the extinguishment by the sovereign of aboriginal title to this land.

(D) NEED FOR ECONOMIC DEVELOPMENT DOES NOT ALTER THE COURT'S ANALYSIS

Finally, the Shinnecock presented evidence of the poverty that exists on the Shinnecock Reservation and argued that the development of a casino at Westwoods will provide the Nation with much-needed economic development to support its self-governing community. Although the Court recognizes the difficult economic circumstances facing many families living on the Shinnecock Reservation, these economic hardships do not give any authority to this Court to rewrite history and ignore the overwhelming evidence demonstrating that aboriginal title of the Westwoods parcel has been extinguished. The Supreme Court has repeatedly cautioned that the justness, wisdom, or equity of a sovereign's extinguishment of aboriginal title is not open to re-examination by the court. *See, e.g., Santa Fe*, 314 U.S. at 347 ("[W]hether [extinguishment] be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts."); *Beecher v. Wetherby,* 95 U.S. 517, 525 (1877) (noting that "the propriety or justice of [the sovereign] towards the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion . . . ."); *see also Oneida,* 691 F.2d at 1096 ("[A]ssuming *arguendo* that New York was entitled without federal consent to purchase the Oneidas' land, judicial inquiry into the 'manner, method and time' of its extinguishment of Indian title would be barred.") (*quoting Santa Fe*, 314 U.S. at 347); *Delaware Nation,* 446 F.3d at 416 ("'[T]he manner, method, and time of the sovereign's extinguishment of aboriginal title raise political, not justiciable, issues.'") (quoting *Santa Fe,* 314 U.S. at 347); *Gemmill*, 535 F.2d at 1147 ("[W]hen the Government clearly intends to extinguish Indian title the courts will not inquire into the means or propriety of the action.").

Thus, although the law requires the plain and unambiguous extinguishment of aboriginal title, *Santa Fe,* 314 U.S. at 354, once that standard is met, the Court cannot disregard the clear intent of the sovereign. As one court explained when faced with similar concerns raised by a Tribe in connection with a land issue,

> The above principles require the court to take a sympathetic view toward the position of the Red Lake Band [of Indians], but those principles do not permit us to ignore the clear wording of a treaty, agreement, or enactment, or to disregard the intent of Congress. The Supreme Court has cautioned that the courts cannot remake history or expand treaties and legislation beyond their clear terms to remedy a perceived injustice suffered by the Indians.

Minnesota, 466 F. Supp. at 1385. In the instant case, the various New York Provincial Governors, while acting under the authority of the British Crown, repeatedly approved of, and confirmed, the fact that the Shinnecock had ceded, relinquished, and conveyed their

interest in lands west of Canoe Place, including Westwoods, to Southampton, and the historical record since that time is completely consistent with that unequivocal act of the sovereign. Thus, aboriginal title has been unambiguously extinguished. Since the extinguishment standard has been met, any injustices that the Shinnecock Nation believes occurred prior to that time, or since that time, with respect to that land or the Shinnecock Nation are beyond the purview of the Court's determination of the legal issue that has been decided in this case.

C. Analysis Under *Sherrill* of Defendants' Claim of Sovereignty Over Westwoods

Plaintiffs also argue that, regardless of whether the Nation has unextinguished aboriginal title to Westwoods, defendants are barred from asserting sovereignty at Westwoods by the equitable doctrines of laches, acquiescence, and impossibility under the Supreme Court standard articulated in *Sherrill*. Defendants argue that *Sherrill* is inapplicable to the factual situation here because, among other things, the Nation is not re-acquiring possession of land as was the circumstance in *Sherrill*. As set forth below, having carefully considered the trial evidence in the context of the *Sherrill* decision and Second Circuit authority interpreting *Sherrill*, the Court finds that equitable doctrines do provide an independent basis for plaintiffs' success on the merits of this case even assuming *arguendo* that the Nation's aboriginal title to Westwoods was not extinguished.

(1) Legal Framework for Analyzing Disruptive Land Claim Issue

The 2005 decision of the United States Supreme Court in *Sherrill* set forth the legal framework under which a court must examine equitable doctrines in the context of an attempt by an Indian tribe to re-assert sovereignty over a parcel of land. In particular, *Sherrill* involved a refusal by the Oneida Indian Nation (the "OIN") to pay taxes on ten small parcels of land that it had recently purchased, which had been part of its former Indian reservation. Specifically, the OIN argued that "because the Court in *Oneida II* recognized the Oneidas' aboriginal title to their ancient reservation land and because the Tribe has now acquired the specific parcels involved in this suit in the open market, it had unified fee and aboriginal title and may now assert sovereign dominion over the parcels." *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 213 (2005). The Supreme Court, however, rejected that argument and held that equitable principles barred the OIN from unilaterally reviving its ancient claim of sovereignty over the land:

> Our 1985 decision [in *Oneida II*] recognized that the Oneidas could maintain a federal common-law claim for damages for ancient wrongdoing in which both national and state governments were complicit. Today, we decline to project redress for the Tribe into the present and future, thereby disrupting the governance of central New York's counties and towns. Generations have passed

> during which non-Indians have owned and developed the area that once composed the Tribe's historic reservation. And at least since the middle years of the 19th century, most of the Oneidas have resided elsewhere. Given the longstanding, distinctly non-Indian character of the area and its inhabitants, the regulatory authority constantly exercised by New York State and its counties and towns, and the Oneidas' long delay in seeking judicial relief against parties other than the United States, we hold that the Tribe cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue. The Oneidas long ago relinquished the reins of government and cannot regain them through open-market purchases from current titleholders.

Id. at 202-03. Specifically, the Court noted that the "unilateral reestablishment of present and future Indian sovereign control, even over land purchased at the market price, would have disruptive practical consequences" because "[a] checkerboard of alternating state and tribal jurisdiction in New York State – created unilaterally at OIN's behest – would seriously burde[n] the administration of state and local governments and would adversely affect landowners neighboring the tribal patches." *Id.* at 219-20 (citation and quotation marks omitted). The Court further explained that "the distance from 1805 to the present day, the Oneidas' long delay in seeking equitable relief against New York or its local units, and developments in the city of Sherrill spanning several generations, evoke the doctrines of laches, acquiescence, and impossibility, and render inequitable the piecemeal shift in governance this suit seeks unilaterally to initiate." *Id.* at 221. Thus, although OIN could seek damages for any wrongful ancient dispossession with respect to this sovereign land, the Court ruled that the Tribe was precluded by equitable principles from seeking to reestablish sovereignty over the land. *Id.*

In the instant case, assuming aboriginal title has not been extinguished, defendants argue that *Sherrill* is inapplicable because, unlike the OIN, which had not been in possession of the land at issue for over a century, the Nation has always been in possession of Westwoods and has not been subject to taxation or government regulation on that land at any point. However, in *Cayuga*, the Second Circuit recognized that *Sherrill* "has dramatically altered the legal landscape" and had to be considered in deciding the land claim at issue in that case. 413 F.3d at 273. In particular, citing the broad language in *Sherrill*, the Second Circuit emphasized that *Sherrill*'s holding could not be limited to the narrow factual circumstances in *Sherrill*, but rather should be applied to disruptive Indian land claims more generally:

> We understand *Sherrill* to hold that equitable doctrines, such as laches, acquiescence, and impossibility, can, in appropriate circumstances, be applied to Indian land claims, even when such a claim is

> legally viable and within the statute of limitations.
>
> The [*Sherrill*] Court's characterization of the Oneidas' attempt to regain sovereignty over their land indicate that what concerned the Court was the disruptive nature of the claim itself. . . . Although we recognize that the Supreme Court did not identify a formal standard for assessing when these equitable defenses apply, the broadness of the Supreme Court's statements indicates to us that *Sherrill*'s holding is not narrowly limited to claims identical to that brought by the Oneidas, seeking a revival of sovereignty, but rather, that these equitable defenses apply to disruptive Indian land claims more generally.

Id. at 273-74 (citations and quotations omitted).

Therefore, given the broad language in *Sherrill* and the Second Circuit's conclusion that *Sherrill* should be applied more generally to disruptive land claims, the Court finds that it is appropriate to utilize the *Sherrill* framework to analyze the Nation's proposed use of the Westwoods land, which has been dormant for hundreds of years from a development standpoint, to build a casino in violation of New York and local laws. Nor does it matter that the Nation is the defendant is this case, rather than the plaintiff. There is no question that this lawsuit is centered around the Nation's position that it is not subject to any New York or local laws or regulation of any kind in connection with its proposed development of a casino at Westwoods. Thus, although the suit was initiated by the State and Town, the Court must resolve the Nation's land claim in the context of this suit and, in doing so, must consider whether the development of Westwoods is so disruptive that equitable principles should prevent the defendants from initiating such development free of governmental laws and regulations. In fact, the Supreme Court also reached such a conclusion in *Sherrill* in rejecting a suggestion by the dissent that a claim of tribal immunity could be raised defensively in a tax proceeding consistent with the majority opinion. *See Sherrill*, 544 U.S. at 214 n.7 (citations omitted) ("The dissent suggests that, compatibly with today's decision, the Tribe may assert tax immunity defensively in the eviction proceeding initiated by Sherrill. . . . We disagree. The equitable cast of the relief sought remains the same whether asserted affirmatively or defensively.").

