

Town of Middleborough

Finance Committee

Centre Street Bank Building
20 Centre Street
Middleborough, Massachusetts 02346-2250

To: Board of Selectman
Cc: Town Manager, Resort Advisory Committee, Town Planner
Date: August 14, 2009

Subject: Casino Pre-Planning Fund

The Town of Middleboro Finance Committee voted on August 10, 2009 to recommend to the Board of Selectman to place a hold on spending money from the Casino Pre-Planning Fund. This is due to concerns about the potential liability which exists unless the Mashpee Wampanoag Tribe and their investors certify in writing all past expenditures. We strongly recommend all future spending of pre-planning monies for the casino be put on hold until the following occurs;

- The Mashpee Wampanoag Tribe and its investors, Trading Cove Associates Mashpee (TCAM) certify in writing to the town that all money spent to date (approx. \$190,000) is approved and meets the criteria of the Tribe and its investors as being related to the casino pre-planning.
- The Mashpee Wampanoag Tribe and its investors (TCAM) certify in writing to the town that the plan for spending future money is pre-approved as meeting the criteria of the Tribe and its investors as being related to the casino pre-planning.
- The Mashpee Wampanoag Tribe and its Investors (TCAM) certify in writing their confirmation of Chairman of the Tribe, Cedric Cromwell's verbal agreement to the Middleboro Board of Selectman stating that neither the Tribe nor the investors will demand the return of any spent or unspent preplanning money should the Inter-Governmental Agreement be terminated for any reason.

Failure to acquire this certification from the Tribe and their investors has created a liability for the town should one or both of those entities challenge Middleboro's spending of the preplanning money allocated to the town. Due to the fiscal issues now facing the town, with a potential \$1.6 million budgetary shortfall for Fiscal Year 2010, the town cannot afford to repay any spent pre-planning money or pay any court fees associated with the challenges to the pre-planning money expenditure. The Inter-Governmental Agreement with the Tribe has no provisions for a challenge of the pre-planning money expenditure.

Please see the attached appendix for background information and potential problems which may cause a dispute between the Town of Middleboro and the Tribe or their investors.

If you have any questions or comments or have additional information on this matter that the Finance Committee is not aware of and that may affect our recommendation, please forward it to us so we can review this matter at a future meeting.

Sincerely yours,
Middleboro Finance Committee

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Appendix

Background

The Town of Middleboro has received three (3) \$250,000 annual pre-planning payments for a total of \$750,000 from Herb Strather, owner of Trading Cove Associates Mashpee (TCAM). This is in accordance with the Inter-Governmental Agreement (IGA) signed on July 28, 2007 at a special town meeting. The conditions of this money being spent are detailed on page 3 of the IGA.

“A. Pre-opening Mitigation – Planning.

Within ninety (90) days of executing this Agreement, the Tribe shall pay annually, using the Fiscal Year of July 1 to June 30, to the Town the sum of \$250,000 for the purpose of mitigating the Town's staff and outside consulting costs for supporting the planning, development, and coordination of the Project, excluding costs relating to offsite permit issuance by the Town. The Town shall provide written certification to the Tribe that the Pre-opening Mitigation Payments in this sub-section are utilized for these purposes and, if requested, copies of detailed invoices of outside consultants. The payments shall continue annually thereafter until the date that Annual Impact Payments described in Section 5.C commence. The Tribe's payment shall be prorated for the first and last years.”

Potential Problems

There are many potential problems with the continued use of the pre-planning money and the proposed plan for future expenditures. Any of the issues could be cause for challenge by TCAM investors or the Mashpee Wampanoag Tribe. These include;

1. The inability of the Secretary of the Interior to place land into trust for tribes recognized after 1934 as ruled by the U.S. Supreme Court in *Carcieri v. Salazar* (No. 07-526, Feb 2009).
2. The confusing current use of the money for salaries of Planning Dept. personnel.
3. OECD funding for a full-time Director position from pre-planning money.
4. The lack of an Environmental Impact Statement for the project which was scheduled to be released last year and has been indefinitely delayed.
5. Controversial plan for future spending to involve Everett Square Revitalization.
6. Hotel Study funding which former Selectman Stephen Spataro stated was not related to the casino planning.

1. *Carcheri v. Salazaar*

The plan for the Mashpee Wampanoag according to the IGA, page 1 is contingent on the Secretary of the Interior to place land into trust according to the Indian Gaming Regulatory Act (IGRA, 1988).

