SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

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.	:	Index No. 631610/2024

DEFENDANTS' MEMORANDUM OF LAW IN REPLY TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

BIG FIRE LAW AND POLICY GROUP, LLP
Danielle Lazore-Thompson
36 Pyke Road
Akwesasne, NY 13655
Telephone: (402) 307-9905
Em: dlazore@bigfirelaw.com

DRAGONFLY LAW GROUP, P.C.
Judith A. Shapiro (Admitted Pro Hac Vice)
Thomas J. Nitschke (Admitted Pro Hac Vice)
Rebecca L. Kidder (Admitted Pro Hac Vice)
731 St. Joseph St., Suite 230
Telephone: (202) 257-6436
Email: Jshapiro@dflylaw.com
Tomn@dflylaw.com
Rebeccak@dflylaw.com

Attorneys for Defendants Lisa Goree, Lance Gumbs, Seneca Bowen, Bianca Collins, Germain Smith, Daniel Collins, Sr., and Linda Franklin

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I. PRELIMINARY STATEMENT

The Court should deny the preliminary injunction because the Plaintiffs have no chance of success on the merits, the balance of the hardships weighs heavily in favor of the Defendants and the Nation they represent, and the multiple jurisdictional infirmities prevent this Court from granting the relief requested.

Plaintiffs seek to enjoin Defendants, Lisa Goree, Lance Gumbs, Seneca Bowen, Bianca Collins, Germain Smith, Daniel Collins, Sr., and Linda Franklin the Trustees ("Trustees") of the Shinnecock Indian Nation ("Nation"), all named in their official capacity, but in reality, seek to enjoin the Shinnecock Indian Nation from constructing a travel plaza on land owned by the Shinnecock Indian Nation. This court lacks jurisdiction over this matter for three reasons:

(1) The court lacks jurisdiction to enjoin the Trustees who are acting in their official capacity, from constructing a travel plaza on tribal lands confirmed by the United States Department of the Interior ("DOI") to be restricted from alienation under federal law pursuant to 25 USC § 177. Because the subject actions are taking place on the Nation's confirmed restricted fee land, *Ex Parte Young,* 209 U.S. 123, type relief is not available to evade the Trustees' sovereign immunity.

(2) The Nation, whose sovereign immunity prevents joinder, is a necessary and indispensable party pursuant to CPLR § 1003 because the relief sought would impair the Nation's real property rights, diminish the right of the Nation to make its own laws and be governed by them, and endanger the economic security and future of the Nation.

(3) The United States, whose sovereign immunity prevents joinder, is a necessary and indispensable party pursuant to CPLR § 1003 for two reasons. First, the suit implicates the United States interest in the land - the restriction against alienation. Second, the relief would conflict with the United States' obligations to protect the restricted fee land as trustee to the Nation pursuant to 25 USC § 177 and violate federal laws and regulations governing easements, rights-of-way and contracts affecting tribal restricted fee lands.

All these jurisdictional barriers will be set forth more completely in the Trustees' Motion to Dismiss, to be filed with this Court.

Subject to the above objections and without waiving same, Trustees object to Plaintiffs', the Town of Southampton, New York (the "Town") and Superintendent of Highways Charles McArdle ("McArdle"), Motion for Preliminary Injunction. Plaintiffs' efforts to enjoin the Trustees from continuing to authorize the construction of a commercial gas and retail development (the "Travel Plaza"), on an approximately 80-acre parcel of restricted fee land ("Westwoods") ignore controlling Federal law, directly attack the Nation's status as a sovereign nation and the restricted fee status of the Nation's land, and threaten to obstruct the Nation's fiduciary relationship with the United States.

This request for extraordinary relief cannot succeed. Upon examination, the motion, and the underlying complaint, fail on both law and facts.

The predicate for injunctive jurisdiction lies exclusively in a now-stale Order issued by the Appellate Division on December 4, 2024 (*Comm'r of the N.Y. State Dep't of Transp. v. Polite, 2024 N.Y. Slip Op. 6023 (N.Y. App. Div. 2nd Dept. Dec. 4, 2024)* ("*Polite* Order" or "*Polite*")). That court determined that the Trustees were subject to injunctive action for their official actions taken "off-reservation." Order at 120. This determination was based on the court's emphasis that

"there is no indication in the record that the Westwoods currently has any federally recognized status." *Id*. at 138. That fundamental premise is false. At the conclusion of a three-year investigation, the United States Department of the Interior concluded that the Westwoods is and has always been held by the Nation in restricted fee status – a land status that entitles it to federal protection against alienation and subjects it to federal laws and regulations that oust State and local control of the land. (Affirmation of Danielle Lazore-Thompson, Exhibit A, Aff. of Lisa Goree at Exhibit 1) ("DOI Letter"). This dispositive determination removes the foundation of the *Polite* Order and removes any basis for the Town's attempt to exert regulatory jurisdiction over Westwoods Territory.