Accordingly, the Court will apply the *Sherrill* framework to the particular facts of this case to determine whether such equitable relief is warranted. Moreover, as with the extinguishment issue, the Court has placed the burden of proof on plaintiffs under a preponderance of the evidence standard, since they are the parties invoking the equitable principles to prevent the assertion of sovereignty. *See, e.g., Gidatex, S.r.L. v. Campaniello, Imports, Ltd.*, 82 F. Supp. 2d 126, 130-136 (S.D.N.Y. 1999) (holding that party invoking equitable principles of unclean hands, laches, and acquiescence has burden of proof); *see also United States v. 0.28 Acres of*

Land, 347 F. Supp.2d 273, 279 (W.D. Va. 2004) (holding that party claiming laches bears the burden of proof).

B. NATION'S MOTION TO PRECLUDE EVIDENCE REGARDING POTENTIAL USES OF WESTWOODS

During the trial, defendants sought to preclude any consideration by the Court of evidence regarding potential uses of Westwoods or the purported impact of those potential uses because such evidence is irrelevant and speculative. Instead, defendants argued that the Court should base its analysis only on evidence relating to the impact caused by the current proposed use of the property by the Nation as reflected in its development agreement – namely, a 61,000 sf. facility to be constructed on about 15 acres at Westwoods, capable of holding between 900-1,000 gaming machines and 60 table games. (D237, at 13, 15-16.) For the reasons set forth below, the Court disagrees and will consider, in conjunction with the entire record, both the impact of the current intended use by the Nation of the property, as well as the potential disruption that could be caused generally by the Nation's unfettered ability to develop the property without regard to the laws and regulations of New York and the Town.

As a threshold matter, the Court notes that this lawsuit is not limited to a desire to enjoin construction of a casino of a particular size or nature; rather, plaintiffs seek to enjoin all construction as it relates to gaming activity at Westwoods. Moreover, in this lawsuit, the Nation has consistently taken the position that they have the absolute right to expand the gaming at Westwoods beyond the terms of any current contract with developers in any manner at any time free of New York and local laws. Thus, the dispute here relates not just to a particular proposed facility, but rather involves a more general position by the Nation that they can use the land for any purpose whatsoever.

In any event, both the Supreme Court in *Sherrill* and the Second Circuit in *Cayuga* analyzed the issue of the disruptive impact of the underlying land claims based upon potential future disruptiveness that would result from a decision in favor of the tribe. As noted *supra*, the *Sherrill* Court noted that "the unilateral reestablishment of present *and future* Indian sovereign control, even over land purchased at the market price, would have disruptive practical consequences." 544 U.S. at 219 (emphasis added). In fact, the *Sherrill* Court specifically referenced the potential harmful consequences that could result in the future if the Oneidas' claim of sovereignty over the land was recognized – namely, the potential of future litigation to free the land of local zoning and other regulatory controls. *See id.* at 220 ("If OIN may unilaterally reassert sovereign control and remove these parcels from the local tax rolls, little would prevent the Tribe from initiating a new generation of litigation to free the parcels from local zoning or other regulatory controls that protect all landowners in the area."). In addition, the *Sherrill* Court cited in a footnote, as an example of potential future disruptive consequences, the Cayugas' attempt to assert tribal sovereignty over newly acquired property in order to conduct gaming in violation of local regulatory controls. *See id.* at 220 n.13. Moreover, the *Sherrill* Court also stated that attempts to regain sovereignty over newly acquired parcels should be addressed through the land-in-trust provisions

established by Congress and the Department of Interior. *Id.* at 220. That process includes consideration by the Secretary of the Interior of potential future conflicts of land which may arise. *Id.* at 221 ("Before approving an acquisition, the Secretary must consider, among other things, . . .'the impact of the State and its political subdivisions resulting from the removal of the land from the tax rolls'; and '[j]urisdictional problems and potential conflicts of land use which may arise.' 25 C.F.R. § 151.10 (2004).").

Similarly, in *Cayuga*, the Second Circuit also considered the potential future impact of the Cayuga's possessory land claim, which sounded in ejectment. Specifically, in rejecting the contention that the request for ejectment should not be precluded under the equitable defense of laches because ejectment is characterized as an action at law rather than an action in equity, the Second Circuit stated that "[w]hether characterized as an action at law or in equity, any remedy flowing from this possessory land claim, which would call into question title to over 60,000 acres of land in upstate New York, can only be understood as a remedy that would similarly 'project redress into the present and future.'" *Cayuga,* 413 F.3d at 275 (quoting *Sherrill*, 544 U.S. at 221 n.14) (footnote omitted). The Court further explained that "the import of *Sherrill* is that 'disruptive,' forward-looking claims, a category exemplified by possessory land claims, are subject to equitable defenses, including laches."[63] *Id.* at 277.

Thus, the Court believes that, in considering the disruptive impact under *Sherrill*, it should consider not only the current stated use of the land, but also other future disruptive consequences that could flow from a broad ruling by this Court (as urged by defendants) that the Nation is free to develop the Westwoods land in any way it sees fit free of any New York or local laws or regulations. However, the Court emphasizes that this conclusion is not critical to the Court's *Sherrill* analysis under the facts of the instant case because, as discussed *infra*, the Court concludes that even the Nation's current intended use of Westwoods is sufficiently disruptive that it should be barred under the equitable principles articulated in *Sherrill.*

(3) ANALYSIS

In applying *Sherrill* to the facts of this case, this Court has considered a number of factors including the degree of control and governmental authority asserted by the Nation and the Town at Westwoods over the past several centuries, the amount of historical delay in the Nation's assertion of sovereignty over Westwoods, and the degree of disruptive impact over neighboring landowners and the community if the Nation were now able to assert sovereignty over this land and build a gaming facility free from governmental laws and regulations. As discussed below, the Court concludes that when these factors are considered in the context of this case –

[63] In fact, Judge Hall also acknowledged in his dissent in *Cayuga* that *Sherrill* applied equitable considerations to land possession claims that involved forward-looking, disruptive remedies. *See id.* at 90 (stating that *Sherrill* "supports the proposition that the nature of forward-looking, disruptive remedies generally will serve as equitable considerations that can bar such equitable remedies as re-possession, even against the United States").

namely, the Nation's hundreds of years of delay in claiming sovereignty over this land, the Nation's lack of use of this land for centuries for anything other than cutting timber and periodic recreational events, and the substantial disruption that a casino facility would have on the administration of governmental affairs in the Town and on the health, safety, and long-settled expectations of the community – the assertion of sovereignty is barred under the equitable doctrines of laches, acquiescence, and impossibility, even assuming *arguendo* that the Nation holds unextinguished aboriginal title to the land.

(A) HISTORIC LACK OF GOVERNMENTAL AUTHORITY OR CONTINUOUS PRESENCE BY THE NATION AT WESTWOODS

The Nation has not maintained a continuous presence at Westwoods or exercised any governmental authority over that land. The evidence at trial demonstrated that the Nation has used Westwoods for its timber resources, pursuant to a lease sought by the Nation and granted by the Town in the early 19th century. This arrangement followed the depletion of timber resources in the lands east of Canoe Place, known as the 1703 Lease Lands. In fact, the only usage of Westwoods attested to by the Nation at trial was for cutting wood, Sunday school, and Fourth of July picnics. This lack of use or exercise of governmental authority over Westwoods was further confirmed by other evidence at trial, including but not limited to, the following: (1) there are no Shinnecock records or other records suggesting or indicating exclusive or continuous Shinnecock habitation of Westwoods; (2) there is no documented or recollected allotment of any lands within Westwoods to any Shinnecock tribal member; (3) there are no written tribal laws, rules, or regulations for use of Westwoods by Tribe members; (4) no permanent structure exists on any part of Westwoods and the property has never been fenced in by the Nation; (5) other than the 1808 minutes reflecting the Shinnecock request to lease 120 acres of land including Westwoods, the Town's Indian records contain no historical references to Westwoods; (6) a 2003 archaeological study of the 15-acre site within Westwoods, that relates to the proposed casino, found "minimal human activity in the past" (T135, at ii; Tr. 964-66); (7) a December 2003 report of a 3-acre site in the vicinity of Westwoods found "[n]o historic features or artifacts" (T202, at 14); and (8) when a non-Shinnecock owner of land adjacent to Westwoods encroached upon Westwoods land, the Nation took no action to have the encroachment removed. In short, the Nation is seeking to assert sovereignty in connection with a parcel of land over which the Nation has never claimed sovereignty prior to this litigation and which has remained essentially dormant for hundreds of years, other than use for timber and periodic social gatherings.

(B) TOWN'S EXERCISE OF GOVERNMENTAL AUTHORITY OVER WESTWOODS

In contrast to this lack of usage or exercise of governmental authority over Westwoods for centuries, the Nation has allowed the Town to exercise significant governmental authority over the land without any objection from the Nation. As a threshold matter, the defendants have emphasized, and the Court recognizes, that the Town has never sought to impose property taxes on the land. There is no record documenting the reason for such inaction, but defendants argue that it is

indicative of an implicit recognition of sovereignty by the Town. However, the Court rejects that conclusion in light of the entire trial record. Although imposition of taxes is a strong indicator of governmental authority, it is certainly not the exclusive indicator under the law, or the dispositive indicator under the facts of this case. More specifically, despite the Town's failure to impose property taxes on Westwoods, the Town has over the years engaged in activity in connection with the land that is clearly indicative of the exercise of governmental authority, including but not limited to the following: (1) the 1738 Canoe Place Division, which subdivided a 3000-4000 acre area west of Canoe Place and north of Montauk Highway, including Westwoods, into 39 numbered lots; (2) the Canoe Place Division Lot Drawing, during which, even though no interests were allotted to Shinnecock members, there was no objection or challenge to the establishment of the Canoe Place Division or the allotment process; (3) Town records indicate that the Town regulated the harvesting of timber throughout the Town in the 18th century, including in areas west of Canoe Place; and (4) in the 1920s, the Town widened and improved Newtown Road, including the portion of the road that runs through Westwoods, without any objection from the Nation. Moreover, since the Town's first zoning ordinance was adopted in 1957, Westwoods has been classified as residentially-zoned property by the Town and remains zoned as residential (R-60) today. Moreover, when the Nation requested that this designation be removed in 1985, the Town refused and the Nation did not further challenge that decision. Thus, even in the absence of the imposition of property taxes, the Town has exercised substantial government authority over Westwoods for several centuries without objection from the Nation and this fact is significant in considering the equitable factors under *Sherrill*.

