UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

KG URBAN ENTERPRISES, LLC *Plaintiff*, v. DEVAL L. PATRICK, in his official capacity as governor of the Commonwealth of Massachusetts, and CHAIRMAN AND COMMISSIONERS OF THE MASSACHUSETTS GAMING COMMISSION, in their official capacities *Defendants*.	No. 01-11-cv-102070-NMG

MEMORANDUM OF LAW IN SUPPORT OF THE AQUINNAH/GAY HEAD COMMUNITY ASSOCIATION'S CONDITIONAL MOTION TO INTERVENE

Proposed Defendant-Intervenor the Aquinnah/Gay Head Community Association, Inc. ("AGHCA") submits this memorandum of law in support of its Conditional Motion to Intervene.[1]

INTRODUCTION

In 1974, the Wampanoag Tribal Council of Gay Head, Inc. (now the Wampanoag Tribe of Gay Head, hereinafter the "Tribe"), at the time a Massachusetts non-profit corporation without federally-recognized tribal status, commenced an action in this Court against the town of Gay Head (now Aquinnah, hereinafter the "Town"), on the island of Martha's Vineyard, claiming that certain historical transfers of land in Gay Head violated the Indian Non-Intercourse Act, 25 U.S.C. § 177. *See Wampanoag Tribal Council of Gay Head, Inc., et al. v. Town of Gay Head, et al.*, No. 74-5826-G (D. Mass.); *see also Building Inspector & Zoning Officer of Aquinnah v. Wampanoag Aquinnah Shellfish Hatchery Corp.*, 443 Mass. 1 (2004) (describing history of tribe and litigation). The AGHCA intervened in that litigation (as the Taxpayers' Association of Gay Head),[2] and in 1983 the Tribe, the Town, the Commonwealth, and the AGHCA entered into a "Joint Memorandum of Understanding Concerning Settlement of the Gay Head, Massachusetts

[1] AGHCA's Proposed Answer is attached hereto as Exhibit 1 and incorporated by reference.

[2] AGHCA, successor to the Taxpayers' Association of Gay Head, is a non-profit corporation not affiliated with the Tribe whose activities are supported by residents of the Town (both seasonal and year-round), and to a lesser extent other areas of Martha's Vineyard. The Taxpayers' Association of Gay Head was formed in 1973; in 2003, it incorporated as a Massachusetts not-for-profit corporation and changed its name to AGHCA. AGHCA received 501(c)(3) status from the Internal Revenue Service in 2004, with the following mission: (a) to gather, maintain, disseminate, and educate the public regarding current and historical information on all aspects of Town functions and to facilitate the implementation of such functions and operations, and to promote discussion and activity to serve to improve the quality of life for all persons owning property in, residing in, or visiting the Town; (b) to ensure the effective enforcement of all municipal laws and regulations, the proper collection and disbursement of public funds, and the prompt discharge of the Town's administrative responsibilities; (c) to assist the Town's public works (such as the Town library, playgrounds, beaches, and volunteer fire department); (d) to encourage historic and environmental preservation in the Town; and (e) to carry on any other charitable or educational activity consistent with Massachusetts law and the organization's Articles of Incorporation. AGHCA, as the Gay Head Taxpayers' Association, was granted leave to intervene in and was deeply involved with the Tribal Council's 1974 litigation seeking a declaration of ownership of land in the Town. AGHCA has subsequently remained active in matters relating to the Tribe and the Settlement Agreement, including being granted leave to intervene in litigation brought by the Town against the Tribe in 2001 related to the scope and interpretation of the Settlement Agreement. *See Wampanoag Aquinnah Shellfish Hatchery Corp.*, 443 Mass. at 2.