“The Tribe plans to have that land acquired by the United States to be held in trust for the Tribe to enable the Tribe to develop a Class II and/or Class III gaming casino pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq. (“IGRA”), including hotel and ancillary facilities on the land, and the Town agrees to submit a letter to the United States Department of the Interior in support of the Tribe's petition to place the land into trust in form and content mutually acceptable to the Tribe and the Town.”

The result of the *Carcieri v. Salazar* Supreme Court decision in February 2009 has ended the potential for land into trust. The decision states the Land-into-Trust process as outlined in IGRA is taken from the 1934 Indian Reorganization Act (IRA). The language identified eligible tribes as being “now” recognized.

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The Supreme Court ruled "now" means 1934 when the IRA was written. The Mashpee Wampanoag were federally recognized in 2007 and therefore do not meet the requirements to have land placed into trust. There has been no legislation introduced to allow the land into trust for tribes recognized after 1934. There have been exceptions made if a tribe has a treaty with the Federal Government prior to 1934. However, according to a statement made by Cederic Cromwell to the Board of Selectman, no such treaty exists for the Mashpee Wampanoag Tribe.

According to the agreement signed with Middleboro, the IGA ends 30 days after the Tribe is informed by the Secretary of the Interior that the United States will not take land into trust and all appeals have been exhausted. From page 18 of the IGA;

"This Agreement shall become effective upon its execution by the Parties hereto and shall continue during the period of time that business operations related to the Project are conducted at the Project Site, provided that if the Tribe is informed by the Secretary of the Interior that the United States will not take the land into trust for the purposes of allowing the Tribe to conduct gaming activities thereon then this Agreement shall terminate 30 days after all appeals related to such a decision have been exhausted."

While the Secretary of the Interior has not informed the Tribe the U. S. will not take land into trust, the Supreme Court has made its decision and there are no appeals allowed to the U.S. Supreme Court. The liability for the town is that the agreement could be terminated at any time since as the 30 days have passed since the Supreme Court has ruled there is no Land into Trust for tribes recognized after 1934. The Town of Middleboro should be prepared for the potential that the IGA could end immediately.

2. Planning Department Salaries

The planning department has been utilizing staff and paying for staff with the casino preplanning fund. The Planning Director is paid with Middleboro taxpayer money while two employees, a staff planner (40hrs per week) and a clerk (20 hours per week), are both funded with casino pre-planning funds. The intention is these employees will be not funded if the casino project terminates. As per a meeting with Planning Director, Ruth Geoffroy, her work is mostly casino related while the staff planner and part time clerk are working on town business while she works with casino plans. This creates a confusing arrangement and should be certified with the investors and Tribe before continuing.

3. OECD Funding

The Executive Director of Office of Economic and Community Development department has been subsidized with the casino preplanning fund from Feb 8, 2008 to Jan 1, 2009 at 20 hours per week and at 35 hours per week after January 1, 2009 for the Director position. This constitutes a full-time position which creates a budgetary liability should the casino project fail. During a discussion at the Board of Selectmen meeting, it was explained the Executive Director was being subsidized from the Casino pre-planning funds until such time grant money will cover the department. A job description for the OECD is available from the Middleborough.com town website;

"The Middleborough Office of Economic and Community Development (OECD) was created by the Town's Board of Selectmen in September of 1998. The primary responsibility of this office is to apply for, implement and administer Economic and Community Development Block Grant Programs for the Town of Middleborough. The OECD is also responsible for business advocacy, commercial district revitalization, retail development, industrial attraction and retention, infrastructure improvements and tourism development. The office is staffed with a

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full-time Executive Director and a full-time Administrative Assistant, fully qualified in the field of economic and community development.”

The discussion at the Board of Selectmen meeting was the Executive Director for OECD is writing Middleboro grants in order to fund the department with grant money instead of Casino planning funds is also confusing. We recommend a clear scope of work for the Executive Director of OECD if that position is funded with casino pre-planning money and that should also be certified by the investors and the tribe.

4. Environmental Impact Statement

An Environmental Impact Statement will detail the impacts of the planned casino and give specific information on the size and scope of the facility. Until a Draft EIS is released regarding the scope of the casino project, planning for the project is very difficult. The schedule for the release of the Draft EIS has been indefinitely delayed since last year. The latest information is the Draft EIS is due out in October.

5. Everett Square Revitalization

There was some controversy over whether or not a planned study on the revitalization of Everett Square can actually be distinguished as casino related. If this study is to be paid for with pre-planning money, the investors and the tribe should certify to that effect.

6. Hotel Study

Comments were made by Selectman Stephen Spataro at a March 2009 Board of Selectman meeting that the hotel study had nothing to do with the casino project but was however, funded by the casino planning money. This topic should be discussed and again forwarded to the investors and Tribe to certify the expenditure.