(C) DISRUPTIVE IMPACT OF NATION'S EXERCISE OF SOVEREIGNTY

In connection with the summary judgment motions and the preliminary injunction motion, Judge Platt identified some of the anticipated disruptive effects that could be caused by the casino project. *See Shinnecock Indian Nation*, 400 F. Supp. 2d at 496 n.6 ("[A] remedy may also be disruptive in cases similar to the one at bar, where dispossession is not at issue and only neighboring landowners will be affected by the Indians' claims.") (*citing Sherrill*, 544 U.S. at 219-20); *Shinnecock Indian Nation*, 280 F. Supp. 2d at 9-10 ("[T]he construction of a casino like the one proposed by Defendants would cause incredible traffic congestion in the surrounding community. . . . [I]t is also likely to drastically heighten air pollution along Routes 25 and 27."); *see also id.* ("If Defendants fail to abide by State and Town environmental regulations, the likely harm to the pristine community of Southampton could be devastating.").

The concerns raised by Judge Platt in the pre-trial context regarding potential disruptive effects of this assertion of sovereignty by the Nation at Westwoods were borne out at trial. As described below, the evidence at trial demonstrated that the construction and operating of a gaming complex at Westwoods would undoubtedly cause a substantial disruption of the administration of state and local governments, as well as severely harm the settled expectations of landowners

neighboring the Westwoods property and Town residents more generally. Moreover, the health and environmental problems would be further magnified in the instant situation because the assertion of sovereignty of the property would allow the Nation to develop a casino project free of New York and local laws and regulations.

First, a casino at Westwoods would require a significant expenditure of additional state and local funds to provide essential services to the facility, including such items as police, fire, ambulance, and providers of other municipal services such as the water district. Although taxation is generally used to at least partially offset these additional costs, no such offset could occur if the Nation were able to assert its sovereignty over the Westwoods land in a manner that made it immune from such taxes and fees.

Second, there is no question that a casino at Westwoods would have substantial disruptive impact on the area's already saturated transportation infrastructure. The evidence at trial clearly demonstrated that the traffic in and around the area of Southampton during the summer months is extremely high, resulting in substantial delays to motorists. Based upon the expert testimony and other evidence the Court heard at trial, the Court finds that the impact of adding thousands and thousands of additional motorists, destined for a Westwoods casino, into this severely-burdened transportation network would be devastating. Plaintiffs' traffic expert concluded: "In our expert opinion, with respect to traffic, the Westwoods project would impose a significant burden on an already overtaxed system. . . . [A] project the size of the Westwoods project, even if it is located west of the canal, would create significantly detrimental traffic and safety impacts to local communities." (S77, at II.) The Court finds that conclusion fully supported by the trial record. The disruption is not limited to the substantially-increased traffic delays and congestion that would inevitably result in the area as a result of the additional usage, but also safety issues that would flow from such a scenario. For example, plaintiffs' expert testimony credibly established that the use of local roads to access Westwoods, especially when considering the unreasonable delays on the major highways and roads that would ensue, would create enormous safety issues for motorists and residents. That evidence included the following: (1) local roadways "would not be able to handle the additional traffic activity" (S77, at 66, V ("The local streets would be unable to accommodate the newly added traffic under these conditions.")); (2) buses going to the casino would have to travel over small, winding residential roads – without shoulders, curbs, sidewalks, or street lights – that are "not appropriate for commercial buses to be on" (Tr. 1466-67); and (3) "extraordinary delays" resulting from the unsignalized intersections being unable to handle the increase in traffic would "encourage unsafe choices by motorists" thereby "increasing the potential for accidents." (S77, at 40.) Even the Nation's expert regarding traffic impact acknowledged that there would be substantial increases in traffic in and around Westwoods from the operation of a casino. However, he concluded that the "unreasonable" traffic impacts could be alleviated through a series of modifications to various roadways *and* if direct access ramps from Sunrise Highway to Westwoods were built. (Tr. 3935-41.) In other words,

even the Nation's traffic expert concluded that a casino would cause unreasonable disruption in the area of Westwoods in the absence of direct access ramps from Sunrise Highway to the casino. Yet, it was far from clear from the evidence who would build these ramps, whether they were legally permissible under current regulations, and who would bear the costs of such construction.[64] Moreover, even if the ramps could be built, it is entirely unclear how the construction of ramps where Squiretown Road or Newtown Road pass under Sunrise Highway would alleviate these traffic problems; instead, the traffic would just be funneled into these small roads and create additional traffic issues there. Therefore, the evidence at trial demonstrated that a Westwoods casino would substantially disrupt the use of roadways in and around the Southampton area as a result of the increased traffic on an already severely-burdened traffic network.

Finally, the Court concludes that there are a series of disruptive health and environment impacts that would flow from the construction and operation of a casino at Westwoods. The Court credits the testimony and evidence offered by the plaintiff that there would be numerous short-term and long-term effects to the natural environment in and around Westwoods, including: (1) the degradation of water quality (Tr. 1847); (2) the loss or fragmentation of "very sensitive, actually rare" ecological subcommunities in the area (Tr. 1848); (3) the potential erosion of the coastal bluff area (Tr. 1851); (4) the generation of "very detrimental" edge habitats, which are used to "provide avenues for the incursion of . . . non-native species into the interior of the forest where they displace native wildlife" (Tr. 1958); and (5) other potential damage to "a critical ecosystem to Long Island," (Tr. 1955), which includes several dozen species of birds and rare plant species (Tr. 1955-59). In addition, plaintiffs offered credible evidence that traffic-related pollutants would increase and "cause a whole series of health impacts." (Tr. 1935-36; S200, at 4-5.) Moreover, the noise quality of the area also would be adversely impacted (in Build Alternative 2, the build without ramp access scenario) and affect "all of the residential development on Squiretown Road and Newtown Road north of Rte 27, which includes approximately 75 single-family homes." (S200, at 16.)

Defendants presented evidence and made a number of arguments to address the massive evidence of disruptive impact offered by the plaintiffs. In particular, the Nation had three principal arguments: (1) although it is the Nation's position that it is not subject to New York or local regulations of any kind in connection with development at Westwoods, its current Development Agreement specifically requires that the initial 61,000 sf. facility and any future expansion be constructed in accordance with state

[64] For example, plaintiffs introduced evidence suggesting that there is substantial doubt as to whether such ramps would be consistent with the current criteria for such ramps under New York Department of Transportation rules. Specifically, the NYS DOT will not grant a permit to any person seeking to build an access ramp from a limited access highway, such as Route 27, to private property, such as Westwoods, unless the ramp connects to publicly-owned roadway before the private property. (S245, D361, at 75-76.) Because the ramps envisioned here would go directly into Westwoods and not connect to any public road, it would be problematic.

environmental laws (Defs. Proposed Conclusions of Law, at 65); (2) the plaintiffs' expert testimony, and the assumptions and methodologies underlying that testimony, are "so unrealistic and unreliable as to be useless for any purpose" (*id.* at 66); (3) plaintiffs' disruption evidence "suffers from a fatal defect" because "[i]nstead of addressing the development of Westwoods as actually contemplated by the Development Agreement, the State and the Town chose to present only evidence with respect to the potential impact of a grossly overstated development of Westwoods that is contemplated only in their own imaginings" (*id.* at 12). The Court has carefully considered all of defendants' expert testimony and their arguments regarding the insufficiencies of plaintiffs' experts and is unpersuaded by the Nation's contention that plaintiffs have not made a sufficient showing of disruptive impact under *Sherrill*. The Court will address the Nation's three main contentions below.

With respect to the Nation's current intention as reflected in the Development Agreement to comply with state environmental standards and its stated intention at trial to use best practices to avoid environmental impacts, the Court does not view such circumstances as sufficient to eliminate the disruptive impacts under *Sherrill*. The Nation currently has no environmental laws, building codes, or any other ordinances that require any contractor building on Westwoods to adhere to any standards whatsoever, or to consider environmental impacts. In any event, if the exclusive sovereignty sought by the Nation over Westwoods were recognized by the Court, the Nation would be free to modify any such codes or ordinances at any time even if they were adopted, and also would be able to modify the Development Agreement or any other contract at any time to eliminate any current desire to comply with New York environmental standards. Thus, the Nation's current intention to comply voluntarily with state environmental standards does not alter the Court's analysis under *Sherrill* under the facts of this case.

