STATE OF NEW YORK
SUPREME COURT SUFFOLK COUNTY

TOWN OF SOUTHAMPTON, NEW YORK and CHARLES McARDLE in his official capacity as Superintendent of Highways,	:	Index No. 631610/2024
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.	:	

MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION BY
PLAINTIFFS TOWN OF SOUTHAMPTON, NEW YORK AND CHARLES McARDLE

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Janon Fisher, *Southampton Town suing Shinnecock Indian Nation over Hampton Bays travel plaza construction*, NEWSDAY (Dec. 22, 2024) 14

Plaintiffs the Town of Southampton, New York (the "Town") and Superintendent of Highways Charles McArdle ("McArdle"), respectfully move for a preliminary injunction to enjoin, pursuant to CPLR 6301, 6311 and Rule 6312, Defendants Lisa Goree, Lance Gumbs, Seneca Bowen, Bianca Collins, Germain Smith, Daniel Collins, Sr., and Linda Franklin ("Trustee Defendants") in their official capacities as members of the Council of Trustees of the Shinnecock Indian Nation (the "Nation") from continuing to direct and supervise the construction of a commercial gas and retail development (the "Travel Plaza"), on an 80-acre residential parcel of non-reservation land in violation of Town Codes and New York state law.

PRELIMINARY STATEMENT

The Town and Mr. McArdle seek to preserve the status quo ante by preliminarily enjoining Trustee Defendants from overseeing continued construction of the Travel Plaza designed to materially alter the nature and use of a residential parcel known as "Westwoods"—a large wooded tract in Suffolk County that is not part of the Nation's reservation. As the Second Judicial Department of the Appellate Division recently confirmed, in a case involving the *same* parcel and the *same* Trustee Defendants,[1] Trustee Defendants are subject to suit in state court to enjoin ongoing violations of New York state law beyond the reservation. Trustee Defendants' efforts to develop the Travel Plaza are highly disruptive and cause material adverse impacts to the surrounding residential community, which injury will continue absent injunctive relief. Trustee Defendants have caused the Nation to disregard Town regulations and authority, ignore questions from the Town about the environmental and safety impacts, flout zoning and permitting requirements, trample on Town property rights, and otherwise threaten the quiet enjoyment of the

[1] *Comm'r of N.Y. State Dept. of Transp. v. Polite*, No. 2020-05137, at *8 -- A.D.3d --, -- N.Y.S.3d --, 2024 WL 4964811, at *5 (N.Y. App. Div. 2nd Dept. Dec. 4, 2024).

surrounding area by the Town and its residents. As the *Polite* decision makes clear, these actions are already, and will continue to be, highly disruptive of settled expectations such that they must be precluded under *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005).

Such unsanctioned and unsupervised construction threatens the physical safety of the Town's residents and the traveling public, the health of the environment, the orderly administration of government, and residents' quiet enjoyment of their property. These harms cannot be cured by money damages and must be enjoined.

Plaintiffs are likely to succeed on their claims that Trustee Defendants are violating multiple sections of the Town Code, that Trustee Defendants are trespassing upon and causing injury to Town property, that Trustee Defendants are maintaining a public nuisance through their development activity, and that Trustee Defendants threaten to increase the public nuisance through operation of the Travel Plaza without adequate oversight, approval, or safeguards, endangering the health and safety of the Town's residents.

The balance of the equities strongly weighs in favor of Plaintiffs because the irreparable injury is being sustained only by the Town and its residents and visitors, while maintaining the status quo by halting further injury inflicts little or any burden on Trustee Defendants, who made the decision to pursue substantial commercial development in a residential-zoned natural environment while explicitly rebuffing the same health and safety standards applicable to every other fee owner of property in the Town.

* * *

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

The Parties.

Plaintiff the Town is a municipal corporation organized under the laws of the state of New York, situated within Suffolk County, New York. (NYSCEF Doc. No. 1) ("Complaint" or "Compl.".) Plaintiff Mr. McArdle is the Town's Superintendent of Highways. (*Id.*, ¶ 2.)

Defendant Lisa Goree ("Goree") is the Chairwoman of the Council of Trustees of the Nation, a federally recognized Indian Tribe as of October 1, 2010 that occupies and controls the Shinnecock Reservation in Suffolk County. (*Id.*) Remaining Trustee Defendants are officers and members comprising the Council of Trustees. (*Id.*, ¶ 10.)

Illegal Development of the Westwoods Parcel.

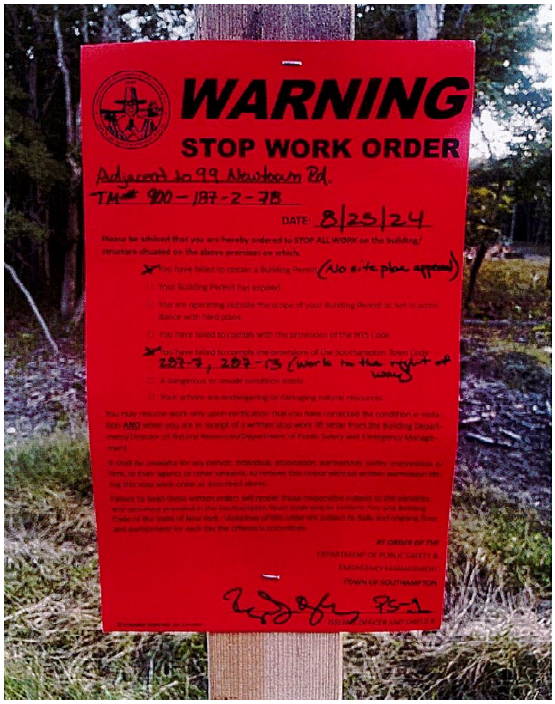
Trustee Defendants have engaged contractors to construct the Travel Plaza in a residential area, including a large gas station and convenience store, on the Westwoods parcel. (Compl., ¶ 40.) Early plans for the Travel Plaza contemplate fueling locations for 20 vehicles and some 56 parking spaces, in addition to a commercial kitchen, smoke shop, retail, and "drive-thru" areas. (Compl., ¶ 41.) The Travel Plaza is the first phase of an extended development plan by which Trustee Defendants intend to build a resort area. (Compl., ¶ 49.) The Town has met repeatedly with certain Trustee Defendants to discuss the Nation's intent to develop the Westwoods parcel. (Compl., ¶ 50.) At no point did Trustee Defendants or any affiliates or agents of the Nation present to the Town a formal proposal or timetable regarding construction, or otherwise submit to the development review process applicable to all fee land in the Town. (*Id.*, ¶¶ 50, 70.)