Further, the motion is devoid of support for its breathless allegations of harm, and without legal basis for their claim of right to regulate the construction to mitigate such harm. Plaintiffs' evidence fails to demonstrate that the challenged activities threaten genuine harm to the surrounding community. (*See* Doc. 9 at pp. 9-14). They complain that the Trustees "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 surrounding area by the Town and its residents" (*Id*.) As the United States has confirmed, the Nation has always held Westwoods in restricted fee status, a status that excludes it from Town zoning and permitting requirements. The Town does not – and cannot - have any property rights to Westwoods, except through agreements with the Nation and as authorized by the United States (*See* 25 CFR §§ 169.9(c), 160.10). Contrary to the Plaintiffs' assertions, *Polite's* assumption based solely on Complaint allegation, has been overcome by new evidence, and the *City of Sherrill v. Oneida Indian Nation of N.Y.*, is inapplicable (544 US 197 [2005]).

The Trustees have imposed construction standards on the Travel Plaza that meet or exceed federal, state, and county rules and regulations and local building codes and ordinances to protect the Nation's two most precious resources, its land and its people. (Affirmation of Danielle Lazore-Thompson, Exhibit B, Aff. of Harold Wingert at ¶¶ 6-12.)

Plaintiffs are unlikely to succeed on their claims because this Court does not have jurisdiction over Westwoods Territory, and the Plaintiffs have failed to name two necessary parties, the Nation and the United States. Both the United States and the Nation are necessary and indispensable parties whose sovereign immunity prevents joinder, but without whom the case cannot proceed. (CPLR § 3211(a)(10); *see Anderson v. Town of Lewiston*, 665 NYS2d 164, 165 [4th Dept 1997]). The United States and the Nation each have fundamental interests in the Nation's restricted fee land and the Nation's sovereign authority over that land, subject to the United States' duty to protect both. If neither sovereign consents or voluntarily appears, the court may proceed only where the plaintiff demonstrates that the factors outlined in CPLR § 1001(b) weigh in favor of proceeding. (*Swezey v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 19 NY3d 543, 550-55 [Ct App 2012]). While all the factors must be considered, significant sovereign interests cannot be outweighed by the other factors (*Swezey v. Lynch*, 87 A.D.3d 119, 132-33 [1st Dept 2011], *aff'd sub nom. Swezey v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 19 NY3d 543). Further, Plaintiffs' unsupported claims that the construction of the Travel Plaza is a danger and being undertaken without oversight are patently false (Affirmation of Danielle Lazore-Thompson, Exhibit B, Aff. of Harold Wingert at ¶¶ 6-12). The balance of the equities weighs strongly in favor of Trustees. The Town has no authority over the Westwoods Territory. Neither the Town nor its residents and visitors face irreparable injury on land owned and controlled by the Nation. The Nation's economic development project on its restricted fee land is being carried out in accordance with health and

safety requirements that meet or exceed all federal, state, county and local standards. *Id.* Finally, and most significantly, this Court lacks jurisdiction over the Trustees, and over the subject matter of this action, which cannot, in any event, proceed without the Nation and the United States as indispensable parties that cannot be joined under CPLR §1001. Plaintiffs cannot possibly meet their burden of showing success on the merits.

II. INJUNCTION STANDARD

"It is well settled that "[p]reliminary injunctive relief is a drastic remedy [that] is not routinely granted" (*Delphi Hospitalist Servs. LLC v. Patrick,* 163 AD3d 1441, 1441 [4th Dept 2018]; *Eastview Mall, LLC v. Grace Holmes, Inc.*, 182 AD3d 1057 [4th Dept 2020]). "In order to establish its entitlement to a preliminary injunction, the party seeking the injunction must establish, by clear and convincing evidence [,] . . . three separate elements: '(1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor'" (*Id.* at 1442, quoting *Destiny USA Holdings, LLC v Citigroup Global Mkts. Realty Corp.*, 69 AD3d 212, 216 [4th Dept 2009]).

III. ARGUMENT

In April 2024, the Nation began construction of a Travel Plaza within the Nation's restricted fee Westwoods Territory. (Affirmation of Danielle Lazore-Thompson, Exhibit B, Aff. of Harold Wingert ¶ 4). The Travel Plaza will have fueling locations for 20 vehicles and 56 parking spaces, retail, and "drive-thru" areas (Complaint, Doc. 1 at ¶ 41). Before construction, Nation met officials met with the Town officials, including town planner several times in an attempt to reach an understanding for safeguarding both government's interests in the safe development of the project. (Affirmation of Danielle Lazore-Thompson, Exhibit C, Aff. of Bryan A. Polite ¶4). In

subsequent meetings between the Full Town Board and the Council of Trustees at the Council of Trustees' office, the Town Board rejected any cooperation or information exchange that did not include the Nation submitting to Town regulation of and jurisdiction over the Nation's restricted fee land. (Affirmation Danielle Lazore-Thompson, Exhibit A, Aff. of Lisa Goree). Trustees have constructed 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. (Affirmation of Danielle Lazore-Thompson, Exhibit B, Aff. of Harold Wingert ¶¶ 5 and 6-12). Third party inspectors regular monitor compliance (*Id.* at ¶¶ 7-8).