Defendants' position regarding flaws in the methodologies and assumptions of plaintiffs' experts is similarly unavailing.[65] Both plaintiffs and defendants in this lawsuit pointed to certain errors made by the opposing party's experts or certain factual assumptions that could not be supported with certainty. Each side argued that these flaws by the opposing expert led to an estimated calculation in terms of disruptive impact that made the expert opinion exaggerated and unreliable. The Court spent considerable

[65] For example, defendants made the following arguments, among others, with respect to plaintiffs' experts: (1) "The methodology underlying the plaintiffs' expert testimony relating to the costs that would be imposed on the State and Town is characterized by gross errors and unfounded assumptions, and ignores any possibility of economic benefits to the community." (Defs. Proposed Conclusions of Law, at 66); (2) "The plaintiffs' environmental analysis suffers from the same unfound assumptions, and displays a notable lack of expertise. In particular, the plaintiffs' analysis of air and noise issues is amateurish and so methodologically defective as to be useless for any purpose" (*id.*); and (3) plaintiffs' traffic expert's report contained numerous errors, including a defective model and arithmetic errors (*id.* at 66-67).

effort navigating through this battle of the experts. Although defendants believe that the purported errors by plaintiffs' experts make them useless, the Court simply disagrees. When assessing these types of impacts based upon a proposed development of a site (or economically-viable potential use of a site), experts by necessity must utilize certain assumptions and estimates about human behavior in terms of how many people will attend such a casino, how long they will spend at the casino, as well as their method and route of transportation. The fact that these require some level of prediction about future human behavior, and that reasonable minds can differ regarding a particular assumption by an expert, does not mean that the testimony is useless. Here, despite defendants' contention to the contrary, the Court concludes that the methodologies utilized by plaintiffs' experts are sufficiently sound to be relied upon by the Court.[66] Moreover, even if plaintiffs' experts' calculations were adjusted to reflect the purported errors or weaknesses identified by defendants, the remaining levels of impact would still be sufficient to satisfy the *Sherrill* standard.

Finally, the Court rejects defendants' contention that the expert evidence offered by plaintiffs is fatally flawed because it erroneously measures impact not of the current intended 61,000 sf. facility, but rather is based upon much larger casino projects not currently intended by the Nation. As a threshold matter, as discussed *supra*, the Court rejects the Nation's legal argument that the Court cannot consider under *Sherrill* the potential development of a casino even larger than the one currently anticipated by the Nation. In other words, the equitable analysis under *Sherrill* cannot take place on a piecemeal basis for each building erected at Westwoods or have to be reassessed and regulated by the federal courts every time there is a future change in activity at Westwoods; rather, this equitable issue under *Sherrill* necessarily looks forward into potential disruptive impacts that can reasonably result from unfettered development of the property. Moreover, the Court finds that plaintiffs credibly demonstrated that a large casino at Westwoods far beyond the Nation's current intentions is economically feasible. As plaintiffs' expert credibly concluded, given its proximity to New York City and the high demand for a gaming facility closer than Atlantic City or Connecticut, a gaming facility at Westwoods would have the economic potential to be massive in scale far beyond the 61,000 sf. casino that the Nation states that it currently intends to build. (Tr. 1410 (describing a 300,00 sf. casino with 7,000 gaming devices and approximately 250 tables).) The expert reached a conservative conclusion that a stand-alone casino at Westwoods comprising 162,500 sf., including 3,500 gaming devices and 140 table games, would be financially viable. (S1, at 3, 6-8; Tr. 1393-96.) In fact, one of the defendants' expert witnesses (Mr. Rittvo), performed an economic analysis of a gaming facility with 3,000 gaming positions (and 450 hotel rooms and a restaurant with seating for 1,000 to 2,000 people), which he concluded would be "optimally sized" and extremely profitable, with between $358.4 million and $403.2

[66] Although defendants moved to strike reports and testimony of certain of plaintiffs' impact experts, the Court found, for the reasons set forth on the record, that the experts' reports and testimony satisfied the *Daubert* criteria.

million in revenues for the Nation. (D329, at 1-2.) The defendants' expert also analyzed an unconstrained scenario with a casino with 6,500 positions, which would have revenues within the range that he considered necessary to be profitable.[67] (D238, at 1; S268, at line 64, col B; Tr. 3216.) Therefore, to the extent that defendants argue that all plaintiffs' expert testimony should be rejected because it looks at casino proposals beyond the one currently anticipated, the Court finds that argument unpersuasive.

In any event, even if the Court adhered to the defendants' position on this issue and only looked at the disruptive impact under *Sherrill* of the current proposed casino development as reflected in the Development Agreement, the Court's conclusion would not be altered under the facts of this case. First, it is undisputed that even the Nation's proposed 61,000 sf. gaming facility would be inconsistent with the current residential zoning classification of the Westwoods property. Second, if the Nation were allowed to assert exclusive sovereignty over this land, such development would take place without the Nation being required to comply with New York and local environmental and health laws and regulations. Third, although the levels of impact in the various areas described above would be less than the projections for the larger potential facilities, it is beyond cavil for the Nation to argue that the current proposal would not significantly increase the level of services that state and local authorities would have to provide in the area, as well as significantly disrupt the neighboring landowners and residents of the Town in various aspects including traffic, noise, and other related effects of a casino construction and operation. Perhaps the best illustration of this point is the testimony of the Nation's traffic expert. Although the Nation's expert regarding traffic impact acknowledged that there would be substantial increases in traffic in and around Westwoods based upon the Nation's current proposal, he concluded that the "unreasonable" traffic impacts could be alleviated through a series of modifications to various roadways. Even if these modifications were made, it is not clear to this Court based upon the detailed traffic evidence submitted at trial that the "unreasonable" traffic impacts will be avoided.

Thus, even the 61,000 sf. facility currently being contemplated by the Nation has a sufficiently disruptive impact to satisfy *Sherrill*. In *Sherrill*, the Supreme Court relied upon the mere possibility that the Oneidas would seek to free the land at issue from zoning and other regulatory controls at some future time as sufficient to apply laches to their sovereignty claim.[68] *See* 544 U.S. at 220

[67] Specifically, with respect to the casino with 6,500 gaming positions, defendants' expert concluded it would generate more than $521 million in gaming revenues and have a win per position of $220, which is within the range of win per position that the expert "likes to see" for a successful casino. (D328, at 1; S268, at line 64, col. B.; Tr. 3216.)

[68] In *Sherrill,* there was no trial on the disruptive impact from the reassertion of sovereignty and the Court did not remand the case to the district court to take evidence on that issue. In fact, the district court had granted summary judgment in OIN's favor, finding there was no evidence of irreparable harm and the City of Sherrill could address any burdens from removal of the parcels from the tax rolls. *Oneida Indian Nation v. City of Sherrill,*

("If [the Oneida Indian Nation] may unilaterally reassert sovereign control and remove these parcels from the local tax rolls, little would prevent the Tribe from initiating a new generation of litigation to free the parcels from local zoning or other regulatory controls that protect all landowners in the area."). Even Justice Stevens, as the lone dissenter in *Sherrill*, recognized that "[g]iven the State's strong interest in zoning its land without exception for a small number of Indian-held properties arranged in a checkerboard fashion, the balance of interests obviously supports the retention of state jurisdiction in this sphere." *Id.* at 226-27 n.6.

The court reached a similar conclusion in *Cayuga Indian Nation of New York v. Village of Union Springs*, 390 F. Supp. 2d 203 (N.D.N.Y. 2005). In *Union Springs*, the court vacated an injunction that prohibited the defendants from enforcing local zoning and land use laws in connection with the Cayuga's activities on property recently purchased by the tribe, within an area subject to the tribe's land claim. In doing so, the court found that immunity from zoning and land laws was even more inherently disruptive than the Oneida's claimed immunity from taxation:

> If avoidance of taxation is disruptive, avoidance of complying with local zoning and land use laws is no less disruptive. In fact, it is even more disruptive. The Supreme Court [in *Sherrill*] clearly expressed its concern about the disruptive effects of immunity from state and local zoning laws, even to the point of citing this case as an example. . . .
>
> The Nation is seeking relief that is even more disruptive than non payment of taxes. The Supreme Court's strong language in *City of Sherrill* regarding that disruptive effect on the every day administration of state and local governments bars the Nation from asserting immunity from state and local zoning laws and regulations.

Union Springs, 390 F. Supp. 2d at 206.

In the instant case, this Court recognizes that there is no allegation that the Nation recently re-possessed Westwoods and, thus, it is factually distinct from *Sherrill* (and *Union Springs*). Although this fact should obviously be carefully weighed in the *Sherrill* equitable analysis, the Court must also recognize that the degree and clarity of the disruption in the instant case demonstrated during the course of a lengthy trial far surpasses the disruption in *Sherrill,* in terms of how the development of Westwoods in violation of local zoning and land usage regulations would disrupt the administration of state and local governments, and negatively impact the well-being and settled expectations of adjacent landowners and the local population. Moreover, the other equitable factors strongly favor plaintiffs, including (1) despite possessing the

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145 F. Supp. 2d 226, 252, 255 (N.D.N.Y. 2001). Instead, the Supreme Court found the disruptive impact warranting equitable relief "on considerations not discretely identified in the parties' briefs." 544 U.S. at 214 n.8.

Westwoods land for centuries, the Nation never claimed sovereignty over that land prior to this lawsuit; (2) the Nation has not used the land for anything other than timber and periodic recreational gatherings; and (3) the Nation never sought to free itself from the decades-old zoning classification, or sought to engage in activity that violated the Town's zoning laws or New York's environmental laws. In sum, after considering all of the equitable factors, the Court finds that, even assuming *arguendo* that the Nation had aboriginal title over Westwoods, the equitable doctrines of laches, acquiescence, and impossibility as articulated in *Sherrill* preclude the Nation from exercising sovereignty over that land for purposes of developing such land without regard to local zoning and land use laws, or other New York and local laws and regulations.

