UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DOCKET NO. 1:13-CV-13286-FDS

THE COMMONWEALTH OF MASSACHUSETTS,

Plaintiff,

vs.

THE WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH), THE WAMPANOAG TRIBAL COUNCIL OF GAY HEAD, INC., and THE AQUINNAH WAMPANOAG GAMING CORPORATION,

Defendants.

TOWN OF AQUINNAH'S REPLY IN SUPPORT OF ITS MOTION TO INTERVENE

Pursuant to this Court's scheduling order, the Town of Aquinnah (the "Town") files the following reply to the defendants' (Wampanoag Tribe of Gay Head (Aquinnah) and Aquinnah Wampanoag Gaming Corporation) (collectively, "the Tribe") Opposition to the Town's Motion to Intervene. Conceding that the Town's effort to intervene is timely, the Tribe raises three other objections, to which the Town responds as follows:

I. Whether the Commonwealth can adequately represent the Town's interests.

The Town seeks to intervene in this proceeding in order to protect its rights to enforce Town zoning by-laws and land use regulations against the Tribe under the Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987, Public Law 100-95 (August 18, 1987) (the "Federal Implementing Act"),[1] which the Tribe has advanced does not preclude it from operating a Casino within the Town. The Commonwealth's complaint seeks relief only under the State Gaming Act, G. L. c. 23K (the "Gaming Act"), and the relief sought pertains only to enforcement of that statute. Since the Commonwealth does not seek to enforce either the Town's zoning by-laws or to enforce conditions imposed by land use permits previously issued by the Town to the Tribe for the facility at issue, the Town and the Commonwealth have divergent, and not identical, interests.

Under the Gaming Act, the Legislature has divided the state into three regions, each of which is entitled to one Class III gaming casino. The Town takes no position as to whether the Tribe is entitled to a gaming license in any other city, town or region other than Aquinnah. Similarly, the Commonwealth does not contend that the Tribe cannot have a Class III casino in

[1] The Aquinnah Act is codified at 25 U.S.C. § 1771 et seq.

Aquinnah, but advances that the Tribe must follow the State Gaming Act.

The Town's rights are grounded in the Federal Implementing Act, which explicitly provides, in part, as follows:

> "Except as otherwise expressly provided in this Act or in the State Implementing Act, the settlement lands and any other land that may now or hereafter be owned 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 and 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 game of chance)."

25 U.S.C. § 1771(g)(emphasis supplied).[2] Thus, Congress mandated that the Tribe must comply with the laws of two jurisdictions: the Commonwealth and the Town.

The language in the Federal Implementing Act (§ 1771g) that the Tribe is "subject to the civil and criminal laws and ordinances and jurisdiction . . . of the Town of Gay Head" is pivotal in light of the Tribe's reliance on State of Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685 (1st Cir. 1994). The Settlement Act at issue in Narragansett Tribe specifically

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[2] The Federal Implementing Act also provides that:

> "The [Tribe] shall not . . . exercise any jurisdiction over any part of the settlement lands in contravention of . . . the civil regulatory and criminal laws of the Commonwealth of Massachusetts, the Town of Gay Head, Massachusetts . . . ."

25 U.S.C. § 1771e(a).

referenced only state law,[3] and did not contain the additional restriction that the Narragansett Tribe was also subject to local laws or regulations pertaining to "bingo or any game of chance." Accordingly, the Narragansett Tribe case is inapposite.

The Tribe also places great weight on the following language in the Narragansett Tribe opinion concerning the Town of Charlestown, which was also a party in that case:

> "Although we recognize both the town's desire to assert jurisdiction in respect to the settlement lands and the Tribe's opposition, we see nothing to be gained by giving separate treatment to the question of local jurisdiction. As a general matter, municipal authority is entirely derivative of state authority; and in the exercise of governmental powers (as opposed to proprietary powers), municipalities act only as agents of the state."

