

New York Law Journal

Real Estate Trends

WWW.NYLJ.COM

VOLUME 265—NO. 55

An ALM Publication

WEDNESDAY, MARCH 24, 2021

ZONING AND LAND USE PLANNING

Courts Address Disputes on Indian Nation Lands

By
**Anthony S.
Guardino**



New York and federal law both set forth rules respecting Native American tribes. For instance, Section 2 of the New York Indian Law defines the term “Indian nation or tribe” to mean one of the following New York State Indian nations or tribes: Cayuga Nation, Oneida Nation of New York, Onondaga Nation, Poospatuck or Unkechaug Nation, Saint Regis Mohawk Tribe, Seneca Nation of Indians, Shinnecock Indian Nation, Tonawanda Band of Seneca, and Tuscarora Nation.

The state and federal systems are not necessarily completely in sync. As an example, consider that although it was not until 2010 that the Shinnecock Indian Nation received formal recognition by the U.S. Bureau of Indian Affairs, the Shinnecock Indian Nation has been

a recognized, sovereign Indian tribe in New York since colonial times; that status is, among other places, codified in Article 9 of the New York Indian Law.

Sovereign Indian tribes facing economic woes often seek to develop their property, or to simply maintain control of their property, for the benefit of their members. When disputes arise, New York courts may become involved.

Two recent cases, both arising on Long Island, illustrate the complexities of the issues and the law, as well as the significant property and financial interests involved.

A Property Dispute

The Unkechaug Indian Nation (the “Nation”) occupies the Poospatuck Reservation in Suffolk County. The case *Unkechaug Indian Nation v. Treadwell*, No. 614783/18 (App. Div. 2d Dept. March 3, 2021), arose when the Nation asked the Supreme Court, Suffolk County, for a declaratory judgment and a permanent

injunction enforcing its Tribal Council’s decision confirming the right of Curtis C. Treadwell, Sr., a blood-right member of the Nation, to possess certain property located within the bounds of the Poospatuck Reservation, including a disputed portion claimed by Danielle Treadwell, another blood-right member of the Nation, and SmokesRUs, Inc. (together, the “defendants”). The defendants operated a gas station/convenience store on the disputed property that competed with one operated by the Nation.

The defendants asserted counterclaims against the Nation seeking, among other things, a declaration that Danielle Treadwell was entitled to possession of the disputed portion of the property.

Thereafter, the Nation convened a special meeting of its membership for the purpose of determining whether Danielle Treadwell was an “undesirable person” within the meaning of its Tribal Rules such that she could be denied the right to occupy land

ANTHONY S. GUARDINO is a partner with Farrell Fritz, practicing in the areas of land use, zoning, and environmental law. He can be reached at aguardino@farrellfritz.com.

within the Poospatuck Reservation. A majority of the voting members present at the special meeting voted to determine that she was an “undesirable person.” The Tribal Council subsequently adopted a resolution and directives that, among other things, resolved that occupancy of the disputed portion of the property be withheld from Danielle Treadwell and directed that she “cease and desist” from occupying, using, and possessing the disputed portion of the property. The Nation also placed concrete barriers around part of the disputed portion.

The Supreme Court found that the Nation’s undesirability determination and the Tribal Council’s actions based on that determination rendered the action as a whole academic. Accordingly, the court dismissed the complaint and the defendants’ counterclaims, and the defendants appealed.

The Second Department affirmed.

In its decision, the appellate court explained that, when acting within its territorial boundaries and with respect to internal matters, an Indian nation retained the sovereignty it enjoyed prior to the adoption of the U.S. Constitution except to the extent that its sovereignty had been abrogated or curtailed by Congress. As such, the Second Department continued, “tribes possess the common-law immunity traditionally enjoyed by sovereign powers.”

The appellate court pointed out that, because of the retained sovereignty of Indian nations, the

subject matter jurisdiction of state courts “must be predicated on explicit authorization from Congress to address matters of tribal self-government.” Moreover, it continued, “when it comes to Indian affairs, state courts are courts of limited jurisdiction.”

The Second Department then ruled that, by asking the Supreme Court to determine that Curtis Treadwell was the rightful possessor of the property, the Nation had waived its sovereign immunity,

Sovereign Indian tribes facing economic woes often seek to develop their property, or to simply maintain control of their property, for the benefit of their members. When disputes arise, New York courts may become involved.

although only as to that determination and its enforcement. However, the appellate court added, once the Nation proceeded to take the undesirability vote and issue the tribal resolution and directives based on the membership’s vote, the Nation, pursuant to its own Tribal Rules, created a new and independent basis, under its sovereign authority, for excluding Danielle Treadwell from the disputed portion of the property. Thus, once the Supreme Court was informed of the undesirability determination, it could not take any action with respect thereto, as this was a sovereign act of the Nation outside the court’s subject matter jurisdiction, the Second Department concluded.

