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February 10, 2005

Mr. Dennis Elverman
Chairman
Kenosha County Board of Supervisors
c/o Frank Volpintesta, Esq.
Corporation Counsel
County of Kenosha
Courthouse, 912-56th Street
Kenosha, WI 53140-3747

Re: Intergovernmental Agreement

Dear Chairman Elverman:

Perkins Coie LLP is pleased to provide its legal analysis in response to certain questions presented to us by Frank Volpintesta, Esq., Corporation Counsel for the Kenosha County Board of Supervisors. These questions concern the proposed intergovernmental agreement (IGA) among the Menominee Indian Tribe of Wisconsin, the Menominee Kenosha Gaming Authority, the City of Kenosha, and the County of Kenosha.

As discussed in the enclosed issue paper, we believe the IGA is a very effective document. It is one of the strongest local governmental/tribal agreements we have seen, and the parties are to be congratulated on its development. Obviously, the IGA is the result of considerable hard work and represents a serious effort to address the concerns of all parties.

We hope the enclosed analysis addresses your questions. Please contact us if you need further assistance.

Very truly yours,

Guy R. Martin

Donald C. Baur

DCB:dml

Cc: Frank Volpintesta, Esq.

ISSUE PAPER

Introduction

This issue paper responds to the request from the Kenosha County Board of Supervisors for a review of the draft intergovernmental agreement (IGA) among the Menominee Indian Tribe of Wisconsin, the Menominee Kenosha Gaming Authority, the City of Kenosha, and the County of Kenosha. The IGA would establish an enforceable agreement among the parties, defining their respective rights and obligations related to the acquisition of land in trust for the development of a Class III, and eventually a Class II, gaming facility. The County specifically requested that we undertake the following tasks:

1) Provide comments on any issues of concern we identify associated with the IGA.

2) Provide an opinion as to whether the exclusivity clause of section 1.D. violates antitrust and restraint of trade laws, in particular Wis. Stat. § 133.03.

3) Determine whether federal law allows the use of payments based upon a "percentage of net win" approach for purposes of calculating compensation to the City and County.

4) Discuss what obligations the County would have to comply with, should the City be the only signatory to the IGA.

5) Provide our opinion on the sales and use tax question, as presented by various legal memoranda that the County has provided to us.

6) Discuss the consequences of activation of the severability clause.

7) Provide observations relevant to the County with regard to the Wisconsin/Menominee Compact, the Kenosha Gaming Authority Charter, and the Tribe's constitution and bylaws.

This analysis has been prepared through a consultative process. We have shared drafts of the issue paper with the Corporation Counsel for the County, as well as counsel for the City and the Tribe. We also have discussed some of our questions and concerns with them. For example, we have deleted our proposed discussion of the need for approval pursuant to 25 U.S.C. § 81 on the understanding that the parties will seek BIA's evaluation of this question. Such action is consistent with our recommendation, so the discussion was not needed. This approach has made it possible for us to answer certain questions and address specific concerns. The parties

also revised the IGA to address certain issues. Those changes are much appreciated, and in our view they have improved an already strong document. The issue paper reflects the results of these communications.

Discussion

1. **General Comments.** The IGA is a very well-drafted, comprehensive agreement. It contains the key concepts that are essential to protect the interests of local governments in the context of Indian gaming agreements. Our comments on the IGA are set forth below.

Final "Whereas" Clause. The final "whereas" clause in the IGA states that the Tribe "acknowledges its obligations to abide by State building and other codes as provided in Section IV of the Compact and has adopted certain ordinances enumerated in Exhibit C." These obligations are not reflected in the terms of the IGA itself. In our discussions with counsel for the City and the Tribe, we learned that enforceability of these terms is provided for through the Compact, which allows for action by the State. The State, in turn, often delegates enforcement of these ordinances and codes to local governments. The sufficiency of the City and County role under the Compact for this purpose is therefore a question for local counsel.