Id. at 696 (citations omitted). The Tribe neglects, however, to quote the immediately following sentence:

> "It follows that if the state chooses to cede a portion of its sovereignty to the town, the town may use that authority to the extent of the power delegated. But delegated powers, of necessity, cannot exceed those possessed by the delegator. The town has cited no independent basis upon which it might exercise municipal jurisdiction and none is apparent to us. Thus Charlestown's concerns are necessarily subsumed in our discussion of State jurisdiction."

Id. at 697 (emphasis supplied)(citations omitted). Here, conversely, Congress added specific language granting the Town an independent basis to exercise "municipal jurisdiction". The

[3] Section 1708 of 25 U.S.C. provides that "[t]he Settlement Lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island."

absence of similar language in the Rhode Island Act is a second reason why the Tribe's reliance on the Narragansett case is misplaced.

Further, as noted, the Federal Implementing Act (for Aquinnah) mandated that the Tribe follow "State and Town laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance." The addition of this language is critical, as the First Circuit noted:

> "We think it is sensible to compare the jurisdictional grant imbedded in the [Rhode Island] Settlement Act with the jurisdictional grants encased in two other Indian claims settlement acts that were to some extent modeled after the Settlement Act. Both of the latter pieces of legislation - one involving Massachusetts, one involving Maine - contain grants of jurisdiction parallel to section 1708, expressed in similar language. See 25 U.S.C. § 1771(g) (1988);[4] 25 U.S.C. § 1725 (1988). Yet both acts also contain corresponding limits on Indian jurisdiction, conspicuously absent from the Settlement Act. See 25 U.S.C. § 1771e(a); 25 U.S.C. § 1725(f). By placing stated limits on the retained jurisdiction of the affected tribes these newer acts imply that an unadorned grant of jurisdiction to a state - such as embodied in the Settlement Act - does not in and of itself imply exclusivity.'"

Id. at 702.

Zoning is a local function, and towns are charged under the Massachusetts Zoning Enabling Act (G. L. c. 40A) with enforcing their own zoning by-laws. The Town's zoning by-laws prohibit commercial gaming. In addition, the Town has issued land use

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[4] This reference is the very section of the Federal Implementing Act which makes the Aquinnah Tribe subject to laws, ordinances and regulations of the State and the Town.

permits restricting the facility at issue to a community center - a "casino" has not been, nor could it be, approved. The Town, not the State, has the responsibility to enforce these zoning by-laws and existing limitations imposed by prior land use permits.

In Wiener v. Wampanoag Aquinnah Shellfish Hatchery, Corporation, 223 F. Supp. 2d 346, 348 (D. Mass. 2002), Judge Woodlock characterized the Building Inspector's action to enforce Town zoning laws against the Tribe as follows:

> "At issue is the manner in which construction on the Cook Lands by the Tribe remains subject to Town zoning by-law promulgated under the authority of Mass. General Laws Ch. 40A."

In remanding the matter to State court, Judge Woodlock ruled that:

> "[N]ot only does Federal law at issue not preempt the law of Massachusetts, it actually directs that the land be subject in some fashion - precisely how is the question presented - to state and local law."

Id. at 352 n. 10. Thus, any ruling bearing on the Town's role under the State Gaming Act, or its rights under the Federal Implementing Act, may interfere with its duty to enforce, for the benefit of its residents, Town zoning regulations and land use permits prohibiting commercial gaming. Since enforcement is entirely a municipal function, the Commonwealth has no direct interest or stake in protecting the Town's rights.