A. IGRA AND COMMON LAW RIGHTS UNDER *CABAZON*

After the trial in this consolidated action was commenced and the trial was reassigned to the undersigned, the State sought reconsideration of the denial by Judge Platt of their potentially dispositive motion for partial summary judgment and for a permanent injunction as it related to IGRA. Specifically, in its original motion and reconsideration motion, the State argued that, through the enactment of IGRA, Congress had occupied the field of Indian gaming and that any gaming outside the scope of this federal law must comply with New York law. As applied to the Nation in this case, the State contended that, because the planned gaming facility does not comply with IGRA and violates New York gaming laws, the State was entitled to partial summary judgment on its first cause of action (alleging violation of New York gaming laws) and a permanent injunction. Although the Nation acknowledged that it is not a tribe under IGRA and thus cannot conduct gaming under the provisions of IGRA, the Nation argued, among other things, that IGRA did not supplant its common law right to conduct gaming activity on Westwoods.

In granting the motion for a preliminary injunction, Judge Platt agreed with the State's position that the Nation did not meet the criteria under IGRA and that any gaming would violate New York law. *Shinnecock Indian Nation*, 280 F. Supp. 2d at 6-7. In denying the State's motion for partial summary judgment, the Court held that a trial was required to determine whether the Nation had retained aboriginal title over Westwoods and, if so, whether the impact of the casino on

Westwoods was sufficiently disruptive that it could be prevented under the *Sherrill* case. *Shinnecock Indian Nation*, 400 F. Supp. 2d at 493-96. However, Judge Platt did not specifically address the IGRA issue in the opinion.

Defendants suggested, when the motion for reconsideration was made during the trial, that Judge Platt implicitly concluded that, if the Nation continues to have unextinguished aboriginal title to Westwoods (an issue that needed to be resolved with a trial), the Nation would retain a common law right under *California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987), to conduct gaming activity outside of IGRA. However, plaintiffs argued that Judge Platt simply overlooked this controlling legal issue and, thus, plaintiffs asked that the Court stop the trial and grant their motion for reconsideration. When the belated motion to reconsider was raised during the trial, the Court declined to halt the trial to decide the motion, but instead allowed the parties to re-brief the issue while the trial continued and advised the parties that the Court would re-analyze the IGRA issue in light of the motion for reconsideration at the conclusion of the case with the benefit of the full trial record. As set forth below, the Court finds that the Nation does not have a common law right to engage in gaming, outside the scope of IGRA, in violation of New York gaming laws and, even assuming *arguendo* that aboriginal title provided a common law safe-haven for such activity, no such exemption exists because aboriginal title has been extinguished.

(1) THE IGRA FRAMEWORK

Through the Commerce Clause of the United States Constitution, which allows Congress to "regulate Commerce . . . with the Indian Tribes," U.S. Const. art. I, § 8, cl. 3, Congress has the authority to regulate Indian affairs. Pursuant to that authority, Congress enacted IGRA in 1988 in response to the Supreme Court's decision in *Cabazon*. In *Cabazon*, the Supreme Court analyzed California's bingo laws, which restricted the operation of games, but did not prohibit them entirely. 480 U.S. at 210. The Court held that because California permitted a "substantial amount of gambling activity . . . California regulate[d] rather than prohibit[ed] gambling in general and bingo in particular" and, thus, was precluded from prohibiting an Indian tribe from conducting bingo on Indian lands, even though it was being conducted in violation of California penal laws. *Id.* at 211. IGRA was enacted to create a comprehensive federal statutory scheme for tribal gaming that differed from the common law principles recognized by the *Cabazon* Court. *See Am. Greyhound Racing Inc. v. Hull,* 305 F.3d 1015, 1018 (9th Cir. 2002) ("Congress declared [in 25 U.S.C. § 2702(1)] that IGRA's primary purpose was "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments.") (footnote omitted); *Pueblo of Santa Ana v. Kelly,* 104 F.3d 1546, 1548 (10th Cir. 1997) (holding that IGRA "provides a comprehensive regulatory framework for gaming activities on Indian lands which seeks to balance the interests of tribal governments, the states, and the federal government") (internal quotation marks omitted). Specifically, Section 1166(a) of

Title 18 provides, in pertinent part, as follows:

> Subject to subsection (c), for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.

18 U.S.C. § 1166(a). The only exception to Section 1166(a) is gaming that occurs in compliance with IGRA. *See* 18 U.S.C. § 1166(c).

Gaming under IGRA can only be conducted by an "Indian tribe" on lands that the federal government defines as "Indian lands." 25 U.S.C. § 2710(d)(1). "Indian tribe" under IGRA is defined narrowly to include only tribes that are recognized by the BIA. 25 U.S.C. § 2703(5)(A). It also defines "Indian lands" to include all lands within the limits of any Indian reservation and any lands title to which is held in trust by the United States for the benefit of any Indian Tribe. 25 U.S.C. § 2703(4); 25 C.F.R. 502.12.

IGRA also divides gaming into three classes. Class I gaming includes social games for prizes of minimal value and traditional forms of Indian gaming engaged in as part of, or in connection with, tribal ceremonies or celebrations. 25 U.S.C. § 2703(6). Class II gaming includes bingo and certain card games, but not banking card games or electronic facsimiles of any games of chance or slot machines of any kind. 25 U.S.C. § 2703(7)(A), (B). Class III gaming is defined as all forms of gaming that are not within the definitions of Classes I and II, including casino games, banking card games, and lotteries. 25 U.S.C. § 2703(8); 25 C.F.R. § 502.4.

With respect to Class III gaming, in addition to the requirements that the gaming be engaged in only by an "Indian tribe" on "Indian lands," IGRA provides the Class III gaming is only lawful where it is: (1) authorized by an ordinance or resolution adopted by the government body of the Indian Tribe and approved by the Chairman of the National Indian Gaming Commission; (2) located in a state that permits such gaming for any purpose by any person, organization, or entity; and (3) conducted in conformance with a tribal-state compact entered into by the Indian Tribe and the state that is in effect. 25 U.S.C. § 2710(d)(1). Pursuant to this framework, the state must negotiate in good faith with an Indian tribe to enter into a tribal-state compact governing the conduct of gaming activities when such negotiation is requested of the state by an Indian tribe with jurisdiction over Indian lands. 25 U.S.C. § 2710(d)(3). The Secretary of the Interior ("the Secretary") must then approve the tribal-state compact before it takes effect. 25 U.S.C. §§ 2710(d)(3)(B), (d)(8). "Since New York allows some forms of class III gaming – for charitable purposes – such gaming may lawfully be conducted on Indian lands provided it is authorized by a tribal ordinance and is carried out pursuant to a tribal-state compact." *Dalton v. Pataki*, 5 N.Y.3d 243, 259 (N.Y. 2005). In short, under IGRA, class III gaming may only be conducted by an "Indian tribe" on "Indian land" in New York

pursuant to a tribal-state compact approved by the Secretary. Given this framework, IGRA preempts state law in the field of regulating Indian gaming, but only to the extent of its application. In other words, if IGRA does not apply, then state law prohibitions on gambling are not preempted. *See, e.g., Carruthers v. Flaum*, 365 F. Supp. 2d 448, 466 (S.D.N.Y. 2005) ("IGRA preempts state anti-gaming laws, but only to the extent of its application."); *Cayuga Indian Nation of N.Y. v. Vill. of Union Springs*, 317 F. Supp. 2d 128, 148 (N.D.N.Y. 2004) (same); *see also First Am. Casino Corp. v. E. Pequot Nation*, 175 F. Supp. 2d 205, 209-10 (D. Conn. 2000) ("Because IGRA's text unambiguously limits its scope to gaming by tribes that have attained federal recognition, the statute does not apply to defendant's gaming-related activities. . . . Accordingly, plaintiff's state law claims are not completely preempted by IGRA.") (citation omitted).

There is no question that the Nation cannot satisfy the requirements necessary to conduct gaming at Westwoods under IGRA. First, and foremost, the Nation cannot satisfy the definition of an "Indian tribe" because it is undisputed that the Nation is not recognized as a tribe by the BIA. In fact, in its opposition to the State's motion for partial summary judgment, the Nation acknowledged that "[a]ll parties agree that IGRA by its terms does not apply to the Shinnecock Nation, in that the Nation has been acknowledged to be an Indian tribe under the administrative procedures of the Department of the Interior described at 25 C.F.R. Part 83." (Defs. Memorandum of Law in Opposition to State's Motion for Partial Summary Judgment, at 11 (footnote omitted).) Moreover, Westwoods does not fall within the definition of "Indian lands" under IGRA.[69] As noted above, in the decision granting the preliminary injunction, Judge Platt thus concluded that the Nation could not conduct gaming consistent with IGRA and that any gaming would violate New York law:

> IGRA outlines which tribes may conduct gaming in the United States, where such gaming may occur, and the types of gaming that may occur. Pursuant to IGRA, high-stakes bingo and slot machines – the type of gaming contemplated by the Shinnecock Nation – may only be conducted by an Indian tribe on lands that the federal government defines as Indian lands, unless the state otherwise permits such activity. 25 U.S.C. § 2710(d)(1). For the purposes of IGRA, an Indian tribe is one that has been recognized as such by the federal government. 25 U.S.C. § 2703(5)(A). . . . As discussed above, Defendants are not

[69] To the extent that defendants also seek to separately argue that Westwoods is "Indian country" under 18 U.S.C. § 1151, the Court disagrees and concludes that Westwoods is not Indian country because it fails to satisfy any of the § 1151 criteria and has never been set aside and superintended by the federal government. However, even assuming *arguendo* that aboriginal title could be equated with Indian country under § 1151, defendants' argument would fail because the Court has found aboriginal title to Westwoods has been extinguished.