Indian Land Claims" (hereinafter "Settlement Agreement"). The Settlement Agreement provides:

> The Tribal Land Corporation shall hold the Settlement Lands, and any other land it may acquire, ***in the same manner, and subject to the same laws, as any other Massachusetts corporation***…. ***Under no circumstances, including any future recognition of the existence of an Indian tribe in the Town of Gay Head, shall the civil or criminal jurisdiction of the Commonwealth of Massachusetts, or any of its political subdivisions***, over the settlement lands, or any land owned by the Tribal Land Corporation in the Town of Gay Head, or the Commonwealth of Massachusetts, or any other Indian land in Gay Head, or the Commonwealth of Massachusetts, ***be impaired or otherwise altered***, except to the extent modified in this agreement and in the accompanying proposed legislation.

Wampanoag Aquinnah Shellfish Hatchery Corp., 443 Mass. at 2 (emphasis added). In 1985, the Commonwealth enacted legislation to implement this settlement, St.1985, c. 277, and on February 10, 1987, the Tribe was granted federal recognition, *see* 52 Fed. Reg. 4193 (1987). After the Tribe gained federal recognition in 1987, Congress enacted federal legislation implementing the Settlement Agreement in a law known as the Massachusetts Indian Land Claims Settlement Act. 25 U.S.C. §§ 1771-1771i. In this legislation, Congress ratified and confirmed the Tribe's existence as an Indian tribe, and also confirmed that, consistent with the terms of the Settlement Agreement, the Tribe is subject to the jurisdiction of the Commonwealth and the Town. The final provision of the federal implementing Act states:

> Except as otherwise expressly provided in this subchapter or in the State Implementing Act, the settlement lands and any other land that may now or hereinafter be owned by or held in trust for any Indian tribe or entity in the town of Gay Head, Massachusetts, shall be subject to the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts and the town of Gay Head, Massachusetts **(*including those laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance*)**.

25 U.S.C. § 1771g (emphasis added).

In the years since the Settlement Agreement was finalized and codified by both the Commonwealth of Massachusetts and the United States, AGHCA has continued to take measures, including in court when necessary, to protect its interests in the proper interpretation and scope of the Settlement Agreement. *E.g.*, *Wampanoag Aquinnah Shellfish Hatchery Corp.*, 443 Mass. at 1.

Prior to the Tribe's motion to intervene no party to this litigation had suggested that the unqualified language subjecting the Tribe to state regulation of gaming constitutes anything but an unequivocal waiver by the Tribe of any right it may have had to conduct gaming on so-called tribal lands. *See KG Urban Enterprises, LLC v. Patrick*, __ F.3d __, 2012 WL 3104195, *9 n.10 (1st Cir. Aug. 2, 2012) (noting the Commonwealth's position that the Tribe has "waived their right to conduct gaming on that land"). Nor is this counter-textual argument likely to succeed; the clear import of the Settlement Agreement and the Massachusetts and federal implementing legislation is that the Tribe waived any sovereign right it may have had to engage in gaming under the subsequently-enacted Indian Gaming Regulatory Act ("IGRA"), and that the 1983, 1985, and 1987 agreements and enactments "specifically provide for exclusive state control over gambling." *Narragansett Indian Tribe v. National Indian Gaming Comm'n*, 158 F.3d 1335, 1341 (D.C. Cir. 1998) (construing § 1771 in litigation involving a Rhode Island tribe's similar claim); *see also Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 702 (1st Cir. 1994) (distinguishing the Tribe's federal implementing legislation from similar legislation relating to Indian settlement lands in Rhode Island, and noting that §§ 1771e and 1771g "contain corresponding limits on Indian jurisdiction" that save the implementing legislation from implied repeal by IGRA).

The Tribe faces many hurdles in making the argument that the negotiated terms of the Settlement Agreement—in which the Tribe received exclusive use of hundreds of acres of publicly- and privately-owned land in exchange for relinquishing its aboriginal title and claims—do not mean what they say. However unlikely it may be that the Tribe will succeed in these arguments, if the Court permits the Tribe to intervene for purposes of advancing those arguments, AGHCA respectfully requests it too be permitted to intervene to defend the terms and existence of the Settlement Agreement in this litigation. For the reasons discussed below, if the Tribe is permitted to intervene, AGHCA satisfies the standard for intervention as a matter of right. In the alternative, AGHCA should be granted permissive intervention to defend the terms of the Settlement Agreement if the Tribe is allowed to challenge those terms in this Court.