Waiver of Tribal Sovereign Immunity. Initially, we were concerned that the Tribe's waiver of sovereign immunity was not broad enough. In section 4, the waiver is limited to "the provisions of Section 22 of this Agreement." Section 22 is the Tribe's guarantee of the performance of the Authority. Certainly, such a waiver is necessary. There are, however, certain IGA provisions under which the Tribe makes its own obligations, separate and apart from the Authority. For example, such obligations are found in: the "whereas" clause noted above, section 2.C. (Tribe's commitment to annual payment), section 2.I. (adoption of Tribal ordinances), section 2.K. (agreement to not enact laws impairing obligations), section 2.L. (agreement to not change Authority's charter), and section 2.P. (agreement to use best efforts to have trust land revert back after cessation of gaming). These, and perhaps other terms of the IGA, are duties of the Tribe, not the Authority, and should be subject to the waiver.

We discussed this issue at length with the other counsel. In response, they took the helpful step of revising the IGA to ensure that the Tribe and the Authority are listed together for all of the Tribe's IGA obligations. This is a significant improvement over the previous draft IGA because it means that there should always be recourse against a tribal entity that has waived its immunity.

Our only cautionary note to the use of a standard severability clause arises from the unique nature of agreements with Indian tribes. Because tribes have sovereign immunity, an agreement with a tribe is unlike a contract with a non-Indian

entity. This is because a tribe can be sued only if it grants its consent. Thus, to enforce an IGA like this, the waiver of immunity is critical.

We therefore believe that the section in this IGA related to the waiver (section 22) is essential. The Tribe has agreed not to challenge the agreement and our judgment is that a waiver defense would be unsuccessful. We note that, however unlikely it is that the waiver would be invalidated, if it is, the City/County obligations arguably would remain in effect and enforceable. It is our understanding that this unlikely possibility has been taken into account by the City and County in their negotiations.

Trust Land Reverter. Section 2.P. provides that, in the event gaming ceases for 365 consecutive days, "the Tribe shall use its best efforts, including, but not limited to, petitioning the United States Congress, to ensure that the Federal Trust Land reverts to taxable status. . . ." In practical terms, it is very difficult to achieve such a result. We understand that the County appreciates this point. We also understand that the guaranteed minimum payment provision was developed with this purpose in mind, and we defer to the County on the sufficiency of those payments. In addition, we noted in our initial comments that this provision was limited to taxable status and that it did not cover compliance with land use and other regulatory issues. New language has been included to address our point, and this issue is addressed to some extent by the fact that certain ordinances will remain in effect under section 2.7. The County should make sure that this is a sufficient list of such ordinances. It is ultimately a policy question for the City and County as to whether these terms are strong enough in the event that gaming ceases on the property.

Sixth "Whereas" Clause. The initial draft of this clause stated that the Tribe intends "to apply . . . to place the lands . . . into Federal Trust pursuant to 25 U.S.C. Section 2719(b) . . . ." We believe it is more accurate to say land is taken into trust pursuant to 25 U.S.C. § 465, as implemented by 25 C.F.R. Part 151. We understand the IGA will be revised to read "to place lands into trust pursuant to 25 U.S.C. § 465, and use those lands for gaming purposes in accordance with 25 U.S.C. § 2719(b)." This is an accurate statement of the controlling legal authority.

Liquidated Damages. Section 6.A. states that liquidated damages are the "exclusive remedy" for breach of certain provisions. These provisions are section 2.H. (inspections), section 2.I. (adoption of Tribal ordinances), section 2.K. (agreement to not enact laws impairing obligations), section 2.L. (agreement to not change Authority's charter), section 2.M. (agreement to not enact environmental regulations that go beyond local standards or trust land boundaries), section 2.O. (use for gaming only as authorized), section 2.Q. (height and other limitations with respect to airport proximity), and section 2.R. (expansion of trust land only by unanimous consent). This would mean that the County could not seek injunctive relief to stop an action from occurring or compel compliance; instead, the sole form of relief for the

specified provisions would be a $10,000/day penalty. The County should be aware that the specified damages are the sole remedy for violations of these obligations.

