Conclusive proof is not required, and a court may exercise its discretion in granting a preliminary injunction even where questions of fact exist (*Ying Fung Moy v Hohi Umeki*, 10 AD3d at 605; *see* CPLR 6312 [c]). "[T]he purpose of a preliminary injunction is … not to determine the ultimate rights of the parties" (*Cong. Machon Chana v Machon Chana Women's Inst., Inc.*, 162 AD3d 635, 637 [2d Dept 2018]). "At this stage of the litigation…the issue is one of probabilities with the ultimate determination of the merits to be made at trial or summary judgment after development of a full

record" (*McKinney's Commentaries,* CPLR 6312, C:6312.1, citing *J.A. Preston Corp v Fabrication Enterprises, Inc.*, 68 NY2d 397, 406 [1986]; *see also Incorporated Vil. of Babylon v Anthony's Water Cafe, Inc.*, 137 AD2d 791, 791 [2d Dept 1988] ["[I]t is clear that the showing of a likelihood of success on the merits required before a preliminary injunction may be properly issued must not be equated with the showing of a certainty of success"] [emphasis and internal quotation marks omitted]). In order to obtain a preliminary injunction, the Plaintiffs only have to establish by "clear and convincing evidence their likelihood of success on the merits on one cause of action that would entitle them to have the relief sought in the preliminary injunction" (*Polite*, 225 NYS3d at 145).

Applying these standards, here, the three requirements for preliminary injunctive relief have been met by the Plaintiffs. Plaintiffs demonstrated a probability of success on the merits, a danger of irreparable injury in the absence of an injunction, and a balance of equities in their favor.

A. Likelihood of Success on the Merits

As in *Polite*, here, the Plaintiffs' ability to establish their likelihood of success on the merits on their causes of action depends upon their ability to demonstrate that State and local law apply to Westwoods. Plaintiffs contend that they are likely to prevail on this issue because the Nation's aboriginal title to the Westwoods has been extinguished, Westwoods is not "Indian Country," and as such, the Westwoods is subject to the regulatory authority of the Town; and that recognition of the Nation's regulatory authority over Westwoods would unduly disrupt settled expectations under *Sherrill*. In opposition, the Trustees attach great significance to the BIA Letter and assert that the designation of Westwoods as "restricted fee" property exempts Westwoods from any local regulation and, therefore, requires denial of the Town's preliminary injunction motion.

1. BIA Letter

The Trustees present the restricted fee status pronounced in the BIA Letter as the key to their success on this motion (and litigation), the reason this Court should not follow the binding precedent of *Polite*, and as affording them complete immunity from compliance with State and local law at Westwoods. However, the BIA Letter does not have the game changing consequences that the Trustees are alleging.

Preliminarily, and as noted above, the BIA Letter refers to no legal authority or legal analysis supporting the determination that Westwoods is restricted fee land. The advice from the Solicitor's Office upon which the Assistant Secretary based the BIA Letter is not part of this

record, and it is unknown what evidence the Solicitor's Office reviewed as part of its legal review. Specifically, it is unknown whether the entire lengthy record from the Federal Action, which included testimony from 20 witnesses over 30 days, various extensive expert reports, and more than 600 exhibits, was part of that review. The Trustees indicated that the reports of their expert from the Federal Action, Professor Katherine Hermes, were provided to the BIA (NYSCEF Doc No. 80) as part of Defendants' application, but it is unknown whether the other documents upon which the Federal Action relied were considered. Finally, the succinct BIA Letter is currently being administratively appealed by both the Town and the State of New York. Accordingly, it is not final for purposes of the instant preliminary injunction application. Furthermore, it is most likely that the ruling on the appeal will be challenged in Federal court. Nevertheless, despite the above identified issues with the BIA Letter, this Court will consider the determination in the BIA Letter and the language of the December 23 Memorandum.

The BIA Letter asserts that Westwoods is "restricted fee land" held by the Nation, within the purview of the Non-Intercourse Act and thus, is restricted against alienation absent consent of the United States. Federal regulations define "restricted land" as "land the title to which is held by an individual Indian or a Tribe and which can only be alienated or encumbered by the owner with the approval of the Secretary due to limitations contained in the conveyance instrument pursuant to Federal law or because a Federal law directly imposes such limitations" (25 CFR 151.2). The Non-Intercourse Act, which was first enacted by Congress in 1790 and is still the law today, provides, in pertinent part, that "no purchase, grant, lease, or other conveyance of lands from any Indian nation or tribe of Indians will be valid unless made by treaty or convention entered into pursuant to the Constitution" (25 USC § 177).[3] Section 177 appears to restrict alienation of lands of an Indian nation regardless of the form in which title is held and its implementing regulations declare that they apply to "lands held in trust by the United States for an Indian tribe, lands owned by a tribe with Federal restrictions against alienation and any other land owned by an Indian tribe"

[3] "The obvious purpose of that statute is to prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties, except the United States, without the consent of Congress, and to enable the Government, ... to vacate any disposition of their lands made without its consent" (*Fed. Power Commn. v Tuscarora Indian Nation*, 362 US 99, 119 [1960]). Typically, the Non-Intercourse Act is invoked today to invalidate a conveyance of lands possessed by Native Americans made without the consent of the United States (*Applicability of 25 U.S.C. § 2719 To Restricted Fee Lands*, Department of the Interior, Office of the Solicitor, M-37023, 2009 WL 9514107, at *3).