ARGUMENT

I. If The Tribe Is Permitted To Intervene, AGHCA Qualifies For Intervention As A Matter Of Right Because The Tribe's Arguments, If Successful, Would Eviscerate The Settlement Agreement To Which AGHCA Is A Party

Rule 24(a)(2) allows any party who "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest" to intervene in a pending litigation as a matter of right. Fed. R. Civ. P. 24(a)(2). The First Circuit has identified four factors to consider in determining whether a moving party is entitled to intervene as a matter of right: (1) the timeliness of the motion to intervene; (2) the party's interest relating to the property or transaction that forms the basis of the ongoing action; (3) whether the disposition of the action threatens to impair the moving party's ability to protect that interest; and (4) whether existing parties cannot adequately represent the moving party's interest in the proceedings. *See Conservation Law Foundation v. Mosbacher*, 966 F.2d 39, 41 (1st Cir. 1992); *Travelers Indem. Co. v. Dingwelu*, 884 F.2d 629,

637 (1st Cir. 1989). If the Tribe is permitted to intervene, AGHCA satisfies each of these considerations, and the conditional motion to intervene should be granted.

AGHCA's Conditional Motion to Intervene is Timely. This conditional motion is filed only ten days after the Tribe tendered its motion to intervene on September 7, 2012 and only seven days after the Court held a status conference at which the Court expressed its view that the Tribe's motion to intervene may be well-taken. Only after the Tribe filed its motion was AGHCA on notice that its interests in enforcing and maintaining the integrity of the Settlement Agreement could be jeopardized in this otherwise-unrelated litigation, and AGHCA filed its motion as soon as practicable thereafter. The timeliness of AGHCA's conditional motion is particularly apparent in light of the First Circuit's mandate that intervention motions should be evaluated "in keeping with a commonsense view of the overall litigation." *Public Service of New Hampshire v. Patch*, 136 F.3d 197, 204 (1st Cir. 1998). Surely if the Tribe is permitted to participate in this litigation as a party and advance arguments that the Settlement Agreement and implementing legislation are no longer in force, AGHCA should be allowed to provide the Court with arguments in support of the existence and enforceability of the Settlement Agreement.

AGHCA Has a Significant Stake in the Outcome of this Litigation if the Tribe is Permitted to Intervene. It is beyond dispute that a party seeking to defend and protect the validity of a contract to which it is a party has a significant stake in the interpretation of that agreement. Likewise, there can be no serious dispute that such a party—like AGHCA here—awaits the outcome of such an interpretation on the sidelines at its own peril. *See Daggett v. Comm'n on Governmental Ethics & Election Practices*, 172 F.3d 104, 110-111 (1st Cir. 1999) (while proposed intervenor may not have been bound by determination "in a strict res judicata sense," fact that court's interpretation of statute would operate to bar proposed intervenor from

benefitting from statute "easily satisfie[s]" intervention test). If the Tribe's interest in this litigation is significant enough to warrant its intervention, surely AGHCA's interest in protecting the terms of its Settlement Agreement is too.