Trustee Defendants have, however, caused the Nation and its agents to clear trees and other natural growth, lay asphalt, and begin construction, which continues at a rapid pace. (Compl., ¶ 52.) The natural character of the land has been utterly destroyed by the perpetual and increasing activity, as indicated in this image from November 2024:

August 23, 2024, Stop Work Order

The Town has attempted repeatedly to enforce its governmental authority or otherwise engage the Trustee Defendants in efforts to bring the project into compliance with local law, but all of those efforts have been flouted. On August 23, 2024, having observed the unlawful excavation and clearing of vegetation on the Westwoods parcel, the Town issued a Stop Work Order to halt construction at the site of the Travel Plaza, including that: "**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."** (Compl., ¶¶ 57, 59.) The

Stop Work Order was displayed on a wooden post at the site of the Travel Plaza, which Trustee Defendants caused to be knocked down. (*Id.* ¶ 58.) The Town returned to post a second Stop Work Order, which the Trustee Defendants have ignored. The Stop Work Order is prominent and impossible to miss:



August 28, 2024 Complaints

In August, the Town issued complaints against the Nation and one of its contractors for violations of Town Code § 287-7 and § 287-13 for installing curb cuts and a driveway to connect Newtown Road to the Travel Plaza. (Compl., ¶ 60; Affirmation of Michael T. Paslavsky ("Paslavsky Aff.") Ex. A.) Newtown Road, which is a Town Road maintained by the Town, bisects the north and south portions of Westwoods adjacent to the construction site. (Compl., ¶¶ 56, 104.) Trustee Defendants' contractors were observed removing a portion of Newtown Road's right of way to install curb cuts and a driveway without permission from the Town Superintendent of Highways. (Compl., ¶ 56.)

Trustee Defendants have continued to oversee development of Westwoods in derogation of the Stop Work Order and complaints. (Compl., ¶ 61.) Trustee Defendants have acknowledged the existence of the Stop Work Order, yet they continue to direct their agents to disregard it and proceed with construction. (Compl., ¶¶ 62, 63, 65, 68, 69.) The Nation and Trustee Defendants contend that they may disregard governmental regulation and oversight, and are free to fundamentally change the character of the parcel they own in fee, on the premise that Westwoods is "Indian Country" over which they exercise aboriginal sovereignty.

The Westwoods Parcel Is Not "Indian Country".

The Nation claims to own in fee these 80 acres in the Hampton Bays area west of the Shinnecock Canal. (Compl., ¶¶ 3, 17.) The Westwoods parcel is distinct from the Shinnecock Indian Reservation, which is located *east* of the Shinnecock Canal. (*Id.*, ¶ 18.) The federal government does not hold Westwoods in trust for the Nation. (Compl., ¶ 22, citing *Polite*, No. 2020-015137, at *30.) It has not been set aside by the federal government for the Nation's use; neither is it subject to federal superintendence as a dependent Indian community. (Compl., ¶ 23, citing *Polite*, No. 2020-05137, at *31.) And the Westwoods parcel is not an Indian allotment under 18 U.S.C. § 1151(c). (Compl., ¶ 24.) Therefore, Westwoods—unlike the Shinnecock Indian Reservation (which is *not* at issue here)—is not "Indian Country" under federal law.[2] The laws

[2] Primary jurisdiction to regulate "Indian country" rests with the federal government and the Indian tribe rather than with the state. *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, n.1 (1998). "Indian Country" is defined in 18 U.S.C. § 1151 as follows:

> (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.

and regulations of the Town and the state of New York apply to Westwoods just as they apply to any parcel of land, owned in fee, located within the Town. (*Id.*, ¶ 25.)

The Nation's Aboriginal Title to the Westwoods Parcel Was Extinguished.

The Nation does not have "aboriginal title"[3] to Westwoods because any aboriginal title was extinguished in the 17th century when the Nation sold the land to non-Indians and it was subsequently acquired by the Town. *Infra* § II.C. The Nation possessed the land that includes the Town and the Westwoods parcel at the time European settlers arrived in 1640. (Compl., ¶ 30.)[4] On December 13, 1640, the Tribal leadership executed a deed conveying all the Nation's rights, title, and interest in the land east of Canoe Place in what is now the portion of the Town east of the Shinnecock Canal where the Shinnecock Reservation is located currently. (Compl., ¶ 31; Paslavsky Aff. Ex. B.) On May 12, 1659, Sachem Wyandanch on behalf of the Nation conveyed by deed the land west of Canoe Place, including what is now known as Westwoods, to the European settler John Ogden (the "Ogden Deed"). (Compl., ¶ 32; Paslavsky Aff. Ex. C.) On April 10, 1662, Sachem Wyandanch's successor, Weany Sunk Squaw, conveyed by deed additional lands west of Canoe Place, including what is known as Westwoods, to the European settler Thomas Topping (the "Topping Deed") on behalf of the Nation under his authority as a tribal leader. (Compl., ¶ 33; Paslavsky Aff. Ex. D.)[5] Therefore, the Nation's conveyance of this land by deed

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[3] "Aboriginal title refers to the Indians' 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 F.3d 245, n.4 (2d Cir. 2004).