(Cohen's Handbook of Federal Indian Law § 18.03 [2] [c] [iii] [2024]; *see also* 25 CFR 152.22 [b]).

Thus, the crucial aspects of a restricted fee land are the restrictions against alienation and encumbrances. Alienation is "the transfer of property and possessions of lands, tenements or other things, from one person to another" (*see Conover v Mutual Insurance Co. of Albany*, 1 NY 290, 294 [1848]; *Huestis v Nassau County,* 40 Misc2d 858, 861 [Sup Ct, Nassau County 1963]; Black's Law Dictionary [to alienate means "to convey or to transfer title to property"]). Concomitantly, zoning regulates the use of land in the "proper exercise of the police power," but is not an encumbrance (*Lincoln Tr. Co. v Williams Bldg. Corp.,* 229 NY 313, 317 [1920]; *JBGR LLC v Chicago Title Ins. Co*., 62 Misc3d 313, 317 [Sup Ct, Suffolk County, 2018], *affd* 195 AD3d 604 [2d Dept 2021], *lv to app denied* 38 NY3d 904 [2022] ["zoning regulation is not an encumbrance on title to property"]).

2. Nation's Title to Westwoods

As noted above, Plaintiffs contend that they are likely to prevail on the merits of their causes of action because Westwoods is not "Indian Country" under Federal law and the Nation does not have "aboriginal title" to Westwoods, and thus Westwoods is not immune from New York law and the regulatory authority of the Town. The Town contends that the Nation's conveyance of Westwoods by deed to Ogden and Topping in the 17th century extinguished the Nation's aboriginal title to Westwoods, that Westwoods was subsequently acquired by the Town, and that the Nation took fee simple title from the Town by adverse possession. As to the BIA Letter, the Town contends that it does not purport to make a finding that the Nation holds aboriginal title to Westwoods, or that Westwoods is "Indian Country" under 18 USC § 1151. The Town argues that restricted fee land is not the same as aboriginal title or "Indian Country," and affords no immunity from compliance with State and local laws and regulations.

In opposition, the Trustees argue that Westwood is "Indian Country" because it is restricted fee land and that "restricted fee tribal lands are subject to federal--not State—regulation"[4] (NYSCEF Doc No. 74). The Trustees argue that the Town's claim that the Nation's aboriginal title to the Westwoods was extinguished is inaccurate because the BIA Letter specifically rebuts that assertion.

[4] Presumably including local regulation.

a. Westwoods Is Not "Indian Country"

The term "Indian Country" is defined in 18 USC § 1151 as

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Although the definition of "Indian Country" in 18 USC § 1151 by its terms relates only to Federal criminal jurisdiction, the United States Supreme Court has recognized that it also generally applies to questions of civil jurisdiction (*see Alaska v Native Vill. of Venetie Tribal Govt.*, 522 US at 527; *Polite*, 225 NYS3d at 139, n 11; *see also* Cohen's Handbook of Federal Indian Law § 4.04 [1] ["The modern definition of Indian Country is found in the criminal code but applies in the civil context as well."]). Generally speaking, "primary jurisdiction over land that is Indian Country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States" (*Alaska v Native Vill. of Venetie Tribal Govt.*, 522 US at 527; *see South Dakota v Yankton Sioux Tribe*, 522 US 329, 343 [1998]).

As argued by Plaintiffs, Westwoods is not "Indian Country" because it fails to satisfy any of the 18 USC § 1151 criteria. Westwoods is not part of the Reservation, it is not a dependent Indian community,[5] and it is not an Indian allotment (*Polite*, 225 NYS3d at 138). The definition of "Indian Country" does not refer to and does not recognize restricted fee land as "Indian Country." Furthermore, the *Polite* Court specifically rejected the Trustees' argument that Westwoods was "Indian Country" pursuant to 18 USC § 1151. The Trustees do not provide any legal authority in support of their contention that restricted fee land is "Indian Country" and do not address 18 USC § 1151 and its three categories. The BIA Letter and the December 23 Memorandum do not state that Westwoods is "Indian Country."

[5] The term "dependent Indian communities" "refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements--first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence" (*Alaska v Native Village of Venetie Tribal Government,* 522 US at 527). Pursuant to the *Polite* Court, Westwoods appears to satisfy neither requirement (*Polite*, 225 NYS3d at 138).