City/County Distributions. An important aspect of the arrangement established by the IGA concerns the division of funds received from the Tribe between the City and the County. The details of this allocation of funds will be addressed in the City/County Revenue Sharing Agreement. One question associated with the revenue-sharing arrangement is whether the City or County could take independent action to enforce its respective rights under the IGA as to revenue payments in the event of a conflict. We believe this situation is adequately addressed in the Dispute Resolution provisions of section 5 of the IGA, which confers upon "each party" the "right and standing to challenge any act or omission which violates the Agreement. . . ."

We were also asked if: 1) the language in the Revenue Sharing Agreement operated so as to delegate to the City the County's ability under the IGA to challenge any act or omission pertaining solely to the County's rights and claims; and 2) if the County does retain its own counsel, whether the language in paragraph 3 suggests that the County must still contribute 1/3 of the City's attorneys' fees even if the County does not use their services.

It is our view that, under the IGA, the losing party pays the other party's reasonable attorneys' fees.

We also believe the language in the Revenue Sharing Agreement is unclear. On its face, paragraph 3 does not directly create a County delegation to the City to litigate, but the language, by covering only litigation by the City, does create the implication that the City would be doing the litigation. This could be a point of contention between the City and the County. Although we prefer the County's side of this interpretation over the City's, the ambiguity should be resolved. This uncertainty could be resolved by adding a provision which states explicitly that if for any reason, including a conflict, the County chooses to retain its own counsel to litigate any financial loss arising out of a particular matter..., it is entitled to do so, and therefore would not be liable to pay for the City's administrative and legal costs and expenses.

2. **Exclusivity Clause**. Ordinarily a political subdivision acting in a regulatory capacity is not considered an economic actor that would be subject to antitrust suit. It is not clear that the reasoning behind this concept would be fully applicable here because neither the County nor City has regulatory authority over gaming per se, and each is getting some compensation in connection with the IGA. It is possible that the County or City could be named as co-conspirator in a suit claiming the exclusivity provision restrains trade.

The exclusivity provision could possibly serve to prevent a competing casino from being built if it were the basis for denying another Indian tribe or, if gaming were to become generally legal in the state, a private gaming entity from establishing

a competing casino. It is not clear exactly how this might occur, since neither the City nor County appears to regulate gaming, but presumably the exclusivity provision might be triggered if local government action were necessary under zoning or environmental laws, or pursuant to some other arrangement whereby their approval was needed to establish a casino. Under those circumstances, honoring the provision could reduce competition for gaming. There are situations, as with cable TV franchises, in which exclusivity may be justified for economic or other practical reasons, and regulation is often established to protect against abuses that might be eliminated through competition.

It is difficult to make economic arguments to support exclusivity in gaming since it does not possess the attributes of a natural monopoly or otherwise require infrastructure that could not economically support competing providers. Additionally, there is currently no means of regulating gaming to avoid abuses that may flow from the lack of competition. Thus, there is no way to prevent the possibility of antitrust claims by a disappointed bidder to offer competing gaming operations, and the law does not categorically preclude suit. We would describe this as theoretically possible. It does not suggest, however, that there is likelihood that the County or City could be causally connected to any claimed anticompetitive outcome.

If antitrust claims were made, the remedies available may be quite limited. Wisconsin construes its antitrust law to be the same as federal law except that state law also covers intrastate commerce, and adopts federal law as Wisconsin law. Thus, it would appear that the two laws are coextensive in their substantive interpretation.

Exclusive contracts are not prosecuted as criminal offenses under federal law, and for this reason the only antitrust remedy, if any, for the exclusive IGA provision would be civil. The Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34 et seq., provides for absolute immunity from damages or attorneys' fees for a federal antitrust claim against local governments, including counties, cities and their officials and employees. The Act does not immunize against injunctive relief, and we have found no case applying the federal Act to state antitrust claims for damages against a local government, although such argument is not foreclosed.