[4] The Complaint includes references to the actual exhibits introduced at trial in *New York v. Shinnecock Indian Nation*, No. 03-cv-3243 (JFB) (ARL) (E.D.N.Y.) ("*Shinneock Indian Nation*"). Copies of relevant exhibits are appended to the Paslavsky Affirmation.

[5] As explained by Judge Bianco, the Ogden and Topping Deeds both included Westwoods. *See Shinnecock Indian Nation*, 523 F. Supp. 2d 185, 200 (E.D.N.Y. 2007), *as amended* (Feb. 7, 2008), *vacated on jurisdictional grounds and remanded*, 686 F.3d 133 (2d Cir. 2012) ("Whatever

to Ogden and Topping, European settlers, extinguished the Nation's aboriginal title to Westwoods. (Compl., ¶ 34.) On October 3, 1666, New York Province Governor Nicolls issued a determination recognizing the validity of the Topping Deed and extinguishment of the Nation's aboriginal title to the land now known as Westwoods, and ownership of this land *exclusively* by the Town. (Compl., ¶ 35; Paslavsky Aff. Ex. E.)

January 2, 2025 Letter from the Bureau of Indian Affairs ("BIA")

The Nation claims to own Westwoods in fee. On January 2, 2025, the Town received notice that the BIA approved the Nation's request to classify the Westwoods parcel as "restricted fee land held by the Nation" (the "BIA Action").[6] The BIA Action, currently pending appeal, states that the Nation has "resided within its aboriginal territory" and that the Westwoods parcel is "within the Nation's aboriginal territory." (*Id.*). The BIA does not purport to make a finding that the Nation holds aboriginal *title* to Westwoods, or that Westwoods is "Indian country" under 18 U.S.C. § 1151. "Restricted fee" land is not the same thing as aboriginal title or "Indian country," and affords no immunity from compliance with state and local law.

ARGUMENT

Preliminary injunctive relief is warranted when a plaintiff establishes that (1) it is likely to succeed on the merits, (2) it will suffer irreparable harm absent a preliminary injunction, and (3) the balance of the equities favors entry of an injunction. *See* CPLR 6301 *et. seq.*; *NOBU Next Door, LLC v. Fine Arts Hous., Inc.*, 4 N.Y.3d 839, 840 (2005). Irreparable harm is "the single most important prerequisite for the issuance of a preliminary injunction. *Bank of Am., N.A. v. PSW NYC LLC*, 918 N.Y.S.2d 396 (N.Y. Sup. Ct., N.Y. Cnty. 2010). "[T]he purpose of the interlocutory

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the reason for these overlapping deeds (which both included Westwoods), there is no question that these lands were sold by the Shinnecock Tribe[.]").

6 (*See* Paslavsky Aff. Ex. F.)

relief is to preserve the status quo until a decision is reached on the merits." *Tucker v. Toia*, 388 N.Y.S.2d 475, 478 (N.Y. App. Div. 4th Dept. 1976). "It is enough if the moving party makes a prima facie showing of his right to relief; the actual proving of his case should be left to the full hearing on the merits." *Id.*

The Town meets each required element. That the Town is entitled to preliminary relief is supported by the Appellate Division's recent ruling in *Polite*, No. 2020-05137, at *8, which held that the State was entitled to preliminary relief to halt the Nation's construction of billboards on the Westwoods parcel. The construction and operation of a commercial Travel Plaza with attendant runoff and environmental hazards are materially more disruptive and consequential than erecting the billboards at issue in *Polite*. It follows from the Appellate Division's ruling that this Court must grant the Town preliminary relief.

I. Plaintiffs Will Suffer Irreparable Harm Absent Injunctive Relief.

The "most important prerequisite" for issuance of a preliminary injunction is harm not compensable by money damages. *See Bank of Am.*, 918 N.Y.S.2d 396. Just like in *Polite*, this Court should find that Plaintiffs have met their burden of establishing the danger of irreparable injury from Trustee Defendants' continued supervision of construction. Trustee Defendants' violations of New York state law and Town codes will cause irreparable harm because the Travel Plaza's continued construction: (i) threatens the physical safety of the Town's residents and the traveling public; and (ii) assaults the residents' rights to quiet enjoyment.