On August 23, 2024, with no authority over the Nation's restricted fee land, the Town issued a Stop Work Order - itself void under federal law (Doc. 1 at ¶¶ 57, 59).

> 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.

(25 CFR § 1.4(a)). Five days later, on August 28, 2024, the Town further ignored the restricted fee status of the land and the Nation's sovereign status by issuing complaints against the Nations and one of its contractors alleging violations of Town Code § 287-7 and § 287-13 for installing curb cuts and a driveway to connect Newtown Road to the Travel Plaza. (Doc. 1 at ¶ 60; Affirmation of Michael T. Paslavsky ("Paslavsky Aff.") Ex. A.) Newtown Road, maintained by the Town, bisects the north and south portions of Westwoods adjacent to the construction site. (*See* Doc. 9. at p. 5). While the Town asserts property rights in Newtown Road, it lacks federal authorization necessary to claim a right of way. (25 CFR §169.4).

The Nation and Trustees are free to fundamentally change the character of the parcel they own in restricted fee, because the Westwoods Territory is "Indian Country" over which local governments lack power to impair the Nation's exercise of sovereignty. (Affirmation of Danielle Lazore-Thompson, Exhibit A, Aff. of Lisa Goree at Exhibit 1; 25 CFR §1.4).

A. The Westwoods Parcel Is "Indian Country".

The Nation owns, in restricted fee, 80 acres in the Hampton Bays area west of the Shinnecock Canal (Affirmation of Danielle Lazore-Thompson, Exhibit A, Aff. of Lisa Goree at Exhibit 1). The United States Congress mandates that restricted fee land is protected against alienation. (25 USC § 177). Federal, rather than local laws apply to such lands. (25 CFR §1.4).

In asserting that Westwoods is not "Indian Country," (Doc 1 at ¶¶ 20-25), Plaintiffs overlook that the Nation's restricted fee lands represent the most fundamental of tribal land tenures, long protected against pressures of colonization. From 1790, such lands have been subject to Congressionally mandated protection of the federal government against alienation from the Nation without the approval of the Nation and the Secretary of Interior. Federal regulations provide:

> Tribal Restricted land, or land in restricted status means land the title to which is held by an . . . Indian 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 Federal law directly imposes such limitations.

(25 CFR 151.2). Congress first restricted tribal lands from alienation without the approval of the United State in 1790, with the passage of the Act of July 22, 1790 ("1790 Non-Intercourse Act"), which stated:

> No sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made

> and duly executed at some public treaty, held under the authority of the United States.

(Pub L 1-33, § 4, 1 Stat. 137, 138). Congress subsequently passed five additional acts in 1793, 1796, 1799, 1802, and 1834, reaffirming that the United Stated would not recognize the right of any other person or government other than the United States to alienate tribal lands without their consent. (Act of March 1, 1793, Pub L 2-19, § 8, 1 Stat. 329, 330; Act of May 19, 1796, Pub L 4-30, § 12, 1 Stat. 469, 472; Act of March 3, 1799, Pub L 5-46, § 12, 1 Stat. 743, 746; Act of March 30, 1802, Pub L 7-13, § 12, 2 Stat. 139, 143; Act of June 30, 1834, Pub L 23-161, § 12, 4 Stat. 729, 730). The Act of June 30, 1834 is presently codified at 25 USC § 177:

> No purchase, grant, lease, or other conveyance of land, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant the constitution.

Federal law does not require restricted fee land to have been "set aside" by treaty or other action of the United States. The full protections of the 1790 Nonintercourse Act and all the subsequently adopted Non-Intercourse Acts apply to tribal lands as of 1790 in all States of the Union, including the original states (*See Mohegan Tribe v. State of Connecticut*, 638 F2d 612, 616-621 [2d Cir 1980], *cert. denied*, 1981).

Unlike "trust lands" – in which the United States holds the underlying fee for a tribal beneficiary – the tribal restricted fee owner retains the full bundle of landowner's rights with one exception: the tribal owner may not alienate the land either by sale or approval of an encumbrance, such as a right-of-way, easement, or lease, without approval of the Secretary of the Interior (25 USC § 81(b)). Restricted Fee tribal lands are subject to federal – not state – regulation and superintendence (25 CFR §§ 1.4, 169.9, 169.10).