As part of their argument that Westwoods is "Indian Country," the Trustees argue that the newly recognized status of restricted fee land "subjects [Westwoods] to the federal laws and regulations that oust State and local control of the land" (NYSCEF Doc No. 74). The Trustees cite to one provision of the United States Code, 25 USC § 81 (b), and to three regulations, 25 CFR 169.9 and 169.10, and 25 CFR 1.4 to support this contention (Defendants' Memorandum of Law in Reply, NYSCEF Doc No. 74, p 8). However, as discussed below, none of these authorities are applicable in this action.

First, the Trustees turn to 25 USC § 81 (b). That section states that "no agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 years or more shall be valid unless the agreement or contract bears the approval of the Secretary of the Interior or designee of the Secretary." Here, there is no agreement or contract alleged and as noted above, zoning is not an encumbrance. Consequently, 25 USC § 81 (b) is of no relevance.

The Trustees next cite to 25 CFR 169.9 and 169.10, which concern rights-of-way over tribal lands, and state that they "are generally not subject to State law or the law of a political subdivision thereof." There is no mention of restricted fee land. Moreover, the Town has made no claim that it is entitled to a right-of-way over Westwoods.

The Trustees also rely on 25 CFR 1.4, which exempts tribal land held in trust by the Federal government and leased to or used by others, from local regulation:

> none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.

No lease or agreement is in consideration here. As a result, 25 CFR 1.4 is not implicated (*see Segundo v City of Rancho Mirage*, 813 F2d 1387 [9th Cir 1987]; *Cayuga Indian Nation of New York v Village of Union Springs*, 317 F Supp 2d 128, n 16 [ND NY 2004]).

Therefore, the Trustees have not identified any applicable legal authority determining that the restricted fee status removes the Town's regulatory jurisdiction over Westwoods, or that restricted fee land is "Indian Country."

Lastly, this Court rejects the Trustees' argument that BIA's determination that Westwoods is a restricted fee land "removes the foundation of the *Polite* Order and removes any basis for the Town's attempt to exert regulatory jurisdiction over Westwoods Territory" (NYSCEF Doc No. 74). The Trustees argue that the *Polite* Court's determination was based on the "fundamental premise" (NYSCEF Doc No. 74) that "there is no indication in the record that Westwoods currently has any federally recognized status" (*Polite*, 225 NYS3d at 138) and that the restricted fee recognition completely vitiates the *Polite* decision. However, right after stating that there was no indication in the record that the Westwoods had any federally recognized status, the Appellate Division stated that there was no indication in the record that Westwoods was part of a federally recognized reservation and or owned in trust by the Federal government for the Nation (*id.*). Of course, this is still the case. The "federally recognized status" as referred to by the Appellate Division, that is, the status of a land as part of a reservation or as being held in trust by the Federal government, has not changed for Westwoods. Furthermore, the Trustees have not shown what part of the very detailed and lengthy *Polite* decision would no longer be applicable because of the restricted fee status, but for generally stating that the *Polite* decision is now "stale" (NYSCEF Doc No. 74).

b. Aboriginal Title

"Aboriginal title refers to the [Native Americans'] exclusive right to use and occupy lands they have inhabited 'from time immemorial, but that have subsequently become 'discovered' by European settlers" (*Seneca Nation of Indians v New York*, 382 F3d 245, 248 n 4 [2d Cir 2004], quoting *County of Oneida v Oneida Indian Nation of N.Y.*, 470 US 226, 234 [1985]). As the *Polite* Court noted, aboriginal title can be "extinguished" by the sovereign "discoverer" through a taking by war, physical dispossession, contract, or treaty (*Polite*, 225 NYS3d at 139; *see United States v Santa Fe Pac. R.R. Co.*, 314 US 339, 347 [1941] [holding that aboriginal title can be extinguished "by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise"). Once aboriginal title in a property has been extinguished, it cannot be revived, even if the Native American nation subsequently reacquires the land (*see Cass County v Leech Lake Band of Chippewa Indians*, 524 US 103, 115 [1998]; *Delaware Nation v Commonwealth of Pennsylvania*, No. 04–CV–166, 2004 WL 2755545, at *10 [ED Pa Nov. 30, 2004]).

Unlike the Plaintiffs in *Polite*, the Town's allegations here regarding the extinguishment of the aboriginal title are supported by the evidence upon which the Eastern District of New York in the Federal Action established that the Nation's aboriginal title to Westwoods was extinguished, that is the Ogden and the Topping Deeds and the determination of Governor Nicolls. The plain and unambiguous language of these colonial era documents of the 17th century demonstrate the acquisition of the Westwoods by the Town and the extinguishment by the sovereign of aboriginal title to the Westwoods.