"[I]rreparable injury means a continuing harm resulting in substantial prejudice caused by the acts sought to be restrained if permitted to continue *pendente lite*." *Societe Anonyme Belge D'Exploitation De La Navigation Aerienne v. Feller*, 492 N.Y.S.2d 756, 758 (N.Y. App. Div. 1st Dept. 1985). Plaintiffs meet their burden when defendants' conduct endangers physical safety. *Cent. Park Sightseeing LLC v. New Yorkers for Clean, Livable & Safe Streets, Inc.*, 66 N.Y.S.3d

477, 481 (N.Y. App. Div. 1st Dept. 2017). On December 4, 2024, *Polite* found that the trial court had erred by denying a preliminary injunction where the State had shown evidence of harm from the billboard's risk to public safety. No. 2020-05137, at *5-6. The harm in that case was irreparable because the regulations concerning displays on billboards "aim to protect the traveling public" and failure to comply with these regulations "pose[d] an unacceptable danger to public safety." *Id.* at *41. The appellate court's analysis focused not only on the physical dangers posed by the structure, but on the injury inherent in denying local government its ability to oversee and regulate the construction activity. *Polite* credited the State's professional engineer that work performed on or near a public highway without first being reviewed through a permitting process is "inherently dangerous." *Id.* at *40. He explained that construction of the billboard would violate New York State regulations concerning billboards and road signs with illumination, concluding that "the proposed advertising signs will present an on-going hazard to the travelling public, who will be distracted by the illuminated lights and may swerve as a result." *Id.* at *41. The risk identified there was twofold, encompassing both the injury from ignoring applicable regulations and the hazard flowing from distraction of drivers.

The danger to public safety here is all the more unacceptable, and defiance of local government all the more egregious. Construction of a gas station involves handling flammable and hazardous materials, which if pursued in violation of Town codes and without adequate supervision endangers the physical safety of Town residents and the traveling public. Trustee Defendants have not sought the recommendation of the Chief Fire Marshal and Town Department of Fire Prevention prior to installing gas storage tanks, steel columns, and hazardous material conduits—all in derogation of Stop Work Orders and Town Code § 330-133. *See infra* §II(E).

To be sure, failing to apply for or obtain a building permit from the Town prior to beginning construction violates Town Building Code § 123, through which the Town enforces the New York State Uniform Fire Prevention and Building Code Act, N.Y. 18 §§ 370-383. (Compl., ¶ 88.) But the reason building permits are required is that public safety demands it. As explained in the Affirmation of John J. Rankin ("Rankin Aff."), Chief Fire Marshal for the Town's Department of Fire Prevention (the "Department"), the unauthorized construction of the Travel Plaza, including conduits for hazardous materials and gasoline storage tanks, poses an immediate and serious threat to the physical safety of the traveling public and the residents in close proximity to the gas station. (Rankin Aff. ¶¶ 21, 25, & 28.) Section 330-133 provides a process for reviewing the proposed installation of flammable materials to ensure public safety. (*Id.* ¶ 12.) Flammable liquids like gasoline can ignite easily and pose significant risk to physical safety. (*Id.* ¶ 25.) These procedures are mandated for every developer in the Town. Construction of the Travel Plaza without these essential safeguards poses an immediate risk to thousands of commuters and local residents. (*Id.* ¶¶ 25, 26, & 28.) To take obvious examples, an explosion caused by a leak of flammable liquids, or the crash of a fuel truck carrying 1,000 to 8,000 gallons of gasoline, both carry risks of fatalities or significant injuries. (*Id.* ¶ 26.)

Those scenarios do not even account for the additional hazard posed by the Travel Plaza site abutting residential properties on Quail Run. (Compl., ¶ 40.) The risks posed to these homes would be substantial even if the Travel Plaza were not planned right on top of them. (Rankin Aff. ¶¶ 25-26.) As planned, the gas station's proximity presents an unacceptable risk of fire and spillage directly into residential backyards. *(Id*. ¶¶ 27-28.) Perhaps these risks could be mitigated or perhaps not; but Trustee Defendants' refusal to even acknowledge them by engaging in the

development approval process that exists for evaluating them is not just illegal; it is unacceptably injurious to public health and safety.

Beyond these health and safety risks, Trustee Defendants' hostility to local government directly endangers the health of every resident in the area by compromising the local water supply. All Town residents depend on a single groundwater aquifer system for their freshwater needs, including drinking water. (Affirmation of Janice T. Scherer ("Scherer Aff.") ¶¶ 10-14.) Groundwater contamination has the potential to endanger the health and wellbeing of the entire population for decades. (*Id*. ¶¶ 25-27.) Contamination may be caused by improper handling, transport, stockpiling, and storage of hazardous materials, resulting in leaks or spills. (*Id*. ¶ 17.) Underground fuel storage tanks in particular present a significant risk of groundwater contamination due to their lifespan of 15-25 years, with increasing risk over time; even a small leakage rate of two drops per second can render nearly half a billion gallons of water unfit for drinking. (*Id*. ¶ 18.) Because fuel is not easily biodegradable, any leakage may result in a persistent buildup of contaminants in the water over time. (*Id*. ¶ 19.) These are among the reasons that the Town's Land Management Department works to implement laws and policies designed to mitigate the likelihood of leakage. (*Id*. ¶ 22.) Trustee Defendants have ignored these legal requirements, too, refusing to submit any certifications related to inspections of the fuel storage tanks currently being installed. (*Id*. ¶ 23.) The ongoing installation, construction, and eventual use of these storage fuel tanks are inherently dangerous to the Town's residents. (*Id*. ¶ 24.)

Trustee Defendants' rejection of applicable legal requirements has thwarted the Town's ability to evaluate and supervise the proposed development, resulting in construction activity that poses significant risks to the health and safety of the Town and its residents, which cannot be remediated by the payment of money. *See Matter of Stop BHOD v. City of New York*, 881

N.Y.S.2d 367, 367 (N.Y. Sup. Ct., Kings Cnty. 2009) (absent preliminary injunction, petitioners would be irreparably harmed by building expansion without the city conducting the legally mandated reviews designed to protect the community). Trustee Defendants' behavior, requiring the handling of flammable and hazardous materials, poses an "unacceptable danger" to public safety and the traveling public.