25 USC § 81(a)(1) defines Indian lands as "lands the title to which is held by the United

States in trust for an Indian tribe or lands the title to which is held by an Indian tribe subject to a restriction by the United States against alienation." Both tribal trust lands and restricted fee lands are restricted against alienation without the approval of the United States Secretary of Interior. "[L]ands owned by a tribe with Federal restrictions against alienation and any other land owned by an Indian tribe may only be conveyed where specific statutory authority exists and then only with the approval of the Secretary unless the Act of Congress authorizing sale provides that approval is unnecessary" (25 CFR § 152.22, citing 25 USC § 177).

On both restricted fee tribal lands and tribal trust lands, federal and tribal regulatory preemption extends beyond transactions involving the land itself (in rem), extending to regulating behavior on those lands. Rights-of-way over tribal lands: "(a) Are subject to all applicable Federal laws; (b) Are subject to tribal law; except to the extent that those tribal laws are inconsistent with applicable Federal law; and (c) Are generally not subject to State law or the law of a political subdivision thereof." (25 CFR §169.9). "Generally speaking, primary jurisdiction . . . rests with the Federal Government and the Indian tribe inhabiting it, and not with the States" (*Alaska v. Native Vill. of Venetie*, 522 US 520, 527 n1 [1998]).

1. The Town's Claim that the Nation's Aboriginal Title to the Westwoods Parcel Was Extinguished is False.

The DOI clarified and affirmed the status of the Westwood Territory is now and has always been restricted fee and therefore "Indian Country." (Affirmation of Danielle Lazore-Thompson, Exhibit A, Aff. of Lisa Goree at Exhibit 1). The DOI letter specifically rebuts Plaintiffs' assertion that aboriginal title was extinguished:

> 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.

> This land is and has always been restricted fee land held by the Nation and is now recorded to reflect such status.

(*Id.*)

The confirmed restricted fee status of the land definitively precludes Plaintiffs' jurisdiction over that land, leaving their merit arguments in tatters, and rendering the extraordinary relief sought an impossibility. "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" (*Corp. Coffee Sys., LLC v. R.U.G. Consulting, LLC*, 2025 NY Slip Op 00945 at *1 [2d Dept Feb. 19, 2025], *quoting Nobu Next Door, LLC v. Fine Arts Hous., Inc.*, 4 NY3d 839, 840[2005]; *see also* CPLR 6301). "[T]he irreparable harm must be shown by the moving party to be imminent, not remote or speculative." (*Golden v. Steam Heat, Inc.,* 216 AD2d 440, 442 [2d Dept 1995]).

The Town fails to meet the required elements. The Town's course of dealing evidences no urgency. Travel Plaza construction started in April 2024, but the Town waited almost nine months before bringing this action. (Affirmation of Danielle Lazore-Thompson, Exhibit B, Aff. of Harold Wingert ¶4; Doc. 1). The removal of trees from the construction site began in February 2024. (See Affidavit of Carol McNeill, Doc. 13 ¶8). Further, until this lawsuit, the Town acknowledged the Westwoods Territory as Indian Reservation lands. *See* Affirmation of Danielle Lazore-Thompson, Exhibit E, Affirm. of Tela Troge. Town maps show the Westwoods Territory as Indian Reservation, and the Town has never taxed the land, demonstrating its understanding that Westwoods Territory is not fee simple unrestricted land. (*See* Affirmation of Danielle Lazore-Thompson, Exhibit E, Affirm. of Tela Troge at ¶¶ 14 and 18; Exhibits 8 and 12). The Town was informed by Robert Batson, legal counsel for the New York Department of State, as long ago as 1987, that it has no authority to regulate Westwoods Territory. (*See* Affirmation of Danielle

Lazore-Thompson, Exhibit E, Affirm. of Tela Troge at ¶17; Exhibit 11). Apparently, the Town was inspired to take action by the recent ruling in *Polite*, No. 2020-05137, but that preliminary ruling, based solely on the allegations in the Complaint, is inapplicable because of the subsequent DOI letter confirming, on behalf of the United States, that the land is restricted fee land. (*Cf.* Order at 44 with Exhibit A). If the Town had believed that the "construction and operation of a commercial Travel Plaza with attendant runoff and environmental hazards" was a threat of imminent harm it could have brought this case and the preliminary injunction sooner. (*See* Doc. 9 at 9). Counsel's argument to the court that Plaintiffs did not seek a temporary restraining order because it was winter rings hollow, especially considering the construction started in April, in the spring. With no urgency, no valid regulatory powers to enforce, and importantly, no jurisdiction over the Trustees, the Court should deny the Town preliminary relief.