The Trustees argue that BIA Letter specifically rebuts the Town's assertion that the Nation's aboriginal title to the Westwoods was extinguished. However, neither the BIA Letter nor the December 23 Memorandum even mention the term "aboriginal title," but, rather, merely state that "the Nation has resided within its aboriginal territory since time immemorial and has never removed therefrom" (NYSCEF Doc No. 10). The statement that Westwoods is located within the confines of the Nation's "aboriginal territory" (i.e., what is now Southampton) has nothing to do with whether the Nation held or lost aboriginal title to Westwoods. In fact, in the December 23 Memorandum, the Assistant Secretary stated that the Nation had been adjudicated to be the fee owner of Westwoods as of approximately 1830 by citing to the holding in *Hubbard* that the Nation "ha[d] good title" to Westwoods by means of adverse possession (NYSCEF Doc No. 84). This indicates that the Nation's aboriginal title had been extinguished. At common law "in order to establish title by adverse possession, it was incumbent upon [parties] to show that they… held the land adversely and in hostility to the **true owner**, claiming the entire title thereto" (*Doherty v Matsell*, 119 NY 646, 647 [1890] [emphasis supplied]).[6] Clearly, if the Nation was awarded Westwoods via adverse possession, it could only be because Westwoods had been owned by another party, namely the Town.

Thus, Plaintiffs met their burden to establish a likelihood of success on the issue of whether Westwoods is not "Indian Country" and on the issue of whether the Nation's aboriginal title to the Westwoods has been extinguished. Given that the Trustees have not demonstrated that the restricted fee designation exempts Westwoods from local regulation, Plaintiffs are likely to prevail on their merits.

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[6] *See also* RPAPL § 501 (["A person or entity is an 'adverse possessor' of real property when the person or entity **occupies real property of another person** or entity with or without knowledge of the other's superior ownership rights, in a manner that would give the owner a cause of action for ejectment"] [emphasis added]).

3. Settled Expectations

Plaintiffs further contend that they are likely to prevail on the merits irrespective of claimed aboriginal title, as the unlawful construction of the Travel Plaza and its presence in the community, especially as a precursor to a resort, are highly disruptive of settled expectations under the doctrine announced in *City of Sherrill v Oneida Indian Nation of N.Y.*, 544 US 197 [2005] (*Sherrill*). In opposition, the Trustees argue that *Sherrill* is inapplicable here because the Nation has maintained its sovereignty over Westwoods, there is no established State or Town regulatory jurisdiction to disrupt, the BIA Letter confirmed that the Nation's tenure at Westwoods has been continuous for centuries, and Westwoods has not been subject to taxation or the Town's regulatory authority.

In *Sherrill*, the Supreme Court pronounced the precept of "justifiable" or "settled" expectations when reviewing the exercise of Native American sovereign authority. The High Court noted that where the sovereign authority of the Oneida Nation would create, unilaterally at the Oneida Nation's behest, a "checkerboard of alternating state and tribal jurisdiction in New York" that would "seriously burde[n] the administration of state and local governments and would adversely affect landowners neighboring the tribal patches" (*Sherrill*, 544 US at 219-20 [internal citation omitted]). The Supreme Court further stated that if the Oneida Nation "may unilaterally reassert sovereign control and remove these parcels from the local tax rolls, little would prevent the [Oneida Nation] from initiating a new generation of litigation to free the parcels from local zoning or other regulatory controls that protect all landowners in the area" (*id.* at 220).

"[T]he broadness of the Supreme Court's statements indicates to us that *Sherrill*'s holding is not narrowly limited to claims identical to that brought by the [Oneida Nation], seeking a revival of sovereignty, but rather, that these equitable defenses apply to 'disruptive' [Native American] land claims more generally" (*Polite*, 225 NYS3d at 143, quoting *Cayuga Indian Nation of N.Y. v Pataki*, 413 F3d at 274). Citing to the broad language in *Sherrill*, the Second Circuit in *Cayuga* emphasized that the *Sherrill* holding could not be limited to the narrow factual circumstances in *Sherrill*, but rather should be applied to disruptive Indian land claims more generally (*Cayuga Indian Nation of N.Y. v Pataki*, 413 F3d at 273 ["We understand *Sherrill* to hold that equitable doctrines, such as laches, acquiescence, and impossibility, can, in appropriate circumstances, be applied to Indian land claims"]). Therefore, contrary to the Trustees' contention, it is appropriate to utilize the framework from *Sherrill* to analyze the Trustees' intended use of Westwoods, which

has been undeveloped and forested for centuries, to build the Travel Plaza in violation of zoning laws.

Here, as in *Polite*, Plaintiffs are likely to succeed on their claim because "this case presents the type of disruptive land claim that would be barred under the doctrine of *City of Sherrill*" (*Polite*, 225 NYS3d at 141). As noted above, homeowners neighboring Westwoods are currently and will be adversely affected by the construction of the Travel Plaza. Further, there is a settled expectation on the part of the area residents that the Town would maintain Newtown Road in its present condition and would regulate the proper location of curb cuts, as well as ingress and egress to the Travel Plaza. There is a settled expectation that the roadway would not be cut into wooded lands in a residential rural area in order to permit access to the 20 pump gas station, smoke shop, retail, and convenience stores from the heavily traveled Sunrise Highway. There is a settled expectation of the neighboring residents that Westwoods would preserve its residential character, that there would not be thousands of additional motorists driving on Newtown Road and across the newly constructed road to access the Travel Plaza, and that there would not be a major commercial development in a residential zone that has been forested for centuries. There is an expectation on the part of the residents and homeowners that State and local laws will protect their health, safety and welfare by imposing site plan controls, which would likely require adequate buffers between their homes and the Travel Plaza.