In Penobscot Nation v. Mills, 2013 WL 3098042 (D. Me. June 18, 2013), Judge Singal of the United States District Court for the District of Maine granted the motions to intervene of various towns in Maine, and other private parties, in an action brought by the Penobscot Nation against the State of Maine. In ruling that municipal intervention was proper, the District Court found that the interests of the municipalities "are sufficiently divergent from the [State of Maine's] interest that the [municipalities] are not adequately represented by [the State]." Id. at *3. The Court also noted:

> "The primary question presented by this litigation -- which party has hunting and fishing regulatory authority over the Main Stem of the Penobscot River -- will have a myriad of potential regulatory, financial, economic and municipal ramifications. The impact on each of the [municipalities] and the State is predictably different in type and scope. While [the State] and [the municipalities] may be united at this point in time over the response to the Second Amended Complaint, it is not clear that they will be united on any further questions or potential ramifications. Therefore the Court finds that [the municipal] interests are not adequately represented by the [State]."[5]

Id. at *4.

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[5] The Court also observed that "the First Circuit has noted that the threshold for permissive intervention is low, and that once a threshold requirement is satisfied, the District Court may 'consider almost any factor rationally relevant'." Dagget v. Comm'n on Governmental Ethics & Election Practices, 172 F.3d 104, 113 (1st Cir. 1999); Massachusetts. Food Ass'n v. Mass. Alcoholic Beverages Control Comm'n, 197 F.3d 560, 568 (1st Cir. 1999)." Id. at *2. Since the Court determined that permissive intervention was appropriate, it did not consider whether the municipalities were entitled to intervene as a matter of right. Id. at *5.

The Town also points out that the Tribe's selective quotations from The Conservation Law Foundation v. Mosbacher, 966 F.2d 39 (1st Cir. 1992) leave out the following:

> "This Court has . . . emphasized that '[t]here is no precise and authoritative definition of the interest required to sustain a right to intervene', while reiterating that 'the intervenor's claim must bear a sufficiently close relationship to the dispute between the original litigants' and that the interest must be direct, not contingent. . . . the determination of whether an interest is sufficient for Rule 24(a)(2) purposes is colored to some extent by the third factor - whether disposition of the action may as a practical matter, impair or impede the applicant's ability to protect its interests."

Id. at 42.

Given the stakes involved, the Town should be allowed to intervene, whether by right or permissively.

II. The Issue of Sovereign Immunity.

The Tribe also argues, as a basis for opposing Town intervention, that the Town's right to intervene is barred by the Tribe's retained "sovereign immunity." First, this argument is a defense which goes to the merits of the case, and not to whether the Town should be allowed to intervene. Incredibly, the Tribe does not cite the case of Building Inspector of Aquinnah v. Wampanoag Shellfish Hatchery Corporation, Inc., 443 Mass. 1 (2004) - - the case decided by the Supreme Judicial Court after Judge Woodlock remanded the prior mentioned zoning dispute to State court. There, the Supreme Judicial Court

("SJC") directly addressed the Tribe's sovereign immunity and whether an agreement signed by a predecessor bound the Tribe. In that case, the Massachusetts Supreme Judicial Court ruled as follows:[6]

> "Here, the facts clearly establish a waiver of sovereign immunity stated, in no uncertain terms, in a duly executed agreement, and the facts show that the Tribe bargained for, and knowingly agreed, to that waiver. There is absolutely nothing to suggest that the Tribe was 'hoodwinked' or that its negotiators were 'unsophisticated' or did not know what they were doing. From all that appears on the record, the parties, represented by able counsel, engaged in protracted and difficult negotiations which produced the settlement agreement bespeaking, in unambiguous terms, the parties' complete understanding. . . . (id. at 12). . . .
>
> The Federal implementing Act was expressly made subject to the terms of the settlement agreement. See 25 U.S.C. Section § 1771d(c). The Tribe's agreement to be treated as a Massachusetts corporation for these purposes was accepted and adopted by Congress. See id. The Federal implementing Act also bound all successors to the land, including the Cook Lands, to the settlement agreement. (See id. at § 1771e(b)). . . . (id. at 14). . . .
>
> The Federal legislation implemented the settlement agreement and confirmed the terms agreed to by the parties. Contrary to the Tribe's contention, paragraph three of the settlement agreement does not express an aspiration or standard for governance of the tribal lands, which the Tribe may elect to follow. Paragraph three is an obligation undertaken by the Tribe and refers specifically to the manner in which the Tribe pledged to conduct its activities on the subject land, waiving its right to proceed otherwise."