Billboards

The second case, *Commissioner of the N.Y. State Dept. of Transp. v. Polite*, 67 Misc.3d 1222(A) (Sup. Ct. Suffolk Co. 2020), is part of an ongoing dispute between the Shinnecock Indian Nation and New York State authorities.

The action was brought by the State of New York and the commissioner of the New York State Department of Transportation against officials and trustees of the Shinnecock Indian Nation (the “Tribe”) in an effort to enjoin the construction and operation of two approximately 60-foot tall electronic billboards—referred to as “monuments” by the defendants—on opposite sides of the state’s declared and recorded right of way for Route 27, Sunrise Highway, where it bisects a tract, or tracts, of land long owned and occupied by the Tribe in the town of Southampton. The Tribe sought to benefit from advertising revenue generated by the signs.

The state moved for a preliminary injunction enjoining the completion, maintenance and operation of the signs, and the defendants’ moved to dismiss for failure to join the Tribe as an indispensable party and, with respect to those defendants who were trustees of the Tribe, on the ground that they were clothed with the same sovereign immunity as the Tribe itself.

In addition, the state sought the imposition of contempt sanctions against the defendants for

completing the construction of the signs and operating them notwithstanding a previously entered temporary restraining order.

The Supreme Court, Suffolk County, first denied the defendants' motion to dismiss based on the Tribe's absence as a defendant. Quoting from the decision by the New York Court of Appeals in *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801 (2003), the court noted that the Tribe had "chosen to be absent" and that it had not been denied the "opportunity to be heard."

The court then ruled that the relief sought by the state could be obtained by proceeding against the Tribe's officials, even in the absence of the Tribe as a defendant, given that "a governmental body, including a sovereign Indian Nation, can act only through the instrumentality of its officials."

Finally, the court denied the state's motion for a preliminary injunction. It explained that, ultimately, the burden would be on the state to refute the defendants' contention that the Tribe had sovereign control over the property in dispute but that, on "the current record," it was "impossible to conclude" that the state would succeed in doing so.

Moreover, the court found that the electronic signs posed "no unacceptable safety risk" and that, on the other hand, the advertising income that the Tribe hoped to earn represented "an important revenue source."

Accordingly, the court concluded, a preliminary injunction preventing the operation of the signs was "unwarranted" because the plaintiffs would suffer no irreparable harm in the absence of a preliminary injunction and the equities did not balance in favor of the state, provided that the defendants constructed and operated the signs in compliance with appropriate structural and other safety standards.

Conclusion

Although the Unkechaug Indian Nation litigation may have reached a conclusion, that is not the situation regarding the disputes between the Shinnecock Indian Nation and New York State.

Following the Supreme Court's decision, the state and the Tribe defendants both appealed to the Second Department. Thereafter, the Tribe defendants filed a motion for a stay pending appeal. On December 23, 2020, the Supreme Court granted the motion solely with respect to a still-pending motion by the state seeking to hold the Tribe defendants in civil contempt.

The Tribe continues to argue that the state may not block it from constructing and operating signs, asserting that the state "lacks authority" over Tribe lands. In the meantime, the Tribe commenced construction of its second sign in January 2021, prompting the state to issue a stop-work order. Despite the state's efforts to halt construction, the second sign was completed in

February and both signs now are operational. The state has notified the Tribe that the signs require special permits that have not been obtained and, as a result, is seeking fines of \$1,000 per day per violation.

There also may be further litigation ahead for these parties. The Tribe has announced plans to construct a 76,000-square-foot casino on its land just off Montauk Highway on the East End of Long Island that would include a bingo parlor, 1,000 video lottery terminals, and 30 "Texas Hold 'em" table games.

In addition, according to reports, the Tribe plans to open a gas station/convenience store on its land near the signs in the coming year. It also apparently has begun plans for a medical cannabis facility to be located on its Southampton property.

Just how the existing disputes between the Tribe and the state over the signs and potential future disputes between these parties over other projects will conclude remains to be seen. One thing is clear, however. One way or another, New York courts are likely to play an important role in their resolution.