> permitted to conduct bingo gaming or games of chance under New York law. There is no exception under Article I, Section 9 of New York State Constitution or State gambling laws that allows a state-recognized Indian tribe to conduct gaming in New York. Likewise, there is no dispute that the Shinnecock Nation may not conduct gaming pursuant to IGRA, given that Defendants are not an Indian within the meaning of the statute, and the Property does not constitute Indian land, as defined by federal statute.

280 F. Supp. 2d at 6-7.

Despite this legal conclusion and the failure to fall within IGRA, defendants argue that gaming on Westwoods is still permissible because IGRA was not preemptive and they continue to have a common law right to engage in tribal gaming. To the extent that the Nation argues that they continue to possess a common law right under *Cabazon* to engage in gaming at Westwoods outside the confines of IGRA, the Court finds that argument unpersuasive. The Court concludes that IGRA and Section 1166 have eliminated any common law right to engage in unregulated gaming under *Cabazon*. In cases involving broad federal legislation supplanting previously-existing common law rights, the Supreme Court and Second Circuit have both cautioned that courts should not infringe on Congress' authority by continuing to adhere to common law rules. For example, the Supreme Court concluded in *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981), in holding that the Federal Water Pollution Control Act Amendments of 1972 had displaced the common law nuisance claims brought by plaintiffs, that "when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears." 451 U.S. at 314. With respect to the statutory scheme enacted by Congress to supersede the common law nuisance claim, the Court explained that "Congress has not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence, but rather has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency." *Id.* at 317. The Court also emphasized that the question to be asked is "whether the legislative scheme 'spoke directly to a question' . . . not whether Congress had affirmatively proscribed the use of federal common law." *Id.* at 315 (citation omitted); *see also United Steelworkers of Am., AFL-CIO v. United Eng'g Inc.*, 52 F.3d 1386, 1393 (6th Cir. 1995) (holding under *Milwaukee* that "a manifest and clear purpose need not be shown to displace federal common law. . . . Rather, the question to be asked is whether Congress has occupied the field") (citations omitted).

The Second Circuit, applying *City of Milwaukee*, reached a similar conclusion in *Senator Linie GMBH & Co. KG v. Sunway Line, Inc.*, 291 F.3d 145 (2d Cir. 2002), and held that a comprehensive maritime statute – the Carriage of Goods by Sea Act ("COGSA") – which contained a strict liability standard

for shipping inherently dangerous goods superseded the scienter requirement in the maritime common law. The Second Circuit explained that the common law must yield to Congress' legislative design:

> We must therefore ask whether the legislative scheme of COGSA speaks directly to the question of strict liability for shippers of inherently dangerous goods. When [a maritime code] does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless. There is a basic difference . . . between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted.

Id. at 168 (citations and quotations omitted). As the Second Circuit noted, quoting *City of Milwaukee*, "'we start with the assumption that it is for Congress, not federal courts, to articulate the appropriate standard to be applied as a matter of federal law.'" *Id.* (quoting *City of Milwaukee,* 415 U.S. at 317).

In the instant case, it is clear from the comprehensive statutory scheme that Congress enacted as part of IGRA that Congress intended to occupy the field of tribal gaming in response to *Cabazon*. In other words, Congress enacted a comprehensive regulatory program, which would be supervised by an expert federal administrative agency, and thereby sought to balance the interests of the tribes and states in the wake of *Cabazon* and provide the framework in which Indian tribes could conduct gaming on Indian lands. *See generally Artichoke Joe's Cal. Grand Casino v. Norton,* 353 F.3d 712, 721 (9th Cir. 2003) ("[T]he same time Congress passed IGRA, it gave California the regulatory authority that *Cabazon* took away, 18 U.S.C. § 1166."). Thus, given the language and nature of this statute, the Court concludes that Congress intended to supplant any federal common law right of Indian tribes to engage in tribal gaming outside the IGRA framework.

To hold otherwise would lead to the untenable conclusion that, although an Indian tribe recognized by the BIA could not conduct gaming on Indian land without a tribal-state compact under IGRA, an Indian tribe such as the Shinnecock Nation, not recognized by the BIA, could still conduct gaming that would otherwise violate IGRA. Such an interpretation – which gives the Nation more authority to conduct gaming than a BIA-recognized tribe under IGRA – would render IGRA's provisions nonsensical.

The court in *Carruthers v. Flaum* reached a similar conclusion. The circumstances in *Carruthers* related to an effort by the Unkechaug Indian Nation to open gaming facilities in Sullivan County. The plaintiff developers claimed, among other things, tortious interference by the defendants in their gaming and employment agreements. The court held that, because the contemplated facilities could not be opened in New York, the agreements were necessarily void. In reaching this conclusion, they rejected the argument that, even though the Unkechaug Nation was not recognized by the United States government, they could operate a

gaming facility on ancestral land without interference from the state or federal government. Specifically, the court found that the Unkechaug Indian Nation did not have a common law right to operate the gaming facility outside the confines of IGRA:

> Plaintiffs contend that, because they do not fall within the ambit of IGRA, the Supreme Court's decision in *Cabazon* permits the tribe to conduct whatever gaming it likes on its ancestral lands. But they are wrong. . . . *Cabazon* itself applies only to gaming activities conducted by federally-recognized Indian tribes on land that the federal government recognizes as reservation land. . . . *Cabazon* by its terms has no applicability to this case, which involves a tribe that is not federally recognized as a sovereign nation, and whose ancestral lands have not been recognized by the federal government. Gaming activities on land that is not federally recognized as tribal lands remains within the State's historic right to regulate this controversial type of economic activities.

365 F. Supp. 2d at 467. This Court agrees with the *Carruthers* analysis.[70] In short, IGRA did not leave available the back-door that defendants now seek to use and the Nation does not retain a common law right to engage in unregulated gaming at Westwoods outside the confines of IGRA.[71]

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[70] Defendants also assert that plaintiffs have no standing to enforce IGRA, except where the State is seeking to enforce a tribal-state compact. *See* 25. U.S.C. § 2710(d)(7). Though the Court agrees with this general point, defendants in fact miss the mark. Plaintiffs here are not asserting a cause of action for a violation of IGRA; rather, plaintiffs allege that, in light of IGRA, defendants have no federal common law right to conduct gaming and, therefore, must comply with New York law. As this Court determined above, Congress supplanted any federal common law right with IGRA and, thus, the Nation has no right to engage in unregulated gaming and must comply with New York law. *See, e.g., Carruthers*, 365 F. Supp. 2d at 467 ("The Unkechaug are not a federally recognized tribe. Therefore, IGRA provides no exception for the Unkechaugs from the general prohibition on gambling in New York State."). Thus, plaintiffs' cause of action lies in violations of New York anti-gambling law in light of the inapplicability of IGRA, not in any right of action under IGRA.

[71] To the extent that defendants similarly contend that they have an "inherent sovereignty" to engage in unregulated gaming even though they have not met the criteria of IGRA, the Court also rejects that argument. The Supreme Court has strictly limited the application of this doctrine of inherent tribal sovereignty. *See, e .g., McClanahan v. Ariz. State Tax Comm'n.*, 411 U.S. 164, 172 (1973) ("[T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption. . . . The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power.") *accord South Dakota v. Bourland*, 508 U.S. 679, 694-95 (1993); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331 (1983); *see also*

Finally, even assuming *arguendo* that there was some residual common law right possessed by a non-BIA recognized tribe such as the Shinnecock Nation to conduct unregulated gaming on land if it held unextinguished aboriginal title to that land, no such right exists here because, as the Court found *supra*, aboriginal title to the Westwoods land has been extinguished.

E. DEFENSE OF SOVEREIGN IMMUNITY

Defendants also argue that sovereign immunity acts as a complete bar to this lawsuit by the State and the Town. In particular, defendants argue that "[t]he Nation is a sovereign tribe of Indians and consequently as a matter of law cannot be sued absent consent or waiver, which it did not give in either of these consolidated actions." (Defs. Proposed Conclusions of Law, at 15-16.) The defendants raised this defense in their summary judgment motion and, although Judge Platt found the Nation to be a tribe of Indians, he denied the defendants' motion for summary judgment on the basis of sovereign immunity. *See Shinnecock Indian Nation,* 400 F. Supp. 2d at 493 ("Unfortunately, recognizing the Shinnecocks as a Tribe does not end the matter. The question remains as to what use Defendants may put the Westwoods property adjacent to the western border of their reservation."). As set forth below, there are a number of independent grounds for the Court's conclusion that sovereign immunity is not a defense to this action.[72]

Narragansett Indian Tribe v. Rhode Island, 449 F.3d 16, 23-24 (1st Cir. 2006), *cert. denied,* 127 S. Ct. 673 (2006). Here, where Congress has enacted IGRA and the proposed gaming does not relate to the protection of tribal self-government or internal relations, there is no basis for the assertion that the Nation – which has not met the requirements of IGRA – has inherent tribal sovereignty to engage in gaming without regard to state law.