There is no evidence that prior to 2024 any development had occurred on the portion of the Westwoods where the Travel Plaza is being built. Photographs provided by the Plaintiffs taken prior to 2024 show the subject area covered with forests. In light of the historical usage of Westwoods as a forested, uninhabited, and undeveloped area, the Trustees' development of the Travel Plaza would have "disruptive practical consequences" (*Sherrill*, 544 US at 219).

Moreover, the *Polite* Court held that "[i]f avoiding property tax is disruptive (*see City of Sherrill v Oneida Indian Nation of N.Y.*, 544 US at 220), then avoiding compliance with state laws that prevent the construction of structures in a highway right-of-way without undergoing the appropriate safety review is even more disruptive (*see Cayuga Indian Nation of N.Y. v Village of Union Springs*, 390 F Supp 2d 203, 206 [ND NY] ["If avoidance of taxation is disruptive, avoidance of complying with local zoning and land use laws is no less disruptive. In fact, it is even more disruptive"]" (*Polite*, 225 NYS3d at 142). Following the same reasoning, if avoiding compliance with State laws that prevent construction of billboards without undergoing the

appropriate safety review is disruptive, then avoiding compliance with local zoning laws and the New York Highway Law that prevent the construction of a pump gas station for 20 vehicles with retail stores and a road in a residential community without following the appropriate health and safety review is clearly more disruptive.

In considering the disruptive impact under *Sherrill*, the Court will not only consider the current stated use of Westwoods, but also other future disruptive consequences that could result from a ruling of this Court permitting the Trustees to freely develop Westwoods in their sole discretion and free of any State and local regulation. As in *Polite*, "if the Nation is permitted to assert sovereign authority over the subject property for purposes of these structures, little would prevent the Nation from asserting full sovereign authority over the subject property or even requiring that the portion of the highway that goes through the subject property be rerouted" (*Polite*, 225 NYS3d at 143) to create, for example, an exit ramp on Sunrise Highway to the Travel Plaza to attract more vehicles and enhance sales and revenue.

A large commercial development at the Travel Plaza, which is what is desired by the Trustees, would require expenditure of additional Town funds to provide essential services to the Travel Plaza, such as police, fire, and ambulance, and to maintain the infrastructure of the Newtown Road and the surrounding local Town roads.

Moreover, although the Town has not imposed property taxes on Westwoods, the Town has exercised its government authority over Westwoods by improving and maintaining Newtown Road and by zoning Westwoods as residential.[7] The exercise of such governmental authority is

[7] At oral argument, Plaintiffs explained, using a trial exhibit from the Federal Action, that in 1986, the Town re-zoned Westwoods residential R–60 through the adoption of local law and that Westwoods remains zoned residential. In response, the Trustee argued that in 1987, the State informed the Trustees that the Town had not authority to zone Westwoods. However, a review of the mentioned April 9, 1987 letter from Robert Batson, legal counsel for the New York Department of State (DOS), shows that Mr. Batson makes no reference to Westwoods. Mr. Batson's letter stated the obvious legal maxim: "[t]o the extent that the Town of Southampton zoning ordinance purposes to regulate land use on the **Shinnecock Reservation**, it is of no force and effect whatsoever" (NYSCEF Doc No. 80, Ex. 11 [emphasis added]). The May 20, 1987 response letter from the Southampton Town Attorney Fred Thiele to the DOS also refers only to the Town's policy concerning its zoning laws with respect to the Reservation. Similarly, Defendants cite to a December 31, 1987 formal opinion by the then New York State Attorney General, Robert Abrams, which determined that the State was without "authority to regulate substance abuse programs on **Indian reservations,"** unless there was an application by the tribal council (NYSCEF Doc No. 79 [emphasis added]). Because all these 1987 letters address the Reservation, and not Westwoods, they are not relevant to this action, do not successfully challenge the Town's assertion that Westwoods is zoned residential, and do not compel denial of the preliminary injunction application.

important when analyzing the equitable factors under *Sherrill* and contradicts the Trustees' assertion that the Town has never regulated the Westwoods parcel.

Additionally, similarly to *Polite*, this Court finds the Trustees' contention that the Travel Plaza is compliant with the safety standards of the Nation's own choosing unpersuasive, as there is no indication that the Westwoods had been previously subject to such a "checkerboard" of regulation (*Sherrill.*, 544 US at 219).