B. Plaintiffs Will Not Suffer Irreparable Harm Absent Injunctive Relief.

Plaintiff premises their belief that that they will suffer irreparable harm on the false narrative that the Trustees are in violation "of New York state law and Town codes." (*See* Doc. 9 at 9). However, the Nation is building the Travel Plaza under construction standards and specifications that meet or exceed federal, state, and county regulations. (Affirmation of Danielle Lazore-Thompson, Exhibit B, Aff. of Harold Wingert ¶¶6-12). Plaintiffs assert, without any tangible evidence, they will suffer irreparable harm because the Travel Plaza's continued construction "threatens the physical safety of the Town's residents and the traveling public." (*See* Doc. 9 at 9). Because their claim is premised on their assertion that the Nation has failed to follow any building codes, it fails. In fact, the Nation has imposed codes on the project that meet or exceed all federal, state, and county standards. (Affirmation of Danielle Lazore-Thompson, Exhibit B, Aff. of Harold Wingert ¶¶6-12).

Plaintiffs correctly set forth the standard for "irreparable injury" under *Societe Anonyme Belge D'Exploitation De La Navigation Aerienne v. Feller* (492 NYS2d 756, 758 [1st Dept 1985]). The Town alleges that "danger to public safety" exists because the construction of a gas station involves handling flammable and hazardous materials. (*See* Doc. 9 at p. 9). However, that alone would make any gas station a hazard to be enjoined. In essence, Plaintiffs' claim that they alone can successfully control the danger. *Id*. This presumption is wrong for two reasons. First, Trustees are building the Travel Plaza in accordance with standards and specifications that meet or exceed those the Town would impose, exercising appropriate governmental responsibility. (Affirmation of Danielle Lazore-Thompson, Exhibit B, Aff. of Harold Wingert ¶¶ 5 and 6-12). Second, the Town does not have jurisdiction over the restricted fee land. (*See* Doc. 5).

The Town also claims that the Trustees failed to apply for or obtain a building permit. (*See* Doc. 9 at p.10). Rather than apply for or obtain a building permit from the Town, the Trustees did apply for and obtain a Work Permit from the Nation, and the project has complied with EPA requirements for Underground Storage Tanks, and SWPP permitting. (Affirmation of Danielle Lazore-Thompson, Exhibit B, Aff. of Harold Wingert ¶¶ 5 and 6-12). The Town also asserts unbridled danger through the Affidavit of John J. Rankin ("Rankin Aff."), Chief Fire Marshal for the Town's Department of Fire Prevention, arguing that only the Fire Marshall's approval and inspection can prevent danger. (*See* Doc. 9 at p.10; Doc. 11, Rankin Aff.). But the harm alleged presumes the Travel Plaza does not meet state codes, and not meeting state codes results in a risk of danger. *See* Doc. 11, Rankin Aff. at ¶18 a-k. The Fire Marshal is not the unique solution. He is not the only one who can monitor compliance with fire safety standards, and he lacks jurisdiction to do so. Fortunately, the Nation takes the safety of its people and its lands very seriously. (*See* Doc. 5). Accordingly, the Travel Plaza is being built to standards and specifications that meet or

exceed all of the regulations and standards cited in the Rankin Aff. (Affirmation of Danielle Lazore-Thompson, Exhibit B, Aff. of Harold Wingert ¶¶6-12).

The Town next expresses concern about the potential for ground water contamination, if there were a leak. (*See* Doc. 9 at p.12). To advance this completely hypothetical concern, the Town attaches the Affirmation of Janice T. Scherer ("Scherer Aff.") the Town Planning & Development Administrator. Ms. Scherer is not a hydrogeologist qualified to opine on the threat of actual contamination if there were a leak. Ms. Scherer's affirmation does nothing more than express a concern, unsupported by scientific evidence or relevant authority. (*See* Doc. 12, Scherer Aff.) Ms. Scherer does not say what the soil composition of the Travel Plaza is, how close to the ground water the Travel Plaza is, or if there is any ground water near the Travel Plaza. *Id*. She simply opines that gas tank leaks can be dangerous. *Id*. The Town goes on to repeat the false refrain that if they cannot control the construction of the Travel Plaza it cannot be safe. (*See* Doc. 9 at p.12). Without any evidence, Plaintiffs assert that the Trustees "have ignored these legal requirements" *Id.* What the Town ignores is that the Trustees serve a sovereign Nation and are building the Travel Plaza to standards that meet or exceed all federal, state, and county regulations, including most current technology designed to protect against the concerns expressed. (Affirmation of Danielle Lazore-Thompson, Exhibit B, Aff. of Harold Wingert ¶¶ 6-12).