[72] With respect to the burden of proof on a claim of sovereignty immunity, the Court concludes that the party asserting this defense – namely, defendants – bears the burden of proof. In *Christy v. Pa. Turnpike Comm'n*, 54 F.3d 1140, 1144 (3d Cir. 1995), the Third Circuit held, in the context of a state agency seeking to invoke a sovereign immunity defense, "that the party asserting Eleventh Amendment immunity (and standing to benefit from its acceptance) bears the burden of proving its applicability"); *accord ITSI TV Prods. v. Agric. Ass'n,* 3 F.3d 1289, 1291 (9th Cir. 1993). The Second Circuit has cited *Christy* and *ITSI TV Productions* with approval in cases in which a State agency was required to demonstrate that it was entitled to invoke Eleventh Amendment immunity. *See, e.g., Richardson v. N.Y. State Dep't of Corr. Servs.*, 180 F.3d 426, 449 (2d Cir. 1999); *see also Mancuso v. N.Y. State Thruway Auth.*, 86 F.3d 289, 292 (2d Cir. 1996) ("[T]he Thruway Authority is entitled to immunity if it can demonstrate that it is more like 'an arm of the State,' such as a state agency, than like 'a municipal corporation or other political subdivision.") (citations omitted). Although the Second Circuit has not decided this issue in the context of Indian tribes, the Eleventh Amendment jurisprudence on the burden of proof applies with equal force to assertions of tribal immunity and, thus, the defendants have the burden of proof on this issue. *See, e.g., State Eng'g of Nev. v. S. Fork Band of the Te-moak Tribe of W. Shoshone Indians of Nev.*, 66 F. Supp. 2d 1163, 1173 (D. Nev. 1999) ("Indian tribal sovereign immunity is closely analogous to a state's immunity from suit under the Eleventh Amendment."). However, even assuming that plaintiffs had the burden of proving that such immunity does not apply here, the Court concludes that plaintiffs have met the

As a threshold matter, defendants have voluntarily submitted to the jurisdiction by removing the State's and Town's state court actions to federal court. The Supreme Court, in *Lapides v. Board of Regents of the University Systems of Georgia,* 535 U.S. 613, 616 (2002), held that a state waives its Eleventh Amendment immunity from suit when it voluntarily removes a lawsuit to federal court. Although the *Lapides* decision was limited to state law claims, there is no reason why the reasoning of *Lapides* would not apply to removal of both state and federal claims when the removing party is subject to suit in state court. *See, e.g., Embury v. King,* 361 F.3d 562 (9th Cir. 2004); *Estes v. Wyo. Dep't of Transp.,* 302 F.3d 1200, 1204 (10th Cir. 2002); *Brownsscombe v. Dep't of Campus Parking,* 203 F. Supp. 2d 479, 482 (D. Md. 2002). Moreover, even though *Lapides* did not involve an Indian tribe, the Court concludes that the issue of Indian tribal sovereignty can be analyzed under the analogous legal framework utilized when considering issues of state immunity from suit under the Eleventh Amendment. For example, in the *State Engineer* case, the district court explained:

> In the instant case Respondent Tribe joined in the removal to federal court, answered the complaint, and opposed a motion to remand on immunity grounds. If the Tribe were a state, that would clearly be sufficient to waive the state's sovereign immunity. We see no reason to treat the Tribe differently. As such, we treat the Tribe's actions as amounting to a clear and unequivocal waiver of immunity in this Court.

66 F. Supp. 2d at 1173. Thus, the defendants can be sued in the instant lawsuit because of their voluntary removal of the state actions to this Court.

Second, it is clear from the Supreme Court's decision in *Sherrill* that a tribe can be prevented from invoking a defense of sovereign immunity where equitable doctrines preclude the tribe from asserting sovereignty over a particular parcel of land. In other words, the *Sherrill* Court held that the OIN could not invoke sovereign immunity to defend against local real property tax enforcement proceedings, including eviction proceedings. 544 U.S. at 211. Specifically, as noted *supra,* Justice Stevens argued in his dissent that tribal immunity could be raised "as a defense against a state collection proceeding." *Id.* at 225. However, the majority opinion specifically rejected that reasoning. *See id.* at 214 n.7 ("The dissent suggests that, compatibly with today's decision, the Tribe may assert tax immunity defensively in the eviction proceeding against Sherrill. We disagree."); *see also id.* at 221 (Souter, J., concurring) (rejecting claim of territorial sovereign status whether affirmative or defensive). Thus, *Sherrill* allows a tribe to be sued by a state or town, such as the instant case, to enforce its laws with respect to a parcel of land if equitable principles prevent the tribe from asserting sovereignty with respect to that land. To hold otherwise would completely undermine the holding of *Sherrill* because, if defendants are immune from suit, plaintiffs here would be left utterly powerless

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burden for the reasons set forth *infra*.

to utilize the courts to avoid the disruptive impact that the Supreme Court clearly stated they have the equitable right to prevent.[73]

Finally, even if the Shinnecock Indian Nation had tribal immunity when sued by the State, its tribal officials could be sued in their official capacities for prospective equitable relief. Specifically, the Second Circuit and other courts have held that a suit for injunctive relief can be pursued against a tribal official in his official capacity so long as plaintiff can maintain a cause of action under the applicable statute. *See Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 87-88 (2d Cir. 2001); *see also Frazier v. Turning Stone Casino*, 254 F. Supp. 2d 295, 310 (N.D.N.Y. 2003) ("*Ex parte Young* offers a limited exception to the general principle of state sovereign immunity and has been extended to tribal officials acting in their official capacities . . . but only to enjoin conduct that violates federal law."); *Bassett v. Mashantucket Pequot Museum and Research Ctr. Inc.*, 221 F. Supp. 2d 271, 278-79 (D. Conn. 2002) ("[U]nder the doctrine of *Ex parte Young*, prospective injunctive or declaratory relief is available against tribal officials when a plaintiff claims an ongoing violation of federal law or claims that a tribal law or ordinance was beyond the authority of the Tribe to enact.").[74] In the instant case, although the State commenced the action alleging violations of New York anti-gaming and environmental law, Judge Platt held in his denial of the State's remand motion that the lawsuit raised federal claims related to IGRA, possessory interests of an Indian tribe with respect to Indian land, and the tribal status of the Shinnecock. (Memorandum and Order, at 3-5.). Thus, given the federal questions found by Judge Platt, the State may sue tribal officials for prospective injunctive relief pursuant to *Ex parte Young* and such defendants do not have a defense of sovereign immunity.[75]

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[73] To the extent that the United States District Court for the Northern District of New York has concluded otherwise, in finding that the Oneida Nation is immune from county real property tax enforcement proceedings regarding the lands at issue in *Sherrill*, the Court disagrees with that conclusion for the reasons stated above. *See Oneida Indian Nation v. Oneida County*, 432 F. Supp. 2d 285, 289 (N.D.N.Y. 2006); *Oneida Indian Nation v. Madison County*, 401 F. Supp. 2d 219, 228-30 (N.D.N.Y. 2005).

[74] The Supreme Court's decision in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1988) is distinguishable from these cases because it was addressing sovereign immunity of federally-recognized Indian tribes from damages actions, not for injunctive relief as is being sought here. *See TTEA v. Ysleta Del Sur Pueblo*, 181 F.3d 676, 680-81 (5th Cir. 1999) (distinguishing *Kiowa* and holding that "while the district court correctly dismissed the damages claim based on sovereign immunity, tribal immunity did not support its order dismissing actions seeking declaratory and injunctive relief"); *Comstock Oil & Gas v. Ala. and Coushatta Indian Tribes of Tex.*, 261 F.3d 567, 571-72 (5th Cir. 2001) ("[T]he district court erroneously concluded that the Tribe was entitled to sovereign immunity against oil companies' claims for equitable relief.").

[75] Moreover, with respect to tribal officials, the Supreme Court has also held that a suit for equitable relief against tribal officials for violation of state law may be brought in state court. *See Puyallup Tribe, Inc. v. Dep't of Game of Wash.*, 433 U.S. 165, 171-72 ("[W]hether or not the Tribe itself may be sued in a state court without its consent or that of Congress, a suit to enjoin

In sum, for the reasons set forth above,[76] the Nation cannot assert sovereign immunity as a defense to the instant lawsuit.[77]

F. NECESSITY FOR PERMANENT INJUNCTIVE RELIEF

Plaintiffs seek a permanent injunction enjoining and restraining defendants from engaging in any further or additional site preparation, construction, development, or gaming-related activities at Westwoods, in furtherance of their announced intention to construct and operate a casino on Westwoods, and from otherwise violating state or local gaming, environmental, land use, and zoning laws with respect to Westwoods. As discussed below, the Court concludes that the requirements for permanent injunctive relief have been satisfied by the plaintiffs.

"A party seeking preliminary injunctive relief must establish (1) either (a) a likelihood of success on the merits of its case as (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in its favor, *and* (2) a likelihood of irreparable harm if the requested relief is denied." *Time Warner Cable, Inc. v. DIRECTV, Inc.*, No. 07-0468-CV, 2007 U.S. App. LEXIS 18846, at *14-*15 (2d Cir. Aug. 9, 2007) (emphasis in original). The standard for a permanent injunction is the same as that for a preliminary injunction except that the plaintiff must establish actual success, rather than merely a likelihood of success on the merits. *See, e.g., Lusk v. Vill. of Cold Spring,* 475 F.3d 480, 485 (2d Cir. 2007) ("'The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff

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violations of state law by individual tribal members is permissible."). In addition, in *Garcia*, the Second Circuit cited *Puyallup Tribe* in concluding that lawsuits for injunctive relief may be brought against tribal officials. 268 F.3d at 87. Therefore, pursuant to *Puyallup Tribe*, the lawsuits in the instant case could have proceeded in state court against tribal officials and a defense of sovereign immunity would have been unavailable. There is no basis for concluding that the removal of these claims against individual tribal members to federal court should alter this analysis.