Therefore, as in *Polite*, the Town is likely to prevail on its claims that its settled expectations require imposition of a preliminary injunction and that State and Town laws and regulations are likely to apply to the Westwoods. By following the Appellate Division's analysis of *Sherrill*, the Court finds that the Town has demonstrated that recognition of the Trustees' regulatory authority over the Westwoods for the purpose of constructing and operating the Travel Plaza would be too disruptive to settled expectations and would not be permitted under the *Sherrill* doctrine.

Plaintiffs have thus met their burden to demonstrate a likelihood of success (*Polite*, 225 NYS3d at 144-45).

B. Irreparable Harm

As noted above, to obtain preliminary injunctive relief based on a violation of its zoning ordinances, a town "need not satisfy the traditional three-part test for injunctive relief," but is required "only [to] show that it has a likelihood of ultimate success on the merits and that the equities are balanced in its favor" (*Town of Oyster Bay v Baker*, 96 AD3d 824 [2d Dept 2012], *as amended* [June 13, 2012] [internal quotations and citations omitted]). To obtain preliminary injunctive relief, a town must "come forward with a strong prima facie showing that the defendants are violating its zoning ordinance" (*id.* [internal citations omitted]). Here, there is no question that the Trustees are in violation of the zoning ordinances so that the prima facie burden has been met. In fact, in their opposition papers, the Trustees admit not having applied for and procured the appropriate approvals and permits from the Town for the development of the Travel Plaza.

Nevertheless, Plaintiffs chose to argue that they would suffer irreparable injury in the absence of an injunction stopping the construction of the Travel Plaza. Plaintiffs contend the Travel Plaza's continued construction threatens the physical safety of the Town's residents and the public and assaults the residents' rights to quiet enjoyment. In opposition, Defendants argue that the

Nation is building the Travel Plaza under construction standards and specifications that meet or exceed Federal, State, and County regulations.

The Court finds that Plaintiffs, even though they are not required to do so, have established the danger of an irreparable injury absent the grant of a preliminary injunction. Plaintiffs' submissions, which included a number of affidavits from different Town officials, are sufficient to establish for the purpose of a preliminary injunction that the construction of the 20 pump gas station in a residential area, close to residents' homes in violation of stop work orders and zoning regulations, threatens the safety and health of the Town's residents.

The Travel Plaza is in very close proximity to the homes on Quail Run. As stated by the Town's Chief Fire Marshal in his affirmation, the gas station's proximity to these residences presents a risk of fire and spillage of hazardous materials directly into residential backyards. The Trustees' failure to submit a site or building plan to the Town and its Chief Fire Marshal and the building of the Travel Plaza in disregard of appropriate Town laws and regulations raise serious safety concerns considering the future installation of flammable liquids at the site. The Town points out that the Trustees have not sought the recommendation of the Chief Fire Marshal and the Town's Department of Fire Prevention prior to installing the gas storage tanks, steel columns, and hazardous material conduits at the Travel Plaza in violation of the stop work orders and Town Code § 330-133. Due to the Trustees' failure to comply with zoning ordinances and State and local laws concerning the development of the Travel Plaza, the Town cannot review whether proper safety precautions have been taken with the construction of the Travel Plaza, such as the design of fire lanes, provision of fire protection water supply, or the installation of alarms and sprinklers.

Furthermore, Janice T. Sherer, Town Planning and Development Administrator, averred that underground fuel storage tanks not built according to applicable standards and requirements can present a risk of groundwater contamination, which would in return affect the safety of the water supply for the Town's residents. Ms. Sherer's affirmation shows that there could be negative effects on the natural environment around Westwoods due to the construction of the Travel Plaza in disregard of State and local laws and regulations.

"Whether driven by a concern for health and safety, esthetics, or other public values, zoning provides the mechanism by which the polity ensures that neighboring uses of land are not mutually-or more often unilaterally-destructive (*Brendale v Confederated Tribes & Bands of Yakima Indian Nation*, 492 US 408, 433 [1989]). "A town has the right pursuant to its police

powers, to prevent conditions dangerous to public health" (*Incorporated Vill. of Babylon v John Anthony's Water Cafe, Inc.*, 137 AD2d at 791 [village entitled to preliminary injunction to enjoin restaurant from operating in excess of capacity and to require removal of portions lacking village permits] [internal citation omitted]). Residents have an expectation that development in close proximity to their homes will be conducted in accordance with a site plan review and a road would not be paved through a forested area surrounding their homes without the proper approvals. They have an expectation that zoning regulations will protect the health and safety of their community, that if a gas station is being constructed it is in compliance with all applicable safety standards. Similarly, the *Polite* decision gave credit to the statements in the affidavit of the State's engineer that work performed on or near a public highway without first being reviewed through a permitting process is "inherently dangerous" (*see Polite*, 225 NYS3d at 145).