The Town also claims, "the Travel Plaza's construction assaults the residents' quiet enjoyment of their property." (*See* Doc. 9 at p.13). It is unclear where the Town gets the right to quiet enjoyment on the Nation's restricted fee lands, where the entities entitled to quiet enjoyment are the Nation and its invitees. Westwoods is not - and cannot be - zoned residential. Any effort by the Town to Zone Westwoods Territory is precluded under federal law. (25 CFR § 1.4). Further, the Town has not identified who, exactly, is disturbed by the alleged noise -which occurs only

during normal business hours. (Affirmation of Danielle Lazore-Thompson, Exhibit B, Aff. of Harold Wingert ¶¶ 5 and 13-15). The only cases cited by the Town deal with claims where the noise was made at night. (*See* Doc. 9 at p.13). They are not applicable here. The only Affidavit presented does not assert disturbance at night, because they can't. (*See* Affidavit of Carol McNeill Doc. 13).

Further, the Town lacks standing to bring a claim for private nuisance, which claim belongs only to individuals who are affected. (*Broxmeyer v. United Cap. Corp.*, 79 AD3d 780, 782 [2d Dept 2010]). Finally, once the Travel Plaza is finished, the construction noise from which the Town seeks protection will cease.

C. The Town Is Unlikely to Succeed on the Merits of Its Claims against the Nation's Activities on its Restricted Fee Lands.

The Town's claim is based upon the false presumption that they have jurisdiction over the Nation's restricted fee land.

1. The Town has no Settled Expectations to affect.

Importantly, the Town is starkly incorrect about the land status of the Westwoods Territory. It is not now, and has never been, fee simple unrestricted land. (Affirmation of Danielle Lazore-Thompson, Exhibit A, Aff. of Lisa Goree at Exhibit 1). The Town's reliance on *Polite* and *Sherrill* is thus misplaced. The Order in *Polite* sought to justify state regulatory authority based on "settled expectations," (Order at 33-37), expanding the United States Supreme Court's decision in *City of Sherrill v. Oneida Nation of New York* (544 US 197, 218 [2005]) far beyond applicability to Westwoods Territory. On different facts, *Sherrill* held that a Tribal Nation cannot reassert jurisdiction and sovereign authority over land by reacquiring lands **from which it had long been dispossessed** (*Id.* at 215-16) (emphasis added). Such expectations are not settled, and certainly

not "justified" where the facts demonstrate that tribal ownership, use, and occupation of the land is and has been reality for centuries (*Id*.). The DOI letter confirms the Nation's land tenure has been continuous, with no record of state jurisdiction or non-tribal ownership. (Affirmation of Danielle Lazore-Thompson, Exhibit A, Aff. of Lisa Goree at Exhibit 1). There is no established state or town regulatory jurisdiction to disrupt – because the Nation has maintained its sovereignty over Westwoods restricted fee Territory. The Town argues generally that it would lose the "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." (*See* Doc. 9 at p.17). But the Town has no regulatory authority to lose. Until recently, neither the State of New York, nor any of its agencies, have attempted to exercise any regulatory powers over the activities of the Nation, or its use of its restricted fee lands. The land has never been taxed, either by State or local governments – consistent with the 25 USC § 233 prohibition against taxation of restricted fee lands. (*See* Affirmation of Danielle Lazore-Thompson, Exhibit E, Affirm. of Tela Troge at ¶14; Exhibit 8). The Westwoods Territory consistently appears on State and local maps labeled as "Indian land," "Indian lands" or "Shinnecock Indian Reservation." (*See* Affirmation of Danielle Lazore-Thompson, Exhibit E, Affirm. Of Tela Troge at ¶¶ 10, 11, and 18; Exhibits 4, 5 and 12). Patently, the Town has no settled expectation in controlling what it has never controlled, on land the Nation has never relinquished.

2. The Town does not have Jurisdiction over the Trustee Defendants.

The Town asserts jurisdiction based upon *Polite* Order issued before the DOI letter removed the premise for its determination. (*See* Doc. 9 at p.17). The Appellate Division in *Polite* relied on its presumption that tribal officials were acting outside of tribal lands to conclude it could enjoin alleged violations of state law. (Order at 2). Without the Court's incorrect fee simple

presumption, the theory collapses. The DOI Letter's clarification of restricted fee status removes all basis for state regulation of that land, leaving no applicable state law to enforce.

The Town's jurisdiction over restricted fee land extends only so far as Congress grants; that grant does not extend civil regulatory jurisdiction. As a matter of federal law, flowing from the Indian Commerce Clause of the United States Constitution (Art. I, § 8, Cl. 3), the United States has both plenary and exclusive power over regulation of Indian lands (*Seminole Tribe of Florida v. Florida*, 517 US 44, 60 [1996] ("[T]he Indian Commerce Clause makes 'Indian relations the exclusive province of federal law'"), *quoting City County of Oneida v. Oneida Indian Nation of N.Y.,* 470 US 226, 234 [1985]). Towns have been "divested of virtually all authority over Indian commerce and Indian tribes" on tribal restricted fee and trust lands (517 US at 62).