Id. at 15. Given the SJC decision, the identities of the parties, and the similarity of the issues raised, the Tribe is

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[6] The SJC decision has preclusive effect on the arguments raised by the Tribe here regarding sovereign immunity.

barred from relying on a sovereign immunity defense in these proceedings which is an argument on the merits in any event, and is not relevant to the intervention inquiry.

III. Issues of Hardship.

The Tribe argues that it will be subject to hardship by having to defend itself against several additional parties if the Town and the Taxpayers Association are allowed to intervene in this case. In the Maine case, Judge Singal ruled that the addition of the municipal parties "will not unduly delay the adjudication of this case because this case is still in its early stages with discovery not set to be completed for several months . . . " Penobscot Nation, supra at *3.

The Court also rejected the Penobscot Nation's claim that permitting the municipalities to intervene in the case would "significantly increase the demands of the case management for the Court." Indeed the Court opined that:

> "While allowing the [municipal] parties to permissibly intervene will undoubtedly add a measure of time and complication to this case that would not occur in their absence, the Penobscot Nation has not pointed to any particular prejudice or delay that it will suffer. Moreover, 'delay' in and of itself does not mean that intervention should be denied."

Id.

IV. Intervention Will Serve the Efficient Administration of Justice.

The Tribe's argument that intervention by the Town will be a burden to them rings hollow. The Town is seeking to intervene as a plaintiff. The Town could bring its own separate action, and the Tribe would have to defend itself against separate actions. By moving to intervene, the Town is seeking to streamline the issues, and bring all the parties who have rights together in one action. Intervention serves the efficient administration of justice.[7]

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[7] We think it is notable that, in a prior action in this Court brought by a private entity challenging the Commonwealth's denial of a right to apply for a license under the Gaming Act, KG Urban Enterprises, LLC v. Patrick, 1:11-cv-12070-NMG, the Mashpee Wampanoags and the Aquinnah Tribe sought to intervene, and the Town and the Taxpayers Association sought to intervene on a conditional basis (in the event the Aquinnah Tribe was allowed to intervene). Judge Gorton denied all parties the right to intervene.

The Aquinnah Tribe (with the same counsel as here) appealed the denial of its motion to intervene to the First Circuit Court of Appeals. KG Urban Enterprises, LLC v. Patrick, First Circuit No. 13-1861 (1st Cir. August 5, 2013). In response, the Town moved to intervene in the First Circuit action, as did the Taxpayers Association. The Aquinnah Tribe filed a response to the intervention motions as follows (Docket Entry No. 23):

> "Although [the Tribe] would prefer to keep non governmental interests out of the instant litigation, and the Town's position should be consumed by the Commonwealth because it is a political subdivision of the Commonwealth, [the Tribe] cannot conclude that the parties remaining in the litigation are capable of advocating the interests of the proposed intervenors. Accordingly, [the Tribe] does not support or oppose the pending motions to intervene."

V. Conclusion.

For all the reasons set forth above, the Town of Aquinnah meets the standards set forth by the First Circuit Court of Appeals for intervention as a matter of right. At a minimum, and as articulated by the United States District Court of Maine in the Penobscot Nation case, the Town certainly meets the standards for permissive intervention. The Town's motion to intervene should be allowed.

TOWN OF AQUINNAH
By its attorneys,

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Dated: July 31, 2014

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**CERTIFICATE OF SERVICE**

In accordance with Local Rule 5.2(b), I hereby certify that this document filed through the ECF system on July 31, 2014 will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

*/s/ Michael A. Goldsmith*
Michael A. Goldsmith