In addition to these health and safety concerns, the Court should find that Plaintiffs will suffer a different harm, equally irreparable, as the Travel Plaza's construction assaults the residents' quiet enjoyment of their property. Trustee Defendants have and continue to direct and supervise commercial construction, without any permits, in a *residential* area. The proposed site abuts residential properties on Quail Run, with a paved driveway along the full length of the neighboring residential development. (Compl., ¶ 40.) Trustee Defendants have directed and continue to direct and supervise the use of heavy construction machinery, such as bulldozers, steam rollers, and large trucks to construct the Travel Plaza. (Compl., ¶¶ 45-46.) The activity is in a location immediately off the residential property in what used to be woods, as shown here:

The Nation and its contractors have altered the Newtown Road right of way by installing a driveway and two curb cuts for egress of construction vehicles. (Compl., ¶ 106) As explained by local resident Carol McNeill, a once peaceful, quiet neighborhood set in a forest has become a construction zone replete with a cacophony of roaring trucks, jackhammering, paving, and building at all hours. (Affirmation of Carol McNeill ("McNeill Aff.") ¶¶ 7-14; *accord id.* ¶ 24 & Ex. B, ¶ 29 & Ex. C.)

Loud noises assaulting quite enjoyment of a plaintiff's home may constitute irreparable harm. *See 61 W. 62 Owners Corp. v. CGM EMP LLC*, 906 N.Y.S.2d 549, 553-54 (N.Y. App. Div. 1st Dept. 2010), *aff'd as modified and remanded*, 16 N.Y.3d 822 (2011) (finding that loud noise amounted to a "nightly assault on the quiet enjoyment" of residents' apartments). *See also Samaha v. Brooklyn Bridge Park Corp*., 217 N.Y.S.3d 166, 168 (2024) (finding sufficient evidence of irreparable harm and granting motion for preliminary injunction concerning "excessive noise levels emanating . . . at varying hours of the day and night"). Trustee Defendants say the Nation "won't stop construction" and "will continue." Janon Fisher, *Southampton Town suing Shinnecock Indian Nation over Hampton Bays travel plaza construction*, NEWSDAY (Dec. 22, 2024), https://www.newsday.com/long-island/shinnecock-travel-plaza-lawsuit-southampton-wdwa2veg. Injunctive relief is necessary to preserve the residents' quiet enjoyment of their property. *See 61 W. 62 Owners Corp.*, 906 N.Y.S.2d at 554; *see also Samaha*, 217 N.Y.S.3d 166 at 168.

II. The Town Is Likely to Succeed on the Merits of Its Claims.

There is no serious dispute that Trustee Defendants have violated, and caused the Nation to violate, Town Law and State Highway Law. Trustee Defendants have not even attempted to comply with pre-development requirements for site plans, review, approvals, and supervision, and they repeatedly ignored, and caused the Nation to ignore, warnings and notices posted by the

Town. Trustee Defendants neither deny that their activities cause material impacts on the Town nor assert that they actually complied with Town requirements. Rather, Trustee Defendants contend that they are not subject to New York or Town law, and can do whatever they want with Westwoods free of Town regulation or oversight. Trustee Defendants are wrong.

A. New York law precludes the challenged conduct irrespective of claimed aboriginal title because the planned Westwoods development is highly disruptive of settled expectations.

As it does with *every* fee owner, the Town seeks only to enforce laws designed to ensure the health, safety, and quiet enjoyment of Town residents and visitors. Trustee Defendants' claim of Tribal sovereign immunity to these laws is flawed for the reasons discussed in the next section. *See infra* § II.B. But *irrespective of* merit, Trustee Defendants' unilateral development is highly disruptive to settled expectations, and for that reason is barred under the doctrine of *City of Sherrill*, 544 U.S. at 221. Just like in *Polite* and *City of Sherrill*, this Court should reject the Nation's effort to ignore the impacts of its development on the surrounding community.

City of Sherrill imposes equitable constraints that preclude the exercise of Tribal sovereignty over land in ways that disrupt settled expectations irrespective of claimed aboriginal title. The United States Supreme Court there rejected a Tribe's effort to assert sovereign control to avoid a municipal regulatory scheme—in that case, property taxes—based on the effort having "*disruptive practical consequences*" in light of the historical usage of the subject lands and neighboring parcels. 544 U.S. at 219 (emphasis added). The *Sherrill* Court sought to avoid "seriously burde[ning] the administration of state and local governments." *Id.* at 220 (quoting *Hagen v. Utah*, 510 U.S. 399, 421, 114 S. Ct. 958, 970, 127 L. Ed. 2d 252 (1994)). Presciently, the Court held that recognizing asserted sovereignty to avoid one aspect of local governance (taxation) would open the door to the Tribe working to "free the parcels from local zoning or other regulatory controls that protect all landowners in the area." *Id.*

The Second Judicial Department's recent opinion in *Polite* requires this Court to apply the *City of Sherrill* analysis to preclude actions that contravene settled community expectations. *See Polite*, No. 2020-05137, at *35-38.[7] *Polite*also applies factually to Trustee Defendants' proposed further development of the same parcel at issue—but in a manner far more injurious to the community than was challenged there.