States or Towns may exercise civil jurisdiction on Indian lands only pursuant to a specific Congressional delegation of authority, and then only within the limits of that delegation. The United States Congress has, in specific legislation, permitted some states to exercise limited civil regulatory jurisdiction on Indian lands. Public Law 83-280, also known as "PL 280," is one example. (67 Stat. 588 [1953], civil provisions codified at 18 USC § 1162; 28 USC § 1360; and 25 USC §§ 1321–1326) (selected states)*; see also* 25 USC § 233 (New York)). But the Supreme Court ruled in *Bryan v. Itasca County* that PL 280's grant of civil authority does not extend to civil regulatory jurisdiction over Indian lands (426 US 373, 383-85 [1976]).

The Attorney General of the State of New York formally opined, in 1987, that the nearly identical language in 25 USC § 233 was equally limited – the State does not have civil regulatory jurisdiction over Indian lands – including the Nation's Westwoods Territory (Affirmation of Danielle Lazore-Thompson, Exhibit D, Formal Op. No. 87-F11 (Ops. NY Atty Gen. December 31, 1987)). New York Courts do not have jurisdiction over Indian Tribes. The State of New York

Duly informed the Town of Southampton, nearly forty years ago, that the Town lacked regulatory jurisdiction over the Nation's Westwoods Territory. (*See* Affirmation of Danielle Lazore-Thompson, Exhibit E, Affirm. Of Tela Troge at ¶17; Exhibit 11). The law has not changed.

3. New York State and local law are inapplicable on aboriginal restricted fee lands.

Plaintiffs' assertion that Westwoods aboriginal title was extinguished is flatly contradicted by the United States' determination. (*See* Doc. 9 at p.18). Plaintiffs rely on a historical record that was fully reviewed and interpreted by the DOI, concluding that the Nation's ownership and occupancy have never been interrupted. Aboriginal title has never been extinguished:

> 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. This land is and has always been restricted fee land held by the Nation and is now recorded to reflect such status.*

(*See* Affirmation of Danielle Lazore-Thompson, Exhibit A, Aff. of Lisa Goree at Exhibit 1)

(*emphasis added*)

4. The Travel Plaza is not a Public Nuisance.

Plaintiffs' basis for claiming a public nuisance is that the Travel Plaza is "*off* reservation property," and that the Trustees are not allowing the Town to regulate the restricted fee land. (*See* Doc. 9 at p.19). Plaintiffs cite technically correct, but inapplicable law: "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 NYS2d 49, 56 [2001]). Plaintiffs' authority disappears once Westwoods Territory is correctly identified as

restricted fee land, a distinction not present in the *Polite* record. Thereafter, the responsibility for standards and monitoring rest with the Nation, which has already imposed construction requirements that meet or exceed those the Town wishes to enforce. (Affirmation of Danielle Lazore-Thompson, Exhibit B, Aff. of Harold Wingert ¶¶6-12). Finally, most of what Plaintiffs allege has not happened, nor does Plaintiff provide any scientific study or evidence that the imagined harms will occur. The Plaintiffs do no more than speculate that there might, someday, be a nuisance. Such allegations do not support injunctive relief. "[W]here, as here, there are substantial unresolved questions of fact, the court is unable to determine whether plaintiffs are likely to succeed on the merits (*State v. Fermenta ASC Corp.*, 160 Misc2d 187, 201 [Suffolk Cty Sup Ct 1994]), Plaintiffs' request for a preliminary injunction must be denied.

5. Trustees are not Subject to Zoning Ordinances and State and Local Laws Concerning Development of the Travel Plaza.

As set forth in Section B, above, states or towns may exercise civil regulatory jurisdiction on Indian lands only pursuant to a specific Congressional delegation of authority, and then only within the limits of that delegation. The United States Congress has, in specific legislation, permitted some states to exercise limited civil regulatory jurisdiction on Indian lands. Public Law 83-280, also known as "PL 280," is one example. (67 Stat. 588 [1953], civil provisions codified at 18 USC § 1162; 28 USC § 1360; and 25 USC §§ 1321–1326) (selected states)*; see also* 25 USC § 233 (New York)). But the Supreme Court ruled in *Bryan v. Itasca County* that PL 280's grant of civil authority does not extend to civil regulatory jurisdiction over Indian lands (426 US 373, 383-85 [1976]).The Attorney General of New York formally concurred in 1987. (Affirmation of Danielle Lazore-Thompson, Exhibit D, Formal Op. No. 87-F11 (Ops. NY Atty Gen. December 31, 1987)).