The Existing Parties Cannot Adequately Represent AGHCA's Interests. AGHCA also is entitled to intervene as a matter of right if the Tribe is permitted to intervene because none of the existing parties to the litigation will adequately represent AGHCA's unique interest in vigorously defending the Settlement Agreement from the Tribe's attack. KG, for its part, has no particular interest in the interpretation of the settlement agreement, but rather can be expected to focus on whether, if the Tribe is able to escape from the confines of that agreement, the Tribe qualifies under the IGRA in a way that may implicate the equal protection analysis. The Commonwealth, moreover, although it has to date taken the position that the Tribe has relinquished any right to conduct gaming on its property on Martha's Vineyard, suffers from competing priorities in this litigation. If the Tribe is correct that the Massachusetts Gaming Act can be salvaged only if the Settlement Agreement is interpreted not to bar the Tribe's efforts to conduct gaming on its land, the Commonwealth's and AGHCA's interests or positions on the interpretation and enforceability of that Settlement Agreement may diverge. This is not a case, moreover, in which the Commonwealth is defending the constitutionality of a statute and can be presumed to be representing the interests of all constituents in that defense. *Compare Daggett*, 172 F.3d at 111-112. Although the Commonwealth has thus far tendered arguments consistent with AGHCA's arguments, there is a non-speculative basis to suggest that the Commonwealth's approach could change. *Cf. Mosbacher*, 966 F.2d 39 at 41.

* * * *

If the Tribe is permitted to intervene in this matter to raise its argument that the Settlement Agreement and implementing legislation do not relinquish any right it may have to conduct gaming on its land, AGHCA satisfies all the criteria for intervention as a matter of right and AGHCA's conditional motion should be granted.

II. In The Alternative, AGHCA Should Be Allowed To Intervene By Permission

Alternatively, AGHCA requests the Court exercise its discretion to permit AGHCA to intervene under Rule 24(b) if it grants the Tribe's motion to intervene. Permissive intervention is appropriate where "an applicant's claim or defense and the main action have a question of law or fact in common." Fed. R. Civ. P. 24(b). District courts have "broad discretion" in deciding whether or not to grant permissive intervention under Rule 24(b)(2). *Travelers Indem. Co. v. Dingwell*, 884 F. 2d 629, 641 (1st Cir. 1989). The First Circuit has articulated three factors to be considered in determining whether permissive intervention is warranted, including whether: "(i) the applicant's claim or defense and the main action have a question of law or fact in common; (ii) the applicant's interests are not adequately represented by an existing party; and (iii) intervention would not result in undue delay or prejudice to the original parties." *In Re Thompson*, 965 F. 2d 1136, 1142 n. 10 (1st Cir. 1992).

As discussed above, if the Tribe is permitted to intervene, AGHCA easily satisfies the first two considerations for permissive intervention—AGHCA's contractual rights are directly implicated and its interests are not adequately represented by the existing parties. Permitting AGHCA to intervene alongside the Tribe also would not prejudice the existing parties—the case is still in the early stages, particularly with respect to the arguments raised by the Tribe, and the Court is still determining how to proceed in light of the First Circuit's opinion and remand.

Allowing AGHCA to intervene at this juncture would not delay any aspects of the proceedings, nor would it cause any prejudice. Therefore, AGHCA should be allowed to intervene by permission if the Tribe is allowed to intervene. *See Daggett*, 172 F.3d at 113 ("[T]he district court can consider almost any factor rationally relevant but enjoys very broad discretion in granting or denying" a motion for permissive intervention).

CONCLUSION

For the foregoing reasons, AGHCA respectfully requests that if the Tribe is permitted to intervene in this litigation, the Court also grant its conditional motion to intervene because AGHCA is entitled to intervene as a matter of right, or that the Court exercise its discretion to permit AGHCA to intervene.

AQUINNAH/GAY HEAD COMMUNITY ASSOCIATION, INC.

By its attorneys,

/s/ Felicia H. Ellsworth
Felicia H. Ellsworth (BBO# 665232)
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, Massachusetts 02109
(617) 526-6000
felicia.ellsworth@wilmerhale.com

James L. Quarles, III (BBO# 408520)
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, DC 20006
(202) 663-6000
james.quarles@wilmerhale.com

September 17, 2012

CERTIFICATE OF SERVICE

In accordance with Local Rule 5.2(b), I hereby certify that this document filed through the ECF system on September 17, 2012 will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/ Felicia H. Ellsworth
Felicia H. Ellsworth