

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff,

AQUINNAH/GAY HEAD COMMUNITY
ASSOCIATION, INC., and TOWN OF AQUINNAH,

Intervenor-Plaintiffs/Counterclaim-Defendants,

v.

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

Defendants/Counterclaim-Plaintiffs,

v.

CHARLES D. BAKER, in his official capacity as
GOVERNOR, COMMONWEALTH OF
MASSACHUSETTS, et al.,

Third-Party Defendants.

Civil Action
No. 13-13286-FDS

INTERVENOR-PLAINTIFF/COUNTERCLAIM-DEFENDANT
AQUINNAH/GAY HEAD COMMUNITY ASSOCIATION, INC.'S
MEMORANDUM IN SUPPORT OF INTERVENOR-PLAINTIFF/COUNTERCLAIM
DEFENDANT THE TOWN OF AQUINNAH'S MOTION FOR TEMPORARY
RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

On July 14, 2015, the Town of Aquinnah (“the Town”) filed a motion for a temporary restraining order and/or preliminary injunction against the Wampanoag Tribe of Gay Head (Aquinnah), Wampanoag Tribal Council of Gay Head, Inc., and Aquinnah Wampanoag Gaming Corporation (together, “the Tribal Defendants”). *See* Dkt. 124. In that motion, the Town requested that this Court preserve the status quo in connection with the present proceedings and issue a temporary restraining order and/or a preliminary injunction against the Tribal Defendants preventing them from “undertaking any further construction activity on [the] unfinished community center building” to establish it as a casino “pending this Court’s ruling on the merits of this action.” *Id.* at 2. The Aquinnah/Gay Head Community Association, Inc. (“the AGHCA”) files this memorandum in support of the Town’s motion.

The central issue in this case is the Tribal Defendants’ obligation to comply with State and local requirements, including Town zoning laws, in connection with the Tribal Defendants’ efforts to open a gaming facility on lands in the Town. While the Tribal Defendants have previously professed an intention to open such a gaming facility, recent actions by the Tribal Defendants and statements by their representatives indicate that the Tribe intends to open a gaming facility on Settlement Lands in the Town imminently—in a matter of weeks or months—and to do so without complying with local requirements, including Town zoning laws. Specifically, both the Chairman of the Wampanoag Tribe of Gay Head (Aquinnah) (“the Tribe”), Tobias J. Vanderhoop, and the Chairwoman of the Aquinnah Wampanoag Gaming Corporation (“the Gaming Corporation”), Cheryl Andrews-Maltais, have confirmed that the Tribe’s former community center building located at 20 Black Brook Road in Aquinnah will be the site for the intended gaming facility. *See* Dkt. 126 at 59:6-21, 82:2-13; Dkt. 125-4 at 1. Chairman Vanderhoop recently confirmed that the Tribe and the Gaming Corporation have taken steps to

convert that building into a gaming facility, including but not limited to transferring control of the building to the Gaming Corporation and sending notice within the past two weeks to the U.S. Department of Housing and Urban Development that the Tribe has changed the use of the community center building to that of a casino. *See* Dkt. 126 at 71:14-22, 92:9-16; Dkt. 125-4 at 4. Furthermore, Chairman Vanderhoop and Chairwoman Andrews-Maltais both confirmed that the Tribe intends to have the converted community center open as a casino by the end of the year. Dkt. 125-4 at 1-2. Indeed Chairwoman Andrews-Maltais stated that the Gaming Corporation intends to open the facility this fall, providing for the possibility that the Tribe's gaming facility will be completed and opened before this Court issues an order on the parties' motions for summary judgment—an order that is expected to directly address the central question at issue: whether the Tribe must comply with State and local requirements prior to engaging in gaming activity in the Town. *Id.* at 2.

In light of these recent statements by the Tribal Defendants, amongst others enumerated in the Town's memorandum in support of its motion (Dkt. 125 at 7-8, 10-11), a temporary restraining order and/or a preliminary injunction is necessary to preserve the status quo—that the Tribal Defendants must comply with the Town's zoning and land use laws, as explicated by this Court in its memorandum and order denying the Tribe's motion to dismiss, Dkt. 95 at 17, *Massachusetts v. Wampanoag Tribe of Gay Head*, No. 13-cv-13286, __ F. Supp. 3d. __, 2015 WL 854850, at *9 (D. Mass. Feb. 27, 2015), and by the Supreme Judicial Court of Massachusetts in *Building Inspector & Zoning Officer of Aquinnah v. Wampanoag Aquinnah Shellfish Hatchery Corp.*, 443 Mass. 1, 12-13 (2004). The Tribe's current efforts to open the gaming facility without complying with applicable State and Town approvals contravene this status quo. And although the Tribal Defendants argue that IGRA exempts the Tribal Defendants from complying

with these laws, it is the Tribal Defendants' burden to establish that IGRA applies—a burden they have not yet carried. *See Saybrook Tax Exempt Investors LLC v. Lake of Torches Econ. Dev. Corp.*, 929 F. Supp. 2d 859, 862-863 (W.D. Wis. 2013) (“[R]ebutting IGRA is not part of the cause of action [for breach of contract] itself. ... [I]t is by now well-settled federal law that contract invalidity is a defense, and that the defeat of potential invalidity defenses is not an element of an affirmative claim.”), *clarified on other grounds by*, 2013 WL 3508378 (W.D. Wis. May 30, 2013); *see also U.S. Liability Ins. Co. v. Selman*, 70 F.3d 684, 691 (1st Cir. 1995) (“[T]he burden of proving affirmative defenses [is] on the party asserting them[.]”).

Preserving the status quo pending the Court's resolution of the merits in this action will not prejudice the Tribal Defendants. This issue is the subject of the parties' currently pending motions for summary judgment, which will be fully briefed on August 6, 2015, and is set for a hearing on August 12, 2015. *See* Dkts. 111-112, 116, 119-120, 123. Maintaining the status quo until this Court issues its ruling on the merits of whether IGRA absolves the Tribe of its obligation to comply with State and Town laws with respect to gaming will not prejudice the Tribal Defendants.

CONCLUSION

For the reasons set forth above and explicated more fully in the Town's memorandum in support of its motion for a temporary restraining order and/or preliminary injunction, the Court should grant the Town's motion and enter the relief requested.

AQUINNAH/GAY HEAD COMMUNITY
ASSOCIATION, INC.

By its attorneys,

July 14, 2015

/s/ Felicia H. Ellsworth
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LOCAL RULE 7.1(a)(2) CERTIFICATION

Undersigned counsel certifies that she conferred with counsel for the other parties pursuant to Local Rule 7.1(a)(2) on July 13, 2015, and informed counsel for the parties, including the Tribal Defendants, that the AGHCA would submit a filing in support of the Town's motion for a temporary restraining order and/or preliminary injunction.

/s/ Felicia H. Ellsworth
Felicia H. Ellsworth

CERTIFICATE OF SERVICE

In accordance with Local Rule 5.2(b), I hereby certify that this document filed through the ECF system on July 14, 2015, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/ Felicia H. Ellsworth
Felicia H. Ellsworth