[76] Plaintiffs also set forth a number of other grounds to defeat any claim of sovereign immunity, including (1) defendants do not have sovereign immunity from suit for alleged violations of the SPDES program requirements because Congress abrogated such immunity in the Clean Water Act (Plts. Proposed Conclusions of Law, at 133-36); (2) defendants have no immunity from suit brought by the State because the Nation is not federally recognized and is subject to state jurisdiction under New York law (*Id.* at 138-40); and (3) defendant Trustees can be sued in their official capacities for prospective equitable relief based upon the *Ex Parte Young* doctrine. Because the Court has found the defense of sovereign immunity to be unavailable in this lawsuit for the reasons described above, the Court declines to address these other alternative arguments.

[77] Defendants have a series of other affirmative defenses in their answers to the State and Town complaints, including, but not limited to, asserting that the claims are barred by collateral estoppel, waiver and equitable estoppel, laches, and unclean hands. The Court has considered all of these other affirmative defenses and, for the reasons outlined in this Memorandum and Order, find that none of these doctrines, or any other defenses asserted in the answers, bar plaintiffs' claims.

must show a likelihood of success on the merits rather than actual success.'") (quoting *Amoco Prod. Co. v. Vill. of Gambell,* 480 U.S. 531, 546 n.12 (1987)). Moreover, the Supreme Court recently reiterated the four-factor test that the court must satisfy in connection with an application for permanent injunctive relief:

> According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

eBay Inc. v. MercExchange, L.L.C., 126 S. Ct. 1837, 1839 (2007).

Applying this standard, all of the requirements for permanent injunctive relief have been met by the plaintiffs. First, plaintiffs have demonstrated actual success on the merits for all the reasons discussed *supra*. Second, plaintiffs have shown that, if the Nation is permitted to construct a gaming facility at Westwoods, they will suffer irreparable injury.[78] In particular, plaintiffs

[78] As an initial matter, under New York law, a municipality such as the Town is not required to demonstrate irreparable injury to demonstrate its right to injunctive relief where the action involves enforcement of zoning ordinances. *See, e.g., Inc. Vill. of Williston Park v. Argano,* 602 N.Y.S.2d 878, 878 (N.Y. App. Div. 1993) ("Because the plaintiff proved that the defendants were in violation of the local zoning ordinance, it was not required to show irreparable injury in order to demonstrate its right to injunctive relief."); *Town of Southampton v. Sendlewski,* 549 N.Y.S.2d 434, 435 (N.Y. App. Div. 1989) ("[N.Y.] Town Law § 268 which authorizes a town to institute any action or proceeding to enforce its zoning ordinances requires no showing of injury to the public or the nonexistence of an adequate remedy at law as a condition to injunctive relief."); *Town of Smithtown v. Schleider,*549 N.Y.S.2d 433, 434 (N.Y. App. Div. 1989) (holding that in action to enjoin defendant's illegal use of property, "it was not necessary for the [Town] to demonstrate that the defendant's allegedly illegal use of his property was causing irreparable injury"). Here, the Town's suit for injunctive relief to restrain violations and threatened violations of its zoning laws is authorized by New York Town Law § 268(2). Therefore, because the Town's request for injunctive relief is statutorily-authorized, irreparable injury is presumed. *See, e.g., Consol. Rail Corp. v. Town of Hyde Park,* 47 F.3d 473, 479 (2d Cir. 1995) (holding that a railroad seeking statutorily authorized injunctive relief is exempt from equitable criteria). Similarly, where as here the State is seeking an injunction to prevent violations of New York environmental laws, the requirements of irreparable injury and the balancing of the equities need not be shown independent of establishing a statutory violation. *See, e.g., New York v. Sour Mountain Realty, Inc.,* 714 N.Y.S.2d 78, 83-84 (N.Y. App. Div. 2000); *Adirondack Park Agency v. Hunt Bros. Contractors, Inc.,* 651 N.Y.S.2d 634, 635 (N.Y. App. Div. 1996); *New York v. Brookhaven*

have shown that construction and operation of a casino in violation of the zoning laws would irreparably harm the community in terms of its essential character, as well as its health and safety. As Justices Stevens and O'Connor noted in *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), development of land in contravention to zoning violations, as is proposed here, can have a highly destructive impact on the community:

> Zoning is the process whereby a community defines its essential character. Whether driven by a concern for health and safety, esthetics, or other public values, zoning provides the mechanism by which the polity ensures that neighboring uses of land are not mutually – or more often unilaterally – destructive.

Id. at 433-34 (Stevens, J., O'Connor, J., concurring). Moreover, plaintiffs have shown that the anticipated construction and operation of the casino will have a detrimental environmental impact, some of which is essentially irreversible, such as the destruction of trees. Similarly, the proposed gaming at Westwoods would be conducted in violation of New York's anti-gaming provisions, which are designed to protect the public. Violations of these provisions clearly constitute irreparable harm to plaintiffs and the public. Third, none of these injuries – zoning violations, environmental injuries, and gambling in violation of state laws – can be adequately addressed by remedies at law, such as monetary damages. *See, e.g., Amoco Prod. Co.*, 480 U.S. at 545 ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment."). Third, the Court has considered the balance of hardships, and finds that a remedy in equity is warranted. Specifically, as the Court discussed in detail in connection with the *Sherrill* analysis – where this land has been undeveloped for centuries, the Nation has never sought to assert sovereignty over the land prior to this litigation, and the proposed development without regarding to zoning or other regulations would substantially disrupt the settled expectations of the community and almost every aspect of the residents' lives – the balance of hardships is decidedly in plaintiffs' favor. Finally, the public interest clearly would not be disserved by a permanent injunction. To the contrary, the public interest is served by ensuring that development of this land does not take place in violation of current zoning laws, other land use regulations, and New York's anti-gaming provisions.

Defendants argue that any irreparable injury in this case is completely speculative and, thus, injunctive relief is unwarranted. The Court disagrees. The Court recognizes that "[i]njunctive relief should be narrowly tailored to fit specific legal violations" and "should not impose unnecessary burdens on lawful activity." *Waldman Publ'g Co. v.*

Aggregates, Ltd., 503 N.Y.S.2d 413, 414-15 (N.Y. App. Div. 1986). However, even in the absence of this presumption of irreparable harm, the Court finds that plaintiffs have satisfied the permanent injunction requirements.

Landoll, Inc., 43 F.3d 775, 785 (2d Cir. 1994) (citing *Soc'y for Good Will to Retarded Children, Inc. v. Cuomo*, 737 F.2d 1239, 1251 (2d Cir. 1984)). Moreover, for an injunction to issue, "more than an abstract or nebulous plan to possibly commit a wrong sometime in the future, must be shown before the broad and potentially drastic injunctive power of the court will be exercised. Rather, 'injunctions issue to prevent existing or presently threatened injuries.'" *Gen. Fireproofing Co. v. Wyman*, 444 F.2d 391, 393 (2d Cir. 1971) (quoting *Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931) (emphasis omitted)). In the instant case, there is nothing speculative or remote about the irreparable harm that would result in this case if the injunctive relief is not granted. The Nation formed a Gaming Authority and entered into a Development Agreement for the development, construction, and operation of a 61,000 sf. facility, and subsequently, prior to the issuance of the preliminary injunction, commenced construction activities at the Westwoods site by clearing trees with a bulldozer and other heavy equipment. Where the Nation's intent and imminent plans to build a gaming facility in violation of New York and Town laws have been made clear by words and action, plaintiffs are not required to wait until the facility is built to seek injunctive relief. Although the Nation continues to argue that harm from the potential expansion of a casino beyond its current plans cannot be the basis for injunctive relief, it is the Court's conclusion for the reasons discussed above that, even with respect to the currently planned casino, there is irreparable, imminent harm that would result if such construction and operation went forward in violation of state and local anti-gaming laws, zoning laws, and requisite environmental permits and approvals. Thus, plaintiffs have shown that they "will suffer 'real and imminent, not remote, irreparable harm' in the absence of a [permanent injunctive] remedy.'" *Henrietta D. v. Bloomberg*, 331 F.3d 261, 290 (2d Cir. 2003) (quoting *Levin v. Harleston*, 966 F.2d 85, 90 (2d Cir. 1992) (internal quotation omitted)). Accordingly, permanent injunctive relief is warranted.

VI. CONCLUSION

For the reasons set forth above, plaintiffs have met their burden for declaratory and permanent injunctive relief.[79] Plaintiffs shall submit a proposed judgment and permanent injunction by November 7, 2007. Defendants shall provide any objections to the specific language of the proposed judgment and permanent injunction by November 14, 2007.

SO ORDERED.

JOSEPH F. BIANCO
United States District Judge

Dated: October 30, 2007
Central Islip, NY

The attorney for plaintiffs State of New York, New York State Racing and Wagering

[79] Defendants moved for a judgment on partial findings at the close of plaintiffs' case pursuant to Rule 52(c) of the Federal Rules of Civil Procedure, which the Court declined to rule on until the close of all evidence. For the reasons set forth in this Memorandum and Order, that motion is denied.

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