There are two non-antitrust state law issues that should also be considered. First, it is not clear to us under state law whether current County officials can bind future County officials in perpetuity to take or not take action with respect to future gaming requests. The issue here is not the ability of the Board to bind the County by contract, but instead the agreement to forestall from taking regulatory action in the future and under potentially different fact circumstances. Second, it is not clear to us that denial of a permit or license on the ground that it is precluded by the IGA would be a valid reason under state law. We understand that these issues have been addressed by local counsel for the City and County.

3. **Percentage of net win**. In general, we agree that the "net win" approach can be used, so long as the National Indian Gaming Commission does not determine that the compensation is excessive in relation to the services provided or the impacts on the local governments. Based on the background documents you have provided, it appears that BIA agrees with this conclusion. We note, for example, that the Indian Gaming Regulatory Act requires a tribe to have the sole proprietary interest in its gaming enterprise. 25 U.S.C. § 2710(b)(2)(A). We believe this IGA does not present a "proprietary control" problem, but recommend obtaining the views of BIA and the NIGC on this issue. We understand that it is the intent of the parties to do so.

4. **County obligations**. The County is not obligated to sign the IGA. If the County does not sign, it would of course have no obligations under the IGA itself, but it also would not obtain any benefits under the contract. However, the County would still have its duties to perform certain functions under state and local law in its capacity as a governmental entity serving its residents. Thus, for example, the County may have a duty to maintain roads under its jurisdiction independent of the IGA, but would not achieve compensation for such costs by means of the agreement.

5. **Sales and use tax**. We are in general agreement with the legal analysis provided by Holland & Knight. We have reviewed the Tribal tax agreement and consider it acceptable.

6. **Severability clause**. The choice of severability clause is ultimately up to the parties. This clause in the initial IGA worked the opposite way from what we typically see. Generally, a severability clause preserves the overall agreement to the extent possible. The idea behind such a provision is to ensure that an IGA is not defeated in its entirety by the invalidation of a specific term of the agreement. The initial severability clause, however, had the opposite effect of terminating the overall IGA. Apparently, this was the intent of the parties in an effort to discourage challenges to the IGA. The revised IGA adopts a traditional severability clause that preserves the overall agreement if specific provisions are invalidated.

7. **Comments on Compact, Charter, Constitution**. We have reviewed the Wisconsin/Menominee Compact, Authority Charter, and Tribal Constitution. We understand that those documents are beyond the control of the County and are not subject to negotiation. We also understand that the Board has been briefed on most of the key provisions of these documents. Our review, therefore, has focused on the provisions in those documents that are relevant to the IGA. We have only a few separate observations.

Compact, Section XX.A., page 66-67. There are certain insurance requirements in this section; however, this section does not permit causes of action for injuries outside the coverage of the general liability insurance required by the Compact. We understand that the Board has been made aware of this issue. We also

noted that the waiver was not broad enough to cover non-contract, non-IGA actions against even the Authority. For example, tort claims would not be covered. This may be the intent of the parties, but the contracting parties should be sure to consider this issue.

Charter, Section 6.b., page 9. We note that the profits of the enterprise are disbursed to the Tribe on a monthly basis. This may limit somewhat the recoveries available under Article XIII of the Tribal Constitution, although the Authority has the power to retain sums necessary and reasonable for reserve accounts. The future net revenue stream would still be available for recovery.

Tribal Constitution, Article XIII and Amendment to Article XIII. This is the article of the Tribal Constitution that governs the Kenosha enterprise. We note that this article limits the recovery of monetary damages under any waiver of sovereign immunity to the *"undistributed or future net revenues or other assets of the tribal gaming business."* Article XIII is referenced in the IGA. The County should be aware that because the damages are limited to "net revenues," if the Authority is not profitable, then there may be no damages available for recovery.

Conclusion

The IGA is an excellent document that reflects a strong and lasting cooperative relationship among the City, County, and Tribe. As discussed above, there are certain provisions that should be carefully considered, and possibly revised, consistent with the comments set forth in this issue paper.