Polite reversed a trial court's decision to not issue a preliminary injunction, where the challenged impact to settled expectations was operation of an electronic billboard on the side of the road. *Id.* The Second Department held that declining to apply New York law would be highly disruptive to settled expectations because the billboard marked a departure from the longstanding management of the road area by the State. The *Polite* court explained that courts have relied upon *City of Sherrill* to "bar disruptive land claims" by Native American Nations. *Id.* at *35 (collecting cases). *Polite* rejected the Nation's contention that "safety standards of the Nation's own choosing" were an adequate substitute, and found that "[i]f avoiding property tax is disruptive . . . 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." *Id.* at *36-37. Importantly, *Polite* considered the "potential future consequences of the land claim at issue," finding that if the Nation were permitted to "assert sovereign authority over the subject property for purposes of these structures, little would prevent the Nation from asserting full

[7] This Court is "bound to apply the law as promogulated by the Appellate Division, Second Judicial Department." *Greenberg v. Spitzer*, 94 N.Y.S.3d 810, 814 (N.Y. Sup. Ct., Putnam Cnty. 2019).

sovereign authority over the subject property or even requiring that the portion of the highway that goes through the subject property be rerouted." *Id.* at *37.[8]

Here, too, Trustee Defendants' assertion of sovereignty over Westwoods would be highly disruptive to settled expectations. The laws being defied apply to everyone. They aim to mitigate risks to physical safety and wellbeing by requiring permits and safety reviews *before* development occurs. *Infra* § II.E. Avoiding compliance likewise would risk divesting the Town of regulatory authority over portions of the area's primary traffic artery, and opening the door to further obstructions in the Town's right of way. As in *Sherrill*, the Travel Plaza's construction also continues to disrupt settled expectations by "adversely affect[ing] landowners neighboring" the Westwoods parcel. 544 U.S. at 220.

B. Trustee Defendants may be sued in this Court for "off-reservation violations" of New York state law.

Polite instructs that officials of a Native American nation may be sued in New York State courts to enjoin off-reservation violations of New York state law. *Polite*, No. 2020-05137, at *8. Trustee Defendants comprise the Council of Trustees, which is the governing body of the Nation. (Compl., ¶¶ 3-10, 13.) The Nation has previously admitted that the Travel Plaza is not located on reservation land. (*See Shinnecock Indian Nation*, ECF No. 245 at ¶ 20 ("The Westwoods Parcel is not part of any reservation established by the State of New York.").) Here, because Plaintiffs' allegations are like those in *Polite*, relate to the same Defendants, and relate to the same parcel of land, this Court also should find that Trustee Defendants may be sued in this Court for their off-reservation violations of New York state law.

[8] The risk is real of such potentially "devastating consequences to the region's economy and a drastic impact on thousands of commuters." *Shinnecock*, 2006 WL 3501099, at *5 n.9. The Nation's stated intent is to ultimately build a resort area. (Compl., ¶ 49.)

C. Westwoods is not immune from New York law because the Nation's aboriginal title has been extinguished.

"Once aboriginal title in property has been extinguished, ***it cannot be revived***, even if the Native American nation subsequently reacquires the land." *Polite* No. 2020-05137, at *32 (collecting cases) (emphasis added).

The limitations imposed on development of Westwoods by *City of Sherrill* preclude the development challenged here irrespective of aboriginal title. But Westwoods also is more broadly subject to plenary New York state and local law because the aboriginal title asserted by the Nation was extinguished in the 17th century. Unlike the plaintiff-appellants in *Polite*, Plaintiffs' allegations here are supported by the evidence upon which Judge Bianco relied in *New York v. Shinnecock Indian Nation*[9] to establish that the Nation's aboriginal title to Westwoods was extinguished. The Court should find on the basis of this same evidence that Plaintiffs are equally likely to establish the same conclusion—that aboriginal title was previously extinguished. Such a finding ends the inquiry because this Court is bound by the rule that once aboriginal title in property has been extinguished, it cannot be revived. *Polite* No. 2020-05137, at *32.[10]

Aboriginal title "refers to the Indians' exclusive right to use and occupy lands they have inhabited from time immemorial, but that have subsequently become discovered by European

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[9] *See* 523 F. Supp. 2d 185, 188 (E.D.N.Y. 2007), *as amended* (Feb. 7, 2008), *vacated on jurisdictional grounds and remanded*, 686 F.3d 133 (2d Cir. 2012). In *Polite*, the Appellate Division held that the *Shinnecock Indian Nation* decision itself, as distinct from the evidence on which it was based, was not *evidence* of a plaintiff's likelihood of success in a suit against the Nation concerning Westwoods because the decision had been vacated on jurisdictional grounds. Here, however, the Town relies on the underlying evidence on which Judge Bianco founded his analysis and conclusion.

[10] The Nation elsewhere asserts that the January 2 BIA Action, currently pending appeal, somehow restores aboriginal title. It doesn't. Even apart from *Polite*, 2020-05137, the BIA Action does not even *purport* to find that the Nation holds aboriginal title to Westwoods. The unremarkable observation that Westwoods is geographically located within the bounds of the Nation's "aboriginal territory" says nothing about how the Nation held or lost *title* to that parcel..

settlers." *Seneca Nation of Indians v. New York*, 382 F.3d 245, 249 n.4 (2d Cir. 2004) (internal quotation marks omitted). *Seneca Nation* made clear that aboriginal title "was not inviolable." *Id.* "Since the adoption of the federal Constitution, the federal government has had the right of extinguishment." *Polite*, No. 2020-05137, at *32 (citing *Oneida Indian Nation of New York v. State of N.Y.*, 860 F.2d 1145, 1150 (2d Cir. 1988)). On the record before it, *Polite* held that plaintiff-appellants had not established they were likely to prove extinguishment of the Nation's aboriginal title ***for the reason that*** plaintiff-appellants "chose not to" "submit[ ] some or all of the *evidence* that the State relied upon in the federal court action to support the contention that the Nation's aboriginal title to Westwoods had been extinguished." *Polite*, No. 2020-05137, at *33. Here, by contrast, the Town relies upon the underlying evidence that Judge Bianco found to "overwhelmingly demonstrate" that the Nation's aboriginal was extinguished in the 17th Century, 523 F. Supp. 2d at 188, thereby establishing that New York state law applies to Westwoods in a plenary fashion, and not just via the limitations imposed by *City of Sherrill* and its progeny. (*See* Compl., ¶¶ 30-36.)