A court may restrain acts which are "dangerous to human life, detrimental to the public health and occasion great public inconvenience and damage" (*Inc. Vill. of Babylon v John Anthony's Water Cafe, Inc.*, 137 AD2d 792, 794 [2d Dept 1988]). Therefore, Plaintiffs have demonstrated that the continued construction at the Travel Plaza, which includes the handling of flammable and hazardous materials, in violation of the zoning laws, would pose a danger to the public's safety and health.

C. Balance of the Equities

Lastly, the balance of the equities weighs in favor of the Town. The Trustees do not deny that they are in violation of, among others, Town Code §§ 287-7, 287-13, 330-133, 330-175 and 330-184, and Town Building Code § 123. They have not complied with the Town's requirements for site plan review and approval. They have ignored two stop work orders and violations issued by the Town. Curb cuts were made without approval of the Town Highway Superintendent and a road linking Newtown Road to the Travel Plaza was cut through the woods and paved with no approval (*see Town of Riverhead v Gezari*, 63 AD3d 1042, 1043 [2d Dept 2009] [the balance of the equities favored Town, as the Town demonstrated that the defendants' failure to obtain a special permit for use of their properties to take off and land a helicopter posed safety hazards and noise concerns]; *First Franklin Square Assocs., LLC v Franklin Square Prop. Acct.*, 15 AD3d at 533 [equities balanced in Town's favor where violation of zoning ordinance would change a traffic pattern that existed for over 30 years]). Residents have complained about the traffic and noise

created by the construction of the Travel Plaza, as bulldozers, steam rollers, and large trucks are constantly at the site in close proximity to their homes.

As discussed above, the construction of the Travel Plaza without regard to zoning or other Town regulations would substantially disrupt the settled expectations of the community. The community would be served by ensuring that any development or construction at the Westwoods does not take place in violation of State law, zoning laws, and other Town laws and regulations.

In the affidavit of Lisa Goree, the Chairwoman of the Nation, the Trustees argue that they will suffer financial harm if the Travel Plaza project would be stopped. Trustee Goree argued that the revenue projected from the operation of the Travel Plaza will provide vital support for the Nation, that the Nation is planning on using the revenue funds for payroll, a Senior Citizen Meal Program, the Nation's Finance and Human Resources Departments, and after-school Indian Education. However, the Trustees' hardships are of their own making, since they took the risk of entering into construction contracts and excavating the parcel in the face of the Suffolk Supreme Court's holding in *Polite,* which denied their motion to dismiss, and continued construction even after the Appellate Division's *Polite* decision reversed the Supreme Court's denial of a preliminary injunction for construction activities on the same property.

Balancing the risk of financial harm to the Defendants with the danger to public safety posed by their conduct, the Court finds the balance of equities favors the Plaintiffs (*see Polite*, 225 NYS3d at 148).

Necessary and Indispensable Parties

In their opposition papers the Trustees set forth "objections" contending that this Court lacks jurisdiction over them because 1) the Nation has sovereign immunity; 2) the Nation, whose sovereign immunity prevents joinder, is a necessary and indispensable party, and 3) the United States, whose sovereign immunity prevents joinder, is a necessary and indispensable party (*see* CPLR 1001 [b]). However, the Defendants did not cross-move to dismiss pursuant to CPLR 3211 and 2215. Without service of a notice of cross-motion, affirmative relief cannot be granted to Defendants (*Chun v North American Mort. Co.,* 285 AD2d 42 [1st Dept 2001] [the court was without jurisdiction to grant the relief afforded to defendants where there was an absence of a notice of cross motion or any other notice to plaintiff that she would be required to respond to a motion to dismiss]; *Bauer v Facilities Dev.,* 210 AD2d 992 [4th Dept 1994] [affidavits submitted in opposition to defendants' motions were insufficient to constitute a cross motion]; *Guggenheim*

v Guggenheim, 109 AD2d 1012 [3d Dept 1985] [it was not sufficient to demand relief in opposing affidavits or memoranda; an outright notice was required to avoid surprise to the original movant]). Accordingly, these issues cannot be reached on this motion.[8]

The Trustees' Laches Argument

The Trustees argue that since preliminary work at the Town Plaza began in April of 2024, the Town's delay should bar injunctive relief, presumably on the basis of laches. However, "[a] municipality, it is settled, is not estopped from enforcing its zoning laws by .... by laches" (*Parkview Assocs. v City of New York*, 71 NY2d 274, 282 [1988]). "Neither laches nor estoppel may prevent a municipality from enforcing its zoning laws by way of a preliminary injunction" (*Lake Placid Vill., Inc. by Vill. Bd. of Trustees v Lake Placid Main St. Corp.*, 90 AD2d 873, 874 [3d Dept 1982]; *see Town of Eastchester v Noble*, 2 Misc2d 1034 [Sup Ct, Westchester County 1956ss], *affd* 2 AD2d 714 [1956] ["Where property owner knows or should know that his use of property is in contravention of zoning ordinances, despite its inactivity and failure to object, municipality is neither chargeable with laches nor estoppel to preclude it from enforcing zoning ordinances"]).