6. Trustees are not Subject to New York Highway Law.

Newtown Road runs adjacent to the construction site (Doc. 1, ¶ 104.) While Newtown Road may be maintained by the Town, (Id.) the Town's claim to an unapproved right of way or road easement does not confer jurisdiction. The roadway is plainly within the metes and bounds description for the Westwoods Territory recorded in TAAMS[1] on December 23, 2024 (DOI Letter at 2). It is thus within the external boundaries of restricted fee lands - beyond the authority of the State to regulate. To exercise such authority, the Town would be required to negotiate with the Nation to acquire a BIA-approved easement/right of way, subject to agreed-upon conditions, with the approval of the DOI (25 USC §§ 323-328; 25 CFR §169.4(a) (non-owners, including governments require federal right-of-way, with the consent of the tribe before crossing the tribal land or any portion thereof)). No restricted fee land can be conveyed without tribal consent subsequent federal approval. (25 CFR § 152.22). The Town provides no evidence of meeting those conditions. Without such approvals, claiming rights in land the United States confirms has always been restricted against alienation, is no more than an unlawful seizure.

D. The Balance of Equities Favors Denial of a Preliminary Injunction.

"It is well settled that "[p]reliminary injunctive relief is a drastic remedy [that] is not routinely granted" (*Delphi Hospitalist Servs. LLC v. Patrick,* 163 AD3d 1441, 1441 [4th Dept 2018]; *Eastview Mall, LLC v. Grace Holmes, Inc.*, 182 AD3d 1057 [4th Dept 2020]). "[B]alancing involves an inquiry whether 'the irreparable injury to be sustained . . . is more burdensome [to the plaintiff] than the harm caused to defendant through imposition of the injunction'" (*Felix v. Brand*

[1] TAAMS stands for Bureau of Indian Affairs ("BIA") Trust Asset and Accounting Management System. *See* 25 CFR § 115.002; Privacy Act Notice, 79 Fed Reg 68292 (Nov. 14, 2014).

Serv. Grp. LLC, 101 AD3d 1724, 1726 [4th Dept 2012], quoting *Destiny USA Holdings, LLC*, 69 AD3d at 223). Here, the balance of the equities weighs in favor of Trustees.

Trustees have in fact required Travel Plaza to be constructed in accordance with standards and specifications that meet or exceed those the Plaintiffs seek to impose. (Affirmation of Danielle Lazore-Thompson, Exhibit B, Aff. of Harold Wingert ¶¶6-12). The Nation is the authority with jurisdiction to determine and enforce the standards of construction, and it has required the project to be built in accordance with those standards. *Id.* at ¶5.

The Nation's interests in their right to make their own laws and to be governed by them, subject to applicable federal laws and regulations, and their interest in economic development of tribal restricted fee lands, coupled with the high standards required by the Trustees in the construction of the Travel Plaza to protect the people residing in the Nation's Territory and visitors to those lands, and the Nation's land outweigh the Plaintiffs' speculative and unfounded assertions of public safety concerns.

Finally, the jurisdictional failures of the complaint are fatal, even before assessing any of its substance. With the DOI Letter's clarification of status of the Westwoods Territory as restricted fee lands, the court lacks jurisdiction to order injunctive relief against the Trustees for conduct occurring on restricted fee lands. Without the presence of the Nation and the United States, both immune from suit, and both indispensable to any final resolution, the case cannot go forward. Plaintiffs cannot possibly succeed on the merits, and the injunction must be denied.

Dated: March 3, 2025
Akwesasne, NY

By: 

Danielle Lazore-Thompson, Esq.
Big Fire Law & Policy Group LLP
36 Pyke Road
Akwesasne, NY 13655
Ph: (402) 307-9905

Em: dlazore@bigfirelaw.com

DRAGONFLY LAW GROUP, P.C.
Judith A. Shapiro*
Thomas J. Nitschke*
Rebecca L. Kidder*
731 St. Joseph St., Suite 230
Rapid City, SD
Tel: (202) 257-6436
Em: jshapiro@dflylaw.com
tomn@dflylaw.com
rebeccak@dflylaw.com
*Admitted *pro hac vice*

Attorneys for Defendants Lisa Goree, Lance Gumbs, Seneca Bowen, Bianca Collins, Germain Smith, Daniel Collins, Sr., and Linda Franklin

WORD COUNT CERTIFICATION

I, Danielle Lazore-Thompson, hereby certify that the foregoing DEFENDANTS' MEMORANDUM OF LAW IN REPLY TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION contains 6,549 words, exclusive of the caption and signature, and I further certify that this document complies with the word count limit contained in 22 NYCRR 202.8-b(a). I have relied upon the word count of the word processing system used to prepare this document.

Danielle Lazore-Thompson, Esq.