D. <u>Trustee Defendants are Liable for Maintaining a Public Nuisance</u>.

Plaintiffs will likely succeed establishing that Trustee Defendants, by constructing the Travel Plaza in derogation of any oversight or coordination with the Town, are liable for maintaining a public nuisance *off* reservation property. "A public nuisance exists for conduct that amounts to a substantial interference with the exercise of a common right of the public, thereby offending public morals, interfering with the use by the public of a public place or endangering or injuring the property, health, safety or comfort of a considerable number of people." *532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*, 727 N.Y.S.2d 49, 56 (2001). Trustee Defendants' illegal construction of the Travel Plaza is a public nuisance.

Polite held that plaintiff-appellant had adequately alleged a public nuisance arising from ongoing violations of New York state law, "by erecting, placing, installing, and continuing to maintain" the billboards at issue there. No. 2020-05137, at *4. *Polite* explained that, while plaintiff-appellant's allegations included a "past failure" to secure the required work permit, the alleged harm stemmed from defendant-appellants' "*continued* construction, operation and maintenance" of the billboards. *Id.* at *17 (emphasis added). Based on these allegations of ongoing violations, *Polite* affirmed denial of the motion to dismiss and ruled that plaintiff-appellant "sufficiently alleged an ongoing violation of the law for purposes of *Ex parte Young*." *Id.* at *16-17.[11]

Construction of the Travel Plaza here in violation of New York state and Town law creates an *ongoing* public nuisance that continues to substantially interfere with the health and safety of Town residents and endanger the surrounding environment. Managing these risks is precisely the reason that such laws and governmental review processes exist. *See* Town Code § 330-174 (zoning code adopted "for the promotion of the public health, safety, morals, comfort, [and] convenience of general welfare"). Construction activity contributes to traffic congestion, noise, pollution, and debris on local roads not designed to accommodate the increased load, which interferes with the Town residents' use of the Town's roadways. (Compl., ¶ 98.) Clearing the natural growth and laying asphalt without adhering to state and local requirements directly injures the natural environment, with potentially significant consequences for the health and safety of the Town's residents. (Compl. ¶¶ 69, 99.) Handling flammable and hazardous materials also poses an obvious danger. (Compl., ¶ 100.) Like in *Seneca Nation*, Trustee Defendants have "continuously impair[ed]" the Town's free use and enjoyment of Westwoods. 58 F.4th at 671.

[11] *See Ex parte Young*, 209 U.S. 123, 159-60 (1908).

E. Trustee Defendants are Liable for Violation of Zoning Ordinances and State and Local Laws Concerning Development of the Travel Plaza.

By overseeing and directing the construction of the Travel Plaza, Trustee Defendants *continue* to violate Town Code §§ 287-7, 287-13, 330-133, 330-175 and 330-184, and Town Building Code § 123. (*See* Paslavsky Aff. Ex. A.). The Nation has never disputed its noncompliance with these laws, so the likelihood-of-success inquiry as to the Trustee Defendants is particularly straightforward.

Trustee Defendants have not complied with pre-development requirements for site plans, review, approvals, and supervision. They have repeatedly ignored, and caused the Nation and its agents and contractors to ignore, warnings and notices posted by the Town. In a similar posture, the Trustee Defendants in *Polite* had failed to obtain a permit for billboard construction, enabling the *Polite* court to satisfy the standard for preliminary injunction on plaintiff-appellants' Highway Law § 52 claim. 2024 WL 4964811, at *39. Plaintiffs easily meet their burden as to all of the Town Codes discussed herein.

Town Code § 330-184

Town Code § 330-184 requires the submission of a site development plan and a conference with the Town's Planning Board prior to the construction of a new nonresidential building or structure. (Compl., ¶ 83.) Neither the Trustee Defendants, nor anyone at their direction even attempted to comply with this requirement. (*Id.*, ¶¶ 81-82.)

Town Codes §§ 287-7 and 287-13

Town Codes §§ 287-7 and 287-13 prohibit work and changes to the highway's right of way without a permit. Trustee Defendants do not claim to have complied. They acknowledged the existence of the Stop Work Order, yet continue to direct their agents to ignore it. (Compl., ¶ 62.) In violation of the Stop Work Order, the Trustee Defendants have installed gasoline storage tanks

and steel columns and conduits for hazardous materials, (*id.*, ¶¶ 63-64,) and begun paving an access driveway to the Travel Plaza. (*Id.*, ¶ 69.)

Town Code 330-133

Town Code § 330-133 concerning fuel storage tanks states that "[t]he recommendations of the local Fire Chief having jurisdiction and of the Town Bureau of Fire Prevention shall also be considered prior to approval of [the installation of flammable liquids or gas]." *Id.* Photographs show that gasoline storage tanks and conduits for hazardous materials have been installed. (Compl., ¶¶ 63, 65.) Trustee Defendants have not sought the recommendation of the Fire Chief and Town Bureau of Fire Prevention prior to the installation of these gasoline storage tanks.

Town Code 330-175 and Town Building Code § 123

Town Code § 330-175, part of the zoning regulations, concerns applications for and issuance of building permits and requires that building permit procedures "shall … conform[ ]" with Town Building Code at § 123, through which the Town enforces the New York State Uniform Fire Prevention and Building Code Act, N.Y. 18 §§ 370-383. Section 123 mandates obtaining a building permit prior to beginning construction. . Trustee Defendants have failed to apply for—let alone obtain—a building permit. (Affirmation of Sean McDermott ¶¶ 23, 28.) They also have failed to submit a plan for the Travel Plaza. *(Id*. ¶¶ 24, 30.)

F. <u>Trustee Defendants are Liable for Violations under New York Highway Law</u>.

Highway Law § 140 empowers the Superintendent of Highways to prosecute violations of laws related to public roads. Newtown Road runs adjacent to the site of construction. (Compl., ¶ 104.) Newtown Road is a Town Road maintained by the Town. (*Id.*) "Town Highways" are "those constructed, improved or maintained by the town with the aid of the state or county, under the provisions of this chapter, including all highways in towns, outside of incorporated villages constituting separate road districts which do not belong to either of the two preceding classes."

N.Y. Highway Law § 3. The Trustee Defendants have altered Newtown Road's right of way by removing a portion and installing a driveway and two curb cuts for construction vehicles onto the Westwoods parcel. (Compl., ¶¶ 56, 106-108.) It is undisputed that the Trustee Defendants failed to get permission for these alterations as required. Mr. McArdle has met his burden.

III. The Balance of Equities Favors Entry of a Preliminary Injunction.

In considering a motion for preliminary injunction, courts "must weigh the interests of the general public as well as the interests of the parties to the litigation." *Eastview Mall, LLC v. Grace Holmes, Inc.*, 122 N.Y.S.3d 848, 851 (N.Y. App. Div. 4th Dept. 2020). Here, the balance of the equities weighs in favor of Plaintiffs.

First, Trustee Defendants have made *no effort* to comply with Town Codes. They have treated with disdain ordinary and prudent requirements for work permits, road alteration, and construction. Zoning violations are the sorts of harms for which New York appellate courts have affirmed preliminary injunctive relief. *See Town of Thompson v. Braunstein*, 669 N.Y.S.2d 387, 388 (N.Y. App. Div. 3d Dept. 1998) (noting that "defendants [had] never applied for or received a permit for the alterations"). Defendants' lack of *effort* to comply with the Town Code or even apply for a building permit tipped the balance of equities in plaintiffs' favor. *Id.* at 388-89.

Second, to the extent raised, the Nation's pecuniary interests do not outweigh the public safety concerns that construction of the Travel Plaza poses. *See Pier 59 Studios, L.P. v. Chelsea Piers, L.P.*, 796 N.Y.S.2d 92, 93 (N.Y. App. Div. 1st Dept. 2005) (finding that plaintiff's concerns about impairments to business were outweighed by the building department's concerns about safety). Trustee Defendants made the choice to begin construction in derogation of local law. That choice created unacceptable risks to public health and safety. Denying the Town any opportunity to evaluate these risks far outweighs any concerns about costs or loss of revenue deriving from the Nation's unilateral action. *See Pier 59 Studios, L.P.*, 796 N.Y.S.2d at 93.

CONCLUSION

For the foregoing reasons, the Town respectfully requests that the Court grant its motion and issue a preliminary injunction enjoining the Trustee Defendants from further construction.

Dated: New York, New York

Date: January 29, 2025

Respectfully submitted,

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CERTIFICATE OF WORD COUNT COMPLIANCE

The undersigned counsel hereby certifies pursuant to Section 202.8-b of the Uniform Rules for the Supreme Court of the State of New York that this document contains 6,985 words (based on the Microsoft word-count function) and complies with the word count limit and page limit of those Rules.

Dated: New York, New York

Date: January 29, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Memorandum of Law in Support of Motion for a Preliminary Injunction, together with copies of the notice of motion, proposed order, and the following exhibits:

- Affirmation of Sean McDermott, dated January 21, 2025, together with its annexed exhibits,
- Affirmation of John J. Rankin, dated January 23, 2025,
- Affirmation of Carol McNeill, dated January 23, 2025, together with its annexed exhibits,
- Affirmation of Janice T. Scherer, dated January 28, 2025, and
- Affirmation of Michael T. Paslavsky, dated January 28, 2025, together with its annexed exhibits,

were, after electronic filing, subsequently deposited in a first-class postage-paid envelope addressed to each of the Trustee Defendants and counsel at the address(es) below, in an official depository under the exclusive care and custody of the United States Post Office in the State of New York:

Lisa Goree
Shinnecock Community Center
P.O. Box 5006
100 Church Street
Southampton, NY 11969
(address on Nation web site)

Lisa Goree
Shinnecock Indian Nation Tribal Office
1 Nations Way
Southampton, NY 11969
(address per NYSCEF Doc. No. 6)[12]

Lance Gumbs
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Lance Gumbs
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1 Nations Way
Southampton, NY 11969

Seneca Bowen
Shinnecock Community Center
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Shinnecock Indian Nation Tribal Office
1 Nations Way

[12] Trustee Defendants have challenged sufficiency of service of process by hand-delivery to an adult of suitable age and discretion at the Shinnecock Community Center with supplemental service by mail to each individual at the same address. (NYSCEF Doc. Nos. 5-7.) Trustee Defendants contend that they should have been served at 1 Nations Way, Southampton, New York—an address that is not on their website and not recognized by the U.S. Postal Service. As a courtesy, Plaintiffs include such additional service address here for each, in addition to serving counsel for all Trustee Defendants.

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