Here, the Town took steps to halt the construction and preserve the status quo by issuing stop work orders and violations and by commencing this action. The preliminary injunction motion was delayed because of the Nation's motion to dismiss for lack of personal jurisdiction. Once the personal jurisdiction issues were resolved by way of a stipulation the preliminary injunction motion was brought. Thereafter, the parties entered into a stipulation to halt some of the work (*see Town of N. Elba v Grimditch,* 131 AD3d 150, 156–57 [3d Dept 2015] [where defendants proceeded with construction "without authority, approval or the required permits and in utter disregard of stop work orders [and]—engaged in what can only be described as [a]... 'race to completion'", a preliminary injunction in favor of the town was issued]). Thus, the Trustees' laches argument is rejected.

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[8] Parenthetically, the Court notes that in *Polite* the Appellate Division specifically rejected the argument that the Nation was an indispensable party when it ruled: "Based on our balancing of the five factors in CPLR 1001(b), the Nation is not an indispensable party to this action. 'Indeed, a contrary holding would effectively gut the *Ex parte Young* doctrine'" (*Polite*, 225 NYS3d at 136 [internal citations omitted]).
With regard to the allegation that the United States is an indispensable party, it is noted that the parties have cited numerous cases where rulings were made regarding regulation of land owned by Native Americans in which the United States is not named as a party (*e.g., City of Sherrill v Oneida Indian Nation of N.Y.*, 544 US 202; *Oneida Indian Nation of N.Y. v County of Oneida*, 617 F3d 114; *Cayuga Indian Nation of N.Y. v Pataki*, 413 F3d 266; *New York v Shinnecock Indian Nation*, 523 F Supp 2d 185; *Polite*, 225 NYS3d 106). ,

Prayer for Relief

The prayer for relief in Plaintiffs' notice of motion is for an order "preliminarily restraining and enjoining the defendants from continuing during the pendency of this action to direct and supervise the construction of a large travel plaza, including a gas station and convenience store, on the 80-acre residential parcel of non-reservation land known as 'Westwoods'" (NYSCEF Doc No. 8). It also contains the general request "for other such relief as to this Court seems just and proper" (*id.*).

Each of the affirmations in support of Plaintiffs' motion, including those of the Chief Building Inspector, Sean McDermott, the Chief Fire Marshall, John Rankin, the Planning and Development Administrator, Janice Scherer, and a neighbor, Carol McNeill, all conclude with the request that "the construction of the Travel Plaza, including the gas station, needs to be stopped immediately" (NYSCEF Doc Nos. 11-14). In addition, the final paragraph in Plaintiffs' memorandum of law in support of their motion asks that the Court "grant its motion and issue a preliminary injunction enjoining the Trustee Defendants from further construction" (NYSCEF Doc No. 9). Plaintiffs' reply memorandum asks the Court to "enjoin the Trustee Defendants from their continued illegal construction of the Travel Plaza" (NYSCEF Doc No. 83). Plaintiffs' proposed preliminary injunction order provided for the Trustees to "immediately cease directing, causing, supporting, enabling, supervising, implementing or effectuating the construction, development or operation of a planned Travel Plaza, including a gas station and convenience store, on the Westwoods parcel without first obtaining written confirmation from the Town of full compliance with applicable Town and state law, until further Order of this Court" (NYSCEF Doc No. 15).

In view of these requests for relief, this decision and Order not only grants the relief requested in the notice of motion, but also includes language enjoining "all activities in furtherance of construction of a travel plaza, gas station, convenience store, petroleum storage tanks and appurtenant structures, including but not limited to excavation and paving on the land known as 'Westwoods.'" "The court may grant relief that is warranted pursuant to a general prayer for relief contained in a notice of motion if the relief granted is not too dramatically unlike the relief sought, the proof offered supports it, and there is no prejudice to any party" (*Trenton Cap., LLC v Bank of New York Mellon*, 184 AD3d 766, 767 [2d Dept 2020]; *Calderon v Esenova,* 132 AD3d 711, 712

[2d Dept 2015]; *Evans v Argent Mtge. Co., LLC,* 120 AD3d 618, 620 [2d Dept 2014]; *Carter v Johnson,* 110 AD3d 656, 658 [2d Dept 2013]).

Here, there is a general prayer for relief as well as requests to stop all construction in each of the affirmations in support so that the proof supports the relief granted by this Court. There is no prejudice to the Trustees because the preliminary injunction order to stop all construction activity is similar to the relief requested in the notice of motion and the Trustees were on notice of Plaintiffs' request for the stopping of the construction as demanded in the various documents submitted by Plaintiffs.

Accordingly, Plaintiffs' motion for a preliminary injunction is granted. The Court has considered the parties' remaining contentions and finds them to be without merit or unnecessary to this determination.

The foregoing constitutes the decision and order of the Court.

ENTER

DATE: March 17, 2025
Riverhead, NY

HON. MAUREEN T. LICCIONE, J.S.C.

___ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION