IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 19-1661, 19-1857

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

Plaintiffs-Appellees/Cross-Appellants,

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff-Appellee,

v.

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

Defendants-Appellants/Cross-Appellees,

CHARLIE BAKER, in his official capacity as Governor of the Commonwealth of Massachusetts; MAURA HEALEY, in her capacity as Attorney General of the Commonwealth of Massachusetts; CATHY JUDD-STEIN, in her capacity as Chair of the Massachusetts Gaming Commission,

Third Party Defendants/Appellees.

Nos. 19-1729, 19-1922

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

Plaintiffs-Appellees/Cross-Appellants,

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff-Appellee,

v.

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

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Commonwealth of Massachusetts; CATHY JUDD-STEIN, in her capacity as Chair of the Massachusetts Gaming Commission,

Third Party Defendants.

On Appeal from the United States District Court for the District of Massachusetts
Case No. 1:13-cv-13286-FDS

PRINCIPAL AND RESPONSE BRIEF OF THE TOWN OF AQUINNAH AND THE AQUINNAH/GAY HEAD COMMUNITY ASSOCIATION INC.

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CORPORATE DISCLOSURE STATEMENT

The Aquinnah/Gay Head Community Association, Inc., is a non-profit corporation organized under the laws of the Commonwealth of Massachusetts; it has no parent corporation and no publicly-held corporation owns more than 10% of its stock.

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INTRODUCTION

This case originated as a dispute between the Commonwealth of Massachusetts and Appellants The Wampanoag Tribe of Gay Head (Aquinnah), the Wampanoag Tribal Council of Gay Head, Inc., and the Aquinnah Wampanoag Gaming Corporation (collectively, the "Tribe") over an issue that has now been resolved: whether the Tribe could build and operate a gaming facility in the Town of Aquinnah (the "Town") without a gaming license from the Massachusetts Gaming Commission (the "MGC"). When the Town and the Aquinnah/Gay Head Community Association, Inc. (the "AGHCA") joined the litigation, they raised a separate issue: whether the Tribe was subject to the local permitting requirements generally applicable to everyone in the Town. The District Court resolved the two issues in separate proceedings after separate hearings; the Tribe lost on both issues, and the District Court entered injunctions against the Tribe. The District Court then entered judgment against the Tribe memorializing both of its prior rulings.

The Tribe appealed, but contested only the first issue—the applicability of state gaming regulations. It neither raised the permitting issue nor sought a stay of the permitting injunction, which remained in effect. This Court accordingly decided only the gaming issue, siding with the Tribe and holding that the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.*, impliedly repealed the Commonwealth's authority to enforce gaming laws on the Tribe's lands.

In accordance with this Court's decision, the District Court undid its gaming injunction and granted the Tribe an injunction against enforcement of state gaming law. But the Tribe contended that it was entitled to have *both* injunctions set aside, even the one it never appealed. The District Court denied that request. This second appeal is the Tribe's improper attempt to undo its forfeiture during the first.

Downplaying its prior strategic choice, the Tribe now attempts to challenge the permitting injunction it previously declined to challenge on appeal. Thus, while the Tribe claims that this appeal concerns whether IGRA allows it to build a gaming facility without following generally applicable non-gaming regulations, the District Court's decision is based on the law of the case, not IGRA. The Tribe cannot now raise an issue that it consciously and strategically dropped from its previous appeal.

Even were the Court to reach the merits, which it should not, the Court should still affirm. The source of the Town's permitting jurisdiction is a settlement agreement between the Tribe, the Commonwealth, the Town, and the AGHCA, which was subsequently codified in federal law. Although this Court previously held that IGRA partially repealed the federal statute codifying the settlement agreement, IGRA left in place the Town's jurisdiction to regulate activities that are not "integral to gaming." *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 705 (1st Cir. 1994). The Town's permitting rules do not regulate any activities that are "integral to gaming"—the permitting rules are generally applicable to all

construction projects in the Town and are designed to protect public health, safety, and the natural environment. IGRA therefore did not repeal the Town's permitting jurisdiction.

JURISDICTIONAL STATEMENT

Although the Town and AGHCA agree with the statutory bases for federal jurisdiction identified in the Tribe's Jurisdictional Statement, the Town and AGHCA do not adopt the Tribe's discussion of sovereign immunity (*see* pp. 36-39, *infra*), or the Tribe's argumentative gloss on the procedural history.

As for the cross-appeal, the District Court had jurisdiction over this case under 28 U.S.C. §§ 1331, 1367. The Court entered an Amended Final Judgment on June 19, 2019. Add.42-45. The Town and AGHCA filed a notice of appeal from that judgment on July 19, 2019. App.1189-91. Subsequently, the District Court entered a Second Amended Final Judgment on July 19, 2019. Add.48-51. On August 2, 2019, the Tribe moved to alter or amend that judgment under Federal Rule of Civil Procedure 59(e). ECF No. 205. The District Court then entered a Third Amended Final Judgment on August 19, 2019. The parties resolved the Rule 59 motion by stipulation on August 30, 2019. App.1362-66; *see* App.1. The Town and AGHCA filed an Amended Notice of Appeal from the Third Amended Final Judgment on September 10, 2019. App.1368-70.

This Court has jurisdiction over the cross-appeal from the final judgment under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the Tribe forfeited its challenge to the District Court's decision on the permitting issue, where the Tribe could have challenged that decision in its first appeal but failed to do so;

2. Whether the District Court's decision on the permitting issue is correct in any event, where the Settlement Act provides that the Tribe will be "subject to the civil and criminal laws, ordinances, and jurisdiction of the . . . [T]own," and the Town's generally applicable laws are not being used to regulate gaming.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND.

The Town is located at the southwestern end of Martha's Vineyard. It is one of the smallest towns in Massachusetts. Although many of the Tribe's members today live off-Island, the Tribe's lands are in the Town, and Tribe members who live locally play an important role in the life of the Town. The Chair of the Town's Board of Selectmen, the Town Manager, and the Chief of Police are all members of the Tribe.

In 1983, the Tribe (which was not yet federally recognized), the Town, the Commonwealth, and the AGHCA all entered into a settlement agreement to resolve certain disputed land claims. App.48-88. That agreement provided that certain lands

(the "Settlement Lands") would be taken into trust for the benefit of the Tribe, but also provided that "[a]ll Federal, State and Town laws shall apply to the Settlement Lands," with the exception of certain property-tax and hunting laws not applicable here. App. 58-60. Subsequently, Congress codified the settlement agreement in the Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987, Pub. L. No. 100-95, 101 Stat. 704 (the "Settlement Act") (previously codified at 25 U.S.C. § 1771 *et seq.* (2012)).[1] Under the Settlement Act, the Settlement Lands would remain "subject to the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth . . . and the [T]own of Gay Head[2] . . . (including those laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance)." Settlement Act § 9, 25 U.S.C. § 1771g.[3]

Since entering into the codified settlement agreement, the Town and the Tribe have enjoyed good relations, and the Tribe has obtained multiple Town permits on a variety of projects without difficulty. App.1217 n.2, App.1227-28 n.2. Until this case, the parties' only permitting dispute involved whether the Tribe needed to

[1] Although the Settlement Act remains in force, a subsequent revision of the U.S. Code omitted the Settlement Act and similar statutes from the codification "as being of special and not general application." 25 U.S.C. § 1771 note (2018). References to 25 U.S.C. §§ 1771-1771i are therefore to the 2012 main volume.

[2] The Town was known as Gay Head until 1998.

[3] The settlement agreement was separately codified as a matter of Massachusetts state law. App.38.

obtain Town building and related permits for a shellfish shed in a marine commercial and coastal district, a question that was resolved in the Town's favor by the Massachusetts Supreme Judicial Court ("SJC"). *See Bldg. Inspector & Zoning Officer of Aquinnah v. Wampanoag Aquinnah Shellfish Hatchery Corp.*, 443 Mass. 1, 17 (2004) ("*Shellfish Hatchery*").

In May 2013, the Tribe sought federal approval to operate a Class II gaming facility on the Settlement Lands. App.494. Class II gaming includes "bingo" and non-banking "card games." 25 U.S.C. § 2703(7). The National Indian Gaming Commission ("NIGC") subsequently issued an informal opinion letter stating that the location of the proposed facility was eligible for gaming. App.586. Although the Tribe informed the Commonwealth of its plans to construct and operate a gaming facility, the Tribe did not seek approval from the MGC.

II. PROCEDURAL BACKGROUND.

A. Initial District Court Proceedings And The Tribe's First Appeal.

1. Upon learning of the Tribe's plans, the Commonwealth filed this action in state court in December 2013. App.32. The Tribe removed to federal court, and the Town and the AGHCA intervened as plaintiffs. App.21-26, App.89.

The Gaming Issue: The Commonwealth's position was that, under the Settlement Act, the Tribe could not build or construct a gaming facility without approval from the MGC. The Tribe filed counterclaims against the Commonwealth

and Town, seeking declaratory and injunctive relief that would allow it to construct and operate its facility without MGC approval. App.98-100; App.116-18. The Tribe argued that Congress's enactment of IGRA repealed the Settlement Act to the extent that it authorized state or local gaming regulation. The parties filed cross-motions for summary judgment on this gaming issue.

The Permitting Issue: Separately, the Town's and the AGHCA's complaints in intervention sought to vindicate the Town's ability to enforce local "regulatory, permitting, and licensing requirements—including all local zoning ordinances and the term[s] of the [Tribe's] locally issued land use permits." ECF No. 52, at 10; *see* ECF No. 53, at 10 (similar). The applicable permitting requirements include provisions of the Town building code, as well as the requirements for review by the Martha's Vineyard Commission ("MVC")—the regional planning agency for Dukes County, which is responsible for reviewing and approving certain large-scale development projects on the Island in light of their potential regional impact. *See* App.1224-27; Add.65-67. Neither the Commonwealth's complaint nor the Tribe's counterclaims sought relief on this separate permitting issue.

2. While the parties' cross-motions for summary judgment on the gaming issue were pending, the Town became aware that the Tribe had started construction of a gaming facility without first receiving the requisite permits. Concerned that the Tribe's unapproved construction would threaten public health, safety, and the

environment, the Town filed a motion for a preliminary injunction barring the Tribe from continuing construction without first receiving all requisite Town permits; the AGHCA filed a memorandum in support of the motion. App.1024. At the hearing on the Town's motion, the Tribe focused on the possibility that the Town might enforce local zoning rules that bar gaming, but expressed little concern about the Town's enforcement of generally applicable building rules. App.1044 (stating that "we probably don't have a dispute at all" if the Town were to enforce generally applicable building-permit requirements rather than gaming-specific requirements). Indeed, the Tribe represented to the District Court that it had already told the Town that if "you want to bring your inspectors in and look at everything that an inspector is able to see, come on in. If you point out that that wire should be thicker than the one that's being put in, we're going to make sure that wire is put in." *Id*.

At the conclusion of the hearing, the District Court granted the Town's motion for a preliminary injunction. The court first distinguished between the permitting issue raised in the preliminary-injunction motion (and the intervenors' complaints) and the gaming issue raised in the cross-motions for summary judgment (and the Commonwealth's complaint and the Tribe's counterclaims). The court described the permitting issue as "a very narrow one." App.1056. As the Court put it, "[w]hether the tribe can build a building without applying for a building permit and getting the required inspections . . . and ultimately an occupancy permit" is "not the

broad issue of whether gaming is permitted on tribal land, whether [IGRA] preempts the Settlement Act, [and] whether it preempts state laws or town zoning" that regulate gaming. App.1056. The Town's permitting rules "are requirements of general applicability" that "apply to all structures" and are "for public health and safety, so "they are independent of the gaming issue generally and the zonings issue specifically as it applies to casino gaming." App.1057.

The District Court then held that the Town was likely to succeed on the merits of its permitting claim, regardless of the outcome on the separate gaming issue. The Town's permitting requirements apply "until proved otherwise," and the Tribe had failed to identify any basis for exempting its project from these requirements. App.1056. Thus, the court explained, even if the Tribe "wins and they can open a casino, it's going to have to obtain a building permit and comply with all the construction and wiring and plumbing code requirements and to obtain an occupancy permit before opening it to the public." App.1056-57; *see also, e.g.*, App.1057 ("The rules are that you need a building permit to construct a building, and, again, as I see it, that requirement will remain in place *regardless of the outcome of the gaming aspect of this case*[.]" (emphasis added)); *id.* ("*[U]nder either scenario*, if the tribe is going to do any work on the building, construction work, it's going to have to obtain a building permit and comply with all of the construction and wiring and plumbing code requirements and to permit inspections and to obtain an occupancy

permit before opening it to the public." (emphasis added)); *id.* ("Again, even if I were to rule, and I express no opinion[,] that the town has no choice but to permit gaming, it nonetheless can require that the appropriate permits be obtained.").

Of course, the District Court also noted that if the Tribe ultimately prevailed on the separate gaming issue, "[t]he town could not enforce their laws in order to unduly burden or harass the tribe or to prevent them from opening the casino because they don't like gambling." App.1056. But the Tribe "nonetheless would have to demonstrate to the satisfaction of the town building inspector that the building was safe and in compliance with code." App.1056-57.

Finally, the District Court explained that the balance of equities also favored granting injunctive relief. Were the Tribe to construct a gaming facility without the proper permits, the "potential harm is one of public safety." App.1058. The building "is intended to be a public building," and "it is impossible as a practical matter to check compliance with code after a building has been completed." *Id.* Although the court acknowledged that compliance with permitting requirements might delay the Tribe's project to some extent, harm from delay was outweighed by the Town's interest in "prevent[ing] construction or completion of an unsafe or noncompliant structure." App.1059.

The District Court therefore entered a preliminary injunction barring the Tribe from "commencing or continuing the construction of a gaming facility . . . without

first complying with the permit requirements of the Town of Aquinnah." App.1020. The Tribe could have appealed the preliminary injunction, 28 U.S.C. § 1292(a)(1), but did not.

3. Subsequently, the District Court issued an opinion on the gaming issue, granting summary judgment to the plaintiffs. *Massachusetts v. Wampanoag Tribe of Gay Head (Aquinnah)*, 144 F. Supp. 3d 152 (D. Mass. 2015). The District Court's summary-judgment opinion did not mention the separate permitting issue, other than describing the preliminary injunction proceedings in a footnote. *Id.* at 161 n.6.

The parties then briefed the form of the final judgment. The Tribe proposed that judgment should enter in favor of the Commonwealth, Town, and AGHCA "for the reasons set forth" in a list of orders that included both the summary judgment order and "the Court's July 28, 2015 Order entering a preliminary injunction, Dkt. 140." ECF No. 156-1, at 1. The District Court then issued a final judgment "consistent with" the summary-judgment order, on the gaming issue, and the prior preliminary-injunction order, on the local-permitting issue. Add.1-3. That judgment granted the Commonwealth, the Town, and the AGHCA declaratory and injunctive relief preventing the Tribe from "commencing or continuing construction of and/or opening any gaming facility at or on the Settlement Lands (as those lands are defined in the Summary Judgment Order) without complying with the laws and regulations of the Commonwealth of Massachusetts and the Town of Aquinnah, *including any*

pertinent state and local permitting requirements." Add.3 (emphasis added); *see also* Add.2 (similar).

4. The Tribe appealed. On appeal, the Tribe raised *only* arguments related to the gaming issue, not the local-permitting issue. The Tribe contended, first, that where it applies, IGRA supersedes the settlement agreement and implementing legislation regarding gaming, and second, that IGRA applies on the Settlement Lands (because the Tribe exercises "governmental power" there). Based on these first two arguments, the Tribe contended, it was entitled to operate a gaming facility without complying with state and local *gaming* regulations. Third, the Tribe contended that the Commonwealth's suit (which, again, pertained to *gaming* regulation) should have been dismissed for failure to join a necessary party. *See* Tribe's Opening Br. at 2, 9-10, *Massachusetts v. Wampanoag Tribe of Gay Head (Aquinnah)*, No. 16-1137, 2016 WL 3437627 (1st Cir. filed June 16, 2016) ("2016 Opening Br.").

Notably, the Tribe *did not argue* in this Court that the District Court's ruling on the permitting issue should be reversed. The Tribe's briefing never mentioned the separate local-permitting issue, or the preliminary-injunction proceedings. The opening brief identified three "Orders to which the Tribe alleges error in this appeal": the summary-judgment decision; the order declining to reconsider that decision; and

an order refusing to dismiss on the necessary-party issue. *Id.* at 7-8. Neither the preliminary injunction nor the permanent injunction was among them.[4]

5. This Court reversed on the gaming issue, holding that IGRA had impliedly repealed state and local jurisdiction to regulate gaming on the Settlement Lands. *Massachusetts v. Wampanoag Tribe of Gay Head (Aquinnah)*, 853 F.3d 618, 629 (1st Cir. 2017). The Court rejected the Tribe's threshold argument about failure to join a necessary party. *Id.* at 624 n.3. Like the Tribe's briefing, this Court's opinion made no mention of the local-permitting issue, except to note in passing the aspects of the judgment that went beyond the summary-judgment decision. *Id.* at 624. Having ruled for the Tribe on the merits of the gaming issue, this Court, "for the foregoing reasons," reversed "the opinion of the district court" and remanded the case "for entry of judgment in favor of the Tribe." *Id.* at 629. The mandate issued on May 9, 2018. Add.28.

B. Proceedings Following Remand.

1. In the months following remand, the Tribe did not seek a building permit or any other permit from the Town or the MVC. Nor did the Tribe ask the District Court to enter the injunction the Tribe had sought or otherwise seek entry of

[4] The United States filed an *amicus curiae* brief in support of the Tribe's first appeal on the gaming issue. Notably, the United States did not file a brief in *this* appeal, though the Tribe sought and received a lengthy extension expressly to accommodate "discussions with the United States" and another group regarding amicus participation. Mot. for Extension of Time 1 (1st Cir. filed Nov. 5, 2019).

judgment consistent with this Court's opinion on the issues the Tribe had appealed. Instead, as the Town eventually learned, the Tribe again began constructing a gaming facility, this time at a different location. App.1114-17. As with the previous construction project, the Tribe neither sought nor obtained permits.

The Town filed a motion for entry of final judgment, in which the AGHCA joined, asking the District Court to effectuate this Court's decision and remand order on the gaming issue and otherwise re-enter the undisturbed aspects of the judgment. *See* ECF Nos. 180, 181, 183. In particular, the Town and AGHCA asked that the District Court's judgment once again require the Tribe—like everyone else—to obtain the permits required by generally applicable local law before commencing construction. *Id.* The Town and AGHCA argued that because the Tribe had previously lost on the local-permitting issue and had not raised that issue on appeal, that aspect of the prior judgment had not been disturbed and should continue to be reflected in any final judgment. *Id.*

The Tribe opposed the motion, arguing that this Court's mandate entitled it to entry of judgment in its favor on *all* issues, even those it did not appeal. ECF No. 185. The Tribe alternatively insisted that it *had* raised the local-permitting issue on appeal. *Id.*

2. The District Court agreed with the Town and AGHCA's reasoning and granted the Town's motion. As the court explained, "the Tribe lost in the District

Court as to three principal issues; it appealed only two of them; its appeal was successful as to those two; and it now seeks judgment in its favor as to all three." Add.31. The District Court declined to "reverse its judgment as to an issue that was never appealed." *Id*.

The District Court began by noting the general principle that "a party's objections to any issue not raised on appeal are waived." Add.36. "When a legal decision goes unchallenged in a subsequent appeal despite the existence of ample opportunity to do so," the court explained, "the decision becomes the law of the case for future stages of the same litigation, and a party normally forfeits its right to challenge that particular decision at a subsequent date." *Id.* The court proceeded to reject the "three reasons" the Tribe had presented for "why that principle should not apply." *Id.*

First, the District Court rejected the notion that the Tribe had, in fact, appealed the local-permitting issue. After reviewing the Tribe's appellate briefing, Add.35, the District Court concluded that "none of [the issues raised on appeal] even arguably concerned [the] holding as to non-gaming permitting requirements." Add.37.

Second, the District Court held that this Court had not expressly or implicitly decided the issue no one had raised. Add.37-38. The District Court emphasized that, under the Settlement Act, the Settlement Lands remain generally subject to state and local jurisdiction, and it noted that the First Circuit's decision addressed only

"state and local regulation of gaming." Add.37. "In short," the court explained, "because the Tribe did not raise the issue on appeal, the First Circuit said nothing on point." Add.38.

Third, the District Court rejected the Tribe's argument that the wording of this Court's mandate required judgment for the Tribe even "on an issue that it did not appeal, that the parties did not brief, and that the First Circuit did not decide." Add.40. The court explained that "[s]uch a result would be anomalous, and indeed unfair." Add.40. Quoting a case the Tribe had cited in its opposition brief, and that the Tribe again relies on in this appeal, the District Court noted that "'opinion[s] and judgment[s]' are 'requir[ed]' to 'be read together.'" Add.39 (quoting *Hynning v. Partridge*, 359 F.2d 271, 273 (D.C. Cir. 1966)). Here, this Court's "opinion considered only the issue of gaming laws," so the mandate required entry of judgment in the Tribe's favor only on that issue. Add.39. As the District Court observed, a mandate "forecloses the lower court" only "from reconsidering matters determined in the appellate court," leaving "to the [lower] court any issue not expressly or impliedly disposed of on appeal." Add.40. Because "the permitting issue was not addressed" in this Court's opinion, the District Court remained "free to reinstate that portion of its final judgment." *Id.*

Accordingly, the District Court entered an amended final judgment. Add.42. That judgment awarded declaratory and injunctive relief to the Tribe on the gaming

issue, and also awarded declaratory and injunctive relief to the Commonwealth, the Town, and the AGHCA on the permitting issue. *Id.* Specifically on the permitting issue, the amended final judgment "permanently enjoined and restrained" the Tribe "from constructing, occupying, and operating a gaming facility on the Settlement Lands without complying with the General Regulatory Laws," which the District Court defined to include all state and local laws other than gaming laws, "including but not limited to any state and local permitting requirements." Add.44-45. The District Court later twice amended the judgment to address issues relating to the Commonwealth and its officers, which are not material to this appeal. Add.48-51; Add.56-59.[5]

3. The Tribe moved for a stay pending appeal. The District Court denied the Tribe's motion. Add.52-54. Notably, the District Court expressly rejected the Tribe's argument—repeated on appeal—that the Town would enforce its generally

[5] The Tribe also sought to amend the injunction to address the safety of the construction site in the interim, but withdrew that motion when the parties reached an agreement with regard to the safe shutdown of the site. App.1362-66. The Tribe's brief contains several misrepresentations about this site-safety issue. First, contrary to the Tribe's suggestion (Opening Br. 11), the Town did not ignore safety issues at the site; to the contrary, the Town attempted to work with the Tribe to craft a solution. *See* App.1351-55. Second, the District Court did not "agree[] with the Tribe" (Opening Br. 11) on any contested issue; the court merely entered an order authorizing the Tribe to take three steps the Town had already agreed it should take and reserved ruling on all contested issues. Add.60-61. The parties' agreement obviated the need for the court to resolve these other issues. *See* App.1 (Oct. 1, 2019 minute order).

applicable requirements unfairly. "If the Town somehow applies those requirements in an unfair or discriminatory manner, or otherwise treats the Tribe unfairly," the District Court explained, "the Tribe can seek appropriate relief from this Court." Add.53. But there was "no reason . . . at this stage to assume that the Tribe will be treated in such a manner." *Id.*[6]

On September 25, 2019, this Court denied the Tribe's stay motion as well.

SUMMARY OF ARGUMENT

The District Court's amended final judgment appropriately recognizes the Tribe's appellate victory on the gaming issue, and the Town's unappealed victory on the permitting issue. This Court should affirm it.

[6] The Tribe suggests that it has already been treated unfairly, but the Tribe's arguments again misstate the record. First, the Tribe suggests in its brief (at 10) that the Town "refus[ed] to approve a routine electrical permit" and issued a "direction to the local electric company to shut off electricity to the construction site." The Town did no such thing. Far from "refusing to process" the electric permit, the Town's electric inspector attempted to access the site for an inspection, but was unsuccessful. App.1216-17. When the inspector followed up with the Tribe's electrician to obtain access, the Tribe's electrician informed the inspector that the permit was no longer necessary. *Id.* Moreover, the electric company (Eversource) disconnected the power line on its own because it believed the Tribe's use of the line to be improper. *See* App.1121. Second, the Tribe incorrectly asserts that the MVC "reject[ed] the project and prohibit[ed] the Town's authorities from issuing any permits for any project involving the Tribe's gaming facility." Opening Br. 11. But the Tribe neglects to mention that the MVC did not deny authorization for the project on the merits, but only without prejudice as "incomplete," given the Tribe's unwillingness to submit a plan or supporting documentation. Add.101, 103.

I. Under basic principles of law, a party that appeals a judgment forfeits any issue that it fails to raise on appeal. An unappealed portion of the judgment becomes law of the case for all subsequent stages of the litigation. These principles are sufficient to resolve the present appeal: the Tribe could have raised the permitting issue in the first appeal, but it chose not to do so; as a result, the District Court's unappealed decision on the permitting issue has become law of the case.

The Tribe's various attempts to evade its forfeiture are unavailing. The Tribe asserts that it properly appealed the permitting issue the first time, and that this Court already resolved the issue in the Tribe's favor, but neither of these things is true. Nor, contrary to the Tribe's argument, did this Court's mandate automatically become a judgment by operation of Federal Rule of Civil Procedure 58(c)(2)(B) or District of Massachusetts Local Rule 58.2(d). Rule 58(c)(2)(B) (which the Tribe raised for the first time in its District Court motion for a stay pending appeal) concerns the time to appeal and does not even apply until the District Court enters judgment, while Local Rule 58.2(d) (which the Tribe raised for the first time on appeal) makes clear that the mandate may become the judgment only where no further proceedings on remand are necessary. That was not the case here: given this Court's decision in the first appeal, the District Court had to craft a new injunction in favor of the Tribe on the gaming issue, regardless of the outcome on the permitting issue. Finally, the Tribe points to the fact that the amended final judgment, unlike

the initial judgment, distinguishes between the gaming laws and the "General Regulatory Laws." This difference simply reflects the Tribe's victory on the gaming issue: the District Court previously had no need to distinguish between the categories of laws, because the court had found that all applied on the Tribe's lands.

Having failed to identify a basis to overlook its forfeiture, the Tribe also argues that it is entitled to reconsideration. Not so. The Tribe never moved for reconsideration below, so the District Court never decided whether to exercise discretion to reconsider prior rulings. In any event, this Court's opinion in the first appeal in no way changed or clarified the law relevant to the permitting issue. Nor is sovereign immunity, which the Tribe briefly invokes, a basis to overlook forfeiture. The Tribe waived sovereign immunity twice over: first in the settlement agreement, and then through litigation conduct. Accordingly, this Court should affirm without reaching the merits of the permitting issue the Tribe forfeited.

II. Even if the Court reaches the merits, it should still affirm. The Settlement Act grants jurisdiction to the Town. The relevant question for purposes of the permitting issue is the extent to which IGRA impliedly repealed that jurisdiction. In *Narragansett*, this Court recognized that implied repeal is disfavored—to the extent possible, federal statutes are to be read in harmony—and explained that IGRA had impliedly repealed the statute at issue only to the extent that it authorized regulation of activities "integral to gaming." 19 F.3d at 704-05.

The Town's permitting rules do not regulate activities "integral to gaming"—they apply generally to all construction activities in the Town. The Tribe points to provisions of IGRA requiring that tribal ordinances address the construction of gaming facilities, but those provisions coexist with the Town's concurrent jurisdiction under the Settlement Act. The Tribe also suggests that it has put adequate health and safety safeguards in place itself, but even assuming this is true, the Tribe's efforts do not supplant the Town's authority over permitting under the Settlement Act.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews "the district court's grant of [an] injunction for abuse of discretion, its underlying legal conclusions de novo, and its underlying factual findings for clear error." *Glob. NAPs, Inc. v. Verizon New England, Inc.*, 706 F.3d 8, 12 (1st Cir. 2013). Application of law of the case is reviewed de novo. *United States v. Matthews*, 643 F.3d 9, 13 (1st Cir. 2011).

II. THE TRIBE HAS WAIVED ANY OBJECTION TO THE PERMITTING INJUNCTION, WHICH IS LAW OF THE CASE.

The Tribe argues that "[t]he dispositive legal issue on appeal is whether the District Court properly concluded that the construction, occupancy and operation of the Tribe's gaming facility are subject to the Commonwealth and Town's 'General Regulatory Laws,' including all local regulations regarding 'construction,

occupancy and operation,' despite IGRA's preemption of the [Settlement Act]." Opening Br. 12. That is not the issue on appeal, nor is it the issue the District Court decided. Rather, the District Court *re*-entered the permitting injunction for the simple reason that the Tribe had not challenged it on appeal, and it is now the law of the case. Add.40. That decision was entirely correct, and the Tribe's various attempts to evade its forfeiture are all meritless.

A. The Permitting Injunction Is Law Of The Case.

As the District Court repeatedly stated in deciding the Town's motion for a preliminary injunction, this case involves two distinct issues: the gaming issue and the permitting issue. Although the District Court initially entered judgment in favor of the Town and AGHCA on both issues, the Tribe chose to appeal only the first, thereby forfeiting any objection to the District Court's decision on the second.

1. The applicable principles are black-letter law. First, arguments that the Tribe did not make in its opening brief on appeal "are deemed waived." *See, e.g.*, *DeCaro v. Hasbro, Inc.*, 580 F.3d 55, 64 (1st Cir. 2009). Second, when a legal decision goes "unchallenged in a subsequent appeal despite the existence of ample opportunity to [challenge it]," that decision "becomes the law of the case for future stages of the same litigation." *Matthews*, 643 F.3d at 12 (quoting *United States v. Bell*, 988 F.2d 247, 250 (1st Cir. 1993)). Thus, failing to challenge a decision on appeal at the first opportunity means "forfeit[ing] any right to challenge that

particular decision at a subsequent date," except under "rare" and "exceptional circumstances" not relevant here, such as a "dramatic[] change in the controlling law." *Id.* at 12, 14 (quoting *Bell*, 988 F.2d at 250, 251). The purpose of these principles is to safeguard "the finality and efficiency of the judicial process by protecting against the agitation of settled issues," resulting in "a sturdier, more stable decisionmaking process." *Id.* at 13.

These principles are dispositive of the Tribe's appeal. As explained, pp. 12-13, *supra*, the permitting issue was neither expressly nor impliedly raised in the Tribe's previous appeal. The Tribe stated expressly that it was appealing three orders; none related in any way to the Town's jurisdiction to enforce generally applicable permitting requirements. Likewise, the Tribe's brief raised three issues; none involved permitting. Unsurprisingly, this Court's opinion did not expressly or impliedly reach the permitting issue that the Tribe never raised. Instead, this Court considered the gaming issue only, and held that IGRA effected a "*partial* repeal of the [Settlement] Act," repealing only those provisions of the Settlement Act that had authorized the application of state and local gaming regulations to the Settlement Lands—not all state and local laws and regulations writ large. *Wampanoag Tribe*, 853 F.3d at 626-27 (emphasis added); *see also id.* at 624-29 (quoting *Narragansett*, 19 F.3d at 705, for the proposition that IGRA left "largely intact the grant of jurisdiction [to the state]" pursuant to a settlement agreement materially identical to

the Federal Act, "but [IGRA] demands an adjustment of that portion of jurisdiction touching on gaming"). And this Court's opinion in the first appeal concludes that "the *opinion* of the district court"—*i.e.*, the opinion granting summary judgment to the Commonwealth, Town, and AGHCA on the gaming issue—"is reversed." *Id.* at 629 (emphasis added). This confirms that the reversal was limited to the gaming issue discussed in that opinion.

The Tribe does not seriously dispute that it was fully on notice of the need to appeal the District Court's decision on the permitting issue if it wished to challenge that portion of the original final judgment.[7] Nor could it. At the preliminary-injunction hearing, the District Court repeatedly stated that the permitting issue was distinct from the gaming issue. And the District Court entered a preliminary injunction—later incorporated into the final judgment as a permanent injunction—barring the Tribe from constructing its gaming facility without complying with generally applicable local permitting requirements. Indeed, the Tribe even incorporated the preliminary-injunction ruling into its own proposed form of final judgment. *See* p. 11, *supra*. Thus, at the time it filed its first appeal, the Tribe risked contempt if it resumed construction without the requisite building permits (or a stay),

[7] *Amici* NCAI Fund et al. argue that the Tribe was not on notice of the need to appeal the permitting issue, because the District Court's summary-judgment decision did not address that issue. Amicus Br. 10-11. *Amici* misunderstand the procedural history and completely overlook the separate proceedings through which the District Court resolved the permitting issue. *See* pp. 7-12, *supra*.

even putting aside the question whether the Tribe also needed approval from the MGC. Nonetheless, for whatever reason, the Tribe decided not to appeal its loss on the permitting issue, making the District Court's decision on that issue law of the case. When the District Court entered final judgment following remand, it simply carried through the portion of the initial final judgment that had been left undisturbed following the first appeal.

B. The Tribe's Arguments That It Did Not Forfeit The Permitting Issue Are All Unavailing.

In an attempt to evade its forfeiture, the Tribe argues: (1) that it raised the permitting issue in the first appeal and this Court resolved the issue; (2) that under the Federal Rules of Civil Procedure and the District of Massachusetts's Local Rules, this Court's mandate from the first appeal functioned as an unchangeable injunction in the Tribe's favor on both the gaming issue and the permitting issue; and (3) that the definitions of "gaming laws" and "General Regulatory Laws" that appear in the current final judgment—but not in the initial final judgment—justify a fresh appeal on the permitting issue. But none of these arguments provides any basis for resuscitating an issue the Tribe has plainly forfeited.

1. The Tribe suggests that it "appealed" the initial final judgment "in its entirety," and that the initial final judgment "included the language enjoining the Tribe from proceeding without local building permits." Opening Br. 50. Thus, the Tribe insists, this Court *did* decide ("implicitly") the question whether the Town's

permitting requirements are preempted by IGRA, and the District Court was "just wrong" to enter judgment on that issue in favor of the Town and AGHCA in light of IGRA's "comprehensive regulatory scheme." Opening Br. 44-45; *see also id.* at 50-51 (same). The Tribe points to *nothing* in the record suggesting that this Court passed upon the permitting issue. As explained above, the Tribe's opening brief said it was raising three issues and appealing three orders. None of the Tribe's issues pertained to the local-permitting dispute, and none of the orders the Tribe appealed was the local-permitting injunction. *See* pp. 12-13, *supra*.

The Tribe emphasizes that this Court's earlier decision "reaffirmed *Narragansett*, which sets forth the governing guidance for determining whether a general regulatory law or regulation applies." Opening Br. 43; *see also id.* at 50-51 (arguing that the earlier decision "focused on the correctness of this Court's decision in *Narragansett*"). But the fact that the panel in the first appeal applied *Narragansett* when resolving the gaming issue says nothing about whether or how the panel might have extended *Narragansett* had the Tribe asked it to resolve the permitting issue. In *Narragansett*, this Court rejected the position that IGRA displaces *all* state and local regulations; at most, it explained, IGRA displaced state and local regulation of certain "activities deemed integral to gaming." *Narragansett*, 19 F.3d at 704-05. The Tribe spends more than ten pages of its brief arguing that, under *Narragansett*, any state and local regulations, including permitting requirements, that bear in any

way on the potential opening of a gaming facility are "integral" to gaming. Opening Br. at 25-37. As explained at pp. 39-49, *infra*, *Narragansett* did not announce such a holding, and any argument to extend *Narragansett* in that way would be incorrect: IGRA did not work such a broad repeal of the Settlement Act. Regardless, however, this is an argument that the Tribe could have raised in the first appeal, but never did. It strains credulity for the Tribe now to argue that this Court somehow adopted this argument "implicitly" based on the zero pages the Tribe devoted to it the first time around.

2. The Tribe also argues that the District Court had no choice but to enter judgment in favor of the Tribe on all claims and counterclaims, because the mandate from this Court instructed the District Court to "enter judgment in favor of the Tribe." Opening Br. 42. But the Tribe fails to address the fact that this Court's opinion—which must be considered together with the mandate, as the Tribe admits (Opening Br. 44)—says not a word about the permitting requirements and speaks only to the gaming regulations. And the Tribe neglects to quote the language immediately preceding the instruction to "enter judgment in favor of the Tribe," where this Court said it was reversing the "opinion" of the District Court, 853 F.3d at 629—*i.e.*, the summary-judgment opinion—which addressed only the gaming regulations, *see* 144 F. Supp. 3d at 177.

In support of its argument, the Tribe (Opening Br. at 44) cites only *Hynning,* a 1966 case from the D.C. Circuit. But *Hynning* provides the Tribe no help. As the D.C. Circuit observed, "an opinion and judgment [must] be read together." 359 F.2d at 272-73; *accord Bell*, 988 F.2d at 250. In *Hynning*, the opinion reversing the judgment against the defendant necessarily also reinstated the defendant's counterclaim to recover his expenses in that litigation. The 54-year-old decision in *Hynning*, never cited by any other court until the Tribe unearthed it, does not stand for any *per se* rule that reversal on one issue necessarily means reversal on unappealed issues, and such a rule would contradict this Court's precedent.

The District Court did what it was supposed to: "A district court seeking to determine the scope of remand must … consider carefully both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces." *United States v. Santiago-Reyes*, 877 F.3d 447, 450 (1st Cir. 2017) (citation and internal quotation marks omitted)). The District Court entered judgment for the Tribe on the issues the Tribe appealed and this Court discussed. The Tribe offers no reason why this Court's opinion would require more.

3. The Tribe is also incorrect in its newfound contention that Federal Rule of Civil Procedure 58(c)(2)(B) and District of Massachusetts Local Rule 58.2(d) stripped the District Court of jurisdiction to enter a judgment, and that the Town's motion for entry of final judgment was untimely under those rules. The Tribe never

made this argument during briefing or argument on the Town's motion[8]—indeed, the Tribe did not even raise *the District Court's* Local Rule 58.2(d) *in the District Court*, but only on appeal. *See Eldridge v. Gordon Bros. Grp., L.L.C.*, 863 F.3d 66, 85 (1st Cir. 2017) (noting that "arguments not seasonably advanced below cannot be raised for the first time on appeal" (internal quotation marks omitted)).[9]

Even if the Tribe's argument were properly before the Court, the two rules the Tribe cites are irrelevant for a host of reasons. Rule 58(c)(2)(B) is designed to start the clock for a losing party to file an appeal if, after 150 days, a district court has "entered" a ruling but has still failed to issue a judgment as a "separate document," the event that usually starts the clock. *E.g.*, *Bos. Prop. Exch. Transfer Co. v. Iantosca*, 720 F.3d 1, 7 (1st Cir. 2013) ("Rule 58(c) details when a judgment has entered, if timing is the only question, but it does not address whether a judgment

[8] The District Court asked the Town a question about Rule 58 at the hearing, *sua sponte*. App.1285-87. The Tribe said nothing about it.

[9] The Tribe appears to contend that its failure to preserve this argument is irrelevant, but it never explains how either rule could implicate the District Court's *jurisdiction* in the way the Tribe posits. The Rules of Civil Procedure "do not extend or limit the jurisdiction of the district courts." Fed. R. Civ. P. 82. Neither do local rules. And a non-jurisdictional timing requirement "may be forfeited if the party asserting the rule waits too long to raise the point." *Fort Bend Cty. v. Davis*, 139 S. Ct. 1843, 1849 (2019). The Tribe appears to argue that the Town's motion is somehow "moot" because final judgment had already entered automatically either on May 9, 2018 (when the mandate issued), or on October 6, 2018 (150 days later). Opening Br. 40-41. Even accepting that judgment did enter on one of those dates, which it did not, the Town's motion would still have been filed within the one-year time period to correct a mistake under Rule 60(b)(1).

has been entered, when the issue implicates more than timing."). The rule governs the actions of the District Court, not this Court, *see* Fed. R. Civ. P. 1, and this Court did not purport to enter judgment, but remanded *to the District Court* to enter judgment. By Rule 58(c)(2)'s express terms, the rule could not apply until the District Court "entered" its amended "judgment."

Local Rule 58.2(d) is similarly irrelevant. As the Tribe acknowledges (Opening Br. 40), under that rule, this Court's mandate is self-effectuating *only where* "further proceedings are not required." Further proceedings were required here. The Tribe's counterclaims sought injunctive relief on the gaming issues. Indeed, in its opposition to the Town's motion, the Tribe did not suggest that the Court could deny the Town's requested relief and be done with the case. Instead, the Tribe proposed alternative injunctive language that would have granted it a victory on both the gaming issue and the permitting issue. App.1136. Thus, entering judgment "in favor of the Tribe" on the gaming issues required further proceedings to craft and enter a permanent gaming injunction barring the Commonwealth and Town from enforcing their gaming laws on the Tribe's lands.

The mandate was insufficient for this task, because an appellate mandate does not speak with the "specific[ity]" and "reasonable detail" required of any binding injunction. Fed. R. Civ. P. 65(d). The Supreme Court has squarely held an injunction insufficient under Rule 65(d) where the district court's order entering the

injunction had said only that "judgment … is entered in accordance with" an earlier opinion that did not itself specifically "outlin[e] the terms of the injunctive relief granted" or "describe[] in reasonable detail the act or acts sought to be restrained." *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (alterations and internal quotation marks omitted). The same is true of the mandate here. Entering an injunction therefore required "further proceedings," and Local Rule 58.2 did not apply.

Moreover, even were this Court's mandate truly self-executing *as to the issues encompassed within it*, that would say nothing about the issues *outside* the mandate. The relevant portion of the District Court's prior judgment—the permitting injunction—was already binding on the Tribe and never appealed. The Tribe never explains how Federal Rule 58 or Local Rule 58.2(d) could divest the District Court of jurisdiction to reaffirm an injunction *it had already entered* before the appeal, and that the appeal did not consider. Rather, the Tribe relies on the notion, refuted above, that this Court's judgment reversed the injunction.

3. In a final attempt to argue that it has not actually forfeited the permitting issue, the Tribe points to what it calls "significant modifications" to the form of the judgment following remand. Opening Br. 49. According to the Tribe, "the District Court did not define and create the 'gaming laws/General Regulatory Laws' false paradigm until June 19, 2019," in its first amended final judgment, so the Tribe could not possibly have appealed that "paradigm." *Id.* Notably, the Tribe does not

separately challenge the definitions the District Court adopted (the so-called "paradigm")—the Tribe simply argues that the existence of these definitions excuses forfeiture, because they did not appear in the initial final judgment.

This is a distinction without a relevant difference. In its initial final judgment, the District Court had no need to divide up Commonwealth and Town laws between "gaming laws" and "General Regulatory Laws," because it held that the Tribe was required to comply with all Commonwealth and Town laws. *See* Add. 000002-03. Thus, the injunction could simply refer to "laws and regulations" without parsing things more finely. Add.2. Following the first appeal, however, the District Court could no longer group all disputed laws together—the court had to revise the judgment to reflect the Tribe's victory on the gaming issue, without disturbing the Town's victory on the permitting issue. Hence the incorporation of separate definitions of "gaming laws" and "General Regulatory Laws." The need to incorporate definitions that were previously unnecessary *to reflect a different outcome on the gaming issue* does not excuse the Tribe's forfeiture of the separate permitting issue. If a plaintiff loses on both of its claims at trial, the trial court might enter a judgment stating generally that the "plaintiff will take nothing"; if the plaintiff then appeals only one claim and prevails, the district court would have to draft new language on remand reflecting the plaintiff's victory on the one appealed

claim, and the defendant's victory on the other forfeited claim. That is all that happened here.

Simply put, the permitting injunction has remained undisturbed since the District Court first entered it. The Tribe had every opportunity to challenge it on appeal, but did not do so. Because this Court did not address the permitting injunction, the District Court correctly re-entered the injunction on remand. *See Biggins v. Hazen Paper Co.*, 111 F.3d 205, 209 (1st Cir. 1997) ("[A]lthough the mandate of an appellate court forecloses the lower court from reconsidering matters determined in the appellate court, it leaves to the lower court any issue not expressly or impliedly disposed of on appeal.'" (citation and internal modifications omitted)).[10]

C. The Tribe Did Not Properly Seek Reconsideration And Would Not Have Been Entitled To It Anyway.

In addition to arguing that it did not actually forfeit the permitting issue (even though it clearly did), the Tribe suggests that the District Court abused its discretion by refusing to reconsider the permitting issue in light of this Court's opinion in the

[10] The Tribe attempts to distinguish *Biggins* by asserting that it involved a remand to the district court "with instructions to proceed with the case" and hold a new trial, but that argument misses the mark. Opening Br. 45. The question in *Biggins* was what *the Supreme Court's mandate* prevented *this Court* from doing on remand, not what *this Court's mandate* prevented the *district court* from doing on remand. Because the Supreme Court had not considered or decided the new-trial issue, its mandate did not govern it. 111 F.3d at 208-09.

first appeal. But the Tribe never actually filed a motion for reconsideration in District Court—it merely raised the possibility of reconsideration in its Opposition to the *Town's* Motion. This is insufficient under Federal Rule of Civil Procedure 7(b)(1), which requires that "[a] request for a Court order must be made by motion." The District Court did not treat the Tribe as having made a request for reconsideration, and it was not required to grant reconsideration *sua sponte*. *Cf. Gray v. Evercore Restructuring L.L.C.*, 544 F.3d 320, 327 (1st Cir. 2008) (holding that a request for leave to amend included in an opposition to the other side's motion to dismiss "[did] not constitute a motion" and that the party had therefore "failed to request" relief, so the "district court [could not] be faulted for failing to grant such [relief] *sua sponte*").

In any event, the Tribe cannot satisfy the strict standard applicable to reconsideration motions. Reconsideration is available only in certain specific circumstances: where the "initial ruling was made on an inadequate record"; where "there has been a material change in controlling law"; where "newly discovered evidence bears on the question"; or "to avoid manifest injustice." *Ellis v. United States*, 313 F.3d 636, 647-48 (1st Cir. 2002). Although the Tribe asserts that it has satisfied many of these criteria, *see* Opening Br. 48, all of the Tribe's reconsideration arguments ultimately come down to the "material change in controlling law" prong. According to the Tribe, this Court's opinion in the first appeal "clarified [the] legal

standard" applicable to the question whether IGRA displaced the Town's permitting authority under the Settlement Act. As explained above, however, this Court's opinion says nothing about the permitting issue at all.

The Tribe insists that "[t]he District Court's misapprehension of *Narragansett* was indisputably the basis for this Court's 2017 Opinion." Opening Br. 48. But the Tribe never explains how the Court's opinion in the first appeal "clarified" the application of *Narragansett* to the Town's permitting jurisdiction. As explained, pp. 26-27, *supra*, *Narragansett* held that IGRA did not displace all state and local jurisdiction; at most it affected "activities" that are "integral to gaming." *Narragansett*, 29 F.3d at 704-05. The Tribe appealed only the issue of the Commonwealth's and Town's gaming jurisdiction, so the Court had no occasion to consider whether local permitting laws might also be "integral to gaming," and if so, which ones. A decision that says nothing about the permitting issue, except to confirm that *Narragansett* remains good law, cannot qualify as a "material change in controlling law" justifying reconsideration. Had the Tribe sought such a change in law, it could have argued that the District Court misapplied *Narragansett* not just with respect to gaming but also with respect to some or all permitting requirements. It did not.

Thus, the Tribe has identified no intervening change in law, previously unavailable evidence, or manifest error of law in the Court's earlier decision—the

Tribe just wants a different outcome on an issue it has forfeited. That is not an appropriate basis for reconsideration.[11]

D. The Tribe Has Waived Its Sovereign Immunity.

The Tribe argues in a single short paragraph, for the first time on appeal, that the permitting issue implicates sovereign immunity and so cannot be forfeited. The Tribe is incorrect, because it has waived its sovereign immunity with respect to land-use disputes twice over.

First, as the District Court held at the pleading stage, the Tribe waived its sovereign immunity with respect to land-use disputes when it entered into the 1983 settlement agreement. The sovereign-immunity issue arose in this case when the Tribe filed a motion to dismiss the AGHCA's complaint (and *only* the AGHCA's complaint, not the Town's) on sovereign-immunity grounds. *Massachusetts v. Wampanoag Tribe of Gay Head (Aquinnah)*, 98 F. Supp. 3d 55, 64 (D. Mass. 2015).

[11] To the extent that the Tribe argues that merely "[seeking] reconsideration preserved the substantive issue on this appeal for review on the merits," Opening Br. 48, the Tribe is incorrect. For one thing, the Tribe never actually never filed a reconsideration motion. And if it had, this Court would deferentially review application of the reconsideration standard—it would not consider the underlying legal issues *de novo*. *See, e.g.*, *Villanueva*, 662 F.3d at 128 (noting that this Court reviews the district court's application of the reconsideration standard for abuse of discretion). The Tribe suggests that, in *Matthews*, "the court noted that the party raising the issue did *not* seek reconsideration upon remand." Opening Br. 47. But the only reference to reconsideration in *Matthews* is a single sentence noting that the losing party could have sought reconsideration in the district court *prior to the first appeal*, but failed to do so. 643 F.3d at 14.

The District Court denied this motion by pointing (*id.*) to the SJC's decision in *Shellfish Hatchery*, where that court held that the Tribe's agreement in the 1983 settlement "to hold its land 'in the same manner, and subject to the same laws, as any other Massachusetts corporation'" waived sovereign immunity "as to matters relating to land use." *Shellfish Hatchery*, 443 Mass. at 13, 14. Because *Shellfish Hatchery* involved the same parties and issue as this case, the District Court held that *Shellfish Hatchery* had issue-preclusive effect here. 98 F. Supp. 3d at 67. The Tribe did not appeal that issue and, indeed, conceded in its opening brief that the District Court and this Court had subject-matter jurisdiction. 2016 Opening Br. 1. That issue is therefore law of the case to the same extent as the District Court's decision on the permitting issue. *See Am. Sur. Co. v. Baldwin*, 287 U.S. 156, 166-67 (1932) (noting that "[t]he principles of res judicata apply to questions of jurisdiction as well as to other issues" and holding that a prior state court decision "is a bar to the present suit in so far as it seeks to enjoin the enforcement of the judgment for want of jurisdiction").[12]

Even putting aside the law of the case, the Tribe has provided this Court no reason to question the SJC's decision. The Tribe's only sovereign-immunity argument is that it has retained its sovereign immunity where "claims by the Town

[12] The Tribe agreed that the motion-to-dismiss order was among the orders to be memorialized in the final judgment. *See* ECF No. 156-1, at 1; p. 11, *supra*.

or Commonwealth … fall within IGRA's preemptive scope." Opening Br. 46. But regardless of the extent to which IGRA might displace the Commonwealth's and Town's statutory authority to regulate land use, the Tribe has never argued that IGRA somehow also undoes the *settlement agreement's* waiver of sovereign immunity. Put differently, whatever effect IGRA might have on *how* to resolve certain land-use disputes, it has no effect on *where* those disputes are heard. As to that latter issue, the Tribe's waiver of sovereign immunity in the 1983 settlement agreement remains fully valid.[13]

Second, the Tribe has separately waived its sovereign immunity through litigation conduct. *See In re Greektown Holdings, LLC*, 917 F.3d 451, 464 (6th Cir. 2019) (collecting cases holding that tribal sovereign immunity may be waived through litigation conduct). As noted above, the Tribe's motion to dismiss on sovereign-immunity grounds was directed solely at the AGHCA's complaint. The Tribe litigated to final judgment without arguing that the Town's permitting claim implicated sovereign immunity—not in opposition to the Town's preliminary

[13] The Tribe suggests in a footnote that the 1983 settlement agreement is "no longer valid" in its entirety, but simultaneously acknowledges that the validity of the agreement is "[n]ot at issue in this appeal." Opening Br. 36 n.12. The District Court upheld the settlement agreement's continued validity, 98 F. Supp. 3d at 65, and the Tribe has long since forfeited the ability to challenge that decision. In the same footnote, the Tribe also asserts, without explanation or argument, that the MVC "was expressly divested with jurisdiction" over the Tribe's lands. But the MVC has twice reviewed and approved proposed projects on the Tribe's lands since 1983, both times with the Tribe's cooperation. *See* App.1227-28 n.2.

injunction motion, nor after entry of the preliminary injunction, nor during the first appeal, nor during proceedings on remand. By failing to assert sovereign immunity against the Town until its second appeal—long after the permitting issue had become law of the case—the Tribe acquiesced to federal-court jurisdiction to resolve the permitting claim.

III. THE DISTRICT COURT CORRECTLY DECIDED THE PERMITTING ISSUE IN THE TOWN'S FAVOR.

As explained above, the Court should affirm the final judgment without reaching the merits of the Tribe's forfeited arguments. But even were the Court to consider those arguments, the Court should still affirm. The Tribe's main argument on the merits is that, under this Court's decision in *Narragansett*, general, non-gaming regulations that might affect gaming facilities fall within (and are thus preempted by) IGRA. Opening Br. 20. But nothing in *Narragansett* supports the notion that IGRA exempts tribal gaming facilities from all manner of *non*-gaming-related laws where a separate federal statute, the Settlement Act, expressly grants jurisdiction to the Town to enforce such laws on the Tribe's lands.

A. IGRA Did Not Repeal The Settlement Act's Grant of General Permitting Jurisdiction To The Town.

The Tribe argues at length that Congress, through passage of IGRA, authorized extensive federal regulation not just of gaming, but of any activity that relates in any way to the construction or operation of a gaming facility. But the

Tribe's brief hardly acknowledges the Settlement Act, which is a separate federal statute expressly conferring certain jurisdiction on the Town. Unless that aspect of the Settlement Act has been impliedly repealed, the Tribe's arguments fail. The merits question in this case is not what IGRA authorizes the federal government to do, but whether IGRA impliedly repealed the Settlement Act's determination that the Settlement Lands would be subject to the Town's regulatory authority. The answer to *that* question is no.

1. In *Narragansett*, this Court "reiterate[ed] the bedrock principle that implied repeals of federal statutes are disfavored." 19 F.3d at 703; *accord, e.g.*, *Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."). Applying this principle, this Court made clear in *Narragansett* that IGRA left "largely intact the grant of jurisdiction [to the state]" pursuant to a codified settlement agreement similar to the Settlement Act. 19 F.3d at 704. Although the Court held that IGRA "demands an adjustment of that portion of jurisdiction touching on gaming," the Court rejected the position that IGRA displaces all state and local regulations, ultimately concluding that IGRA displaces at most state and local regulation of "activities deemed integral to gaming." *Id.* at 704-05.

The Tribe argues that any state and local regulations, including permitting requirements, that bear in any way on the potential opening of a gaming facility are "integral" to gaming. Opening Br. 32-34. But *Narragansett*'s commentary about "integral" activities comes in the context of the distinction between "core" functions and "peripheral" ones. "[Z]oning, traffic control, advertising, [and] lodging," this Court observed, may fall within the "peripheral" category and thus "remain subject to state [and local] control." 19 F.3d at 705. Building regulations, and other regulations designed to protect public health, safety, and the natural environment are also necessarily "peripheral" to gaming, as they do not go to "core" gaming functions.[14] The Town's permitting jurisdiction under the Settlement Act therefore remained in place following passage of IGRA.

2. The Tribe's counterarguments are unavailing. The Tribe repeatedly suggests that the District Court failed to engage in a "particularized inquiry" to determine whether generally applicable permitting rules regulate activities that are "integral to gaming." Opening Br. 31. But the District Court did just that at the preliminary-injunction hearing. It carefully considered the purposes and breadth of

[14] The Tribe asserts in passing that Town jurisdiction over public health, safety, and environmental protection would "nullif[y] a cornucopia of federal law applicable to federal lands, such as the National Environmental Policy Act ["NEPA"]." Opening Br. 31. But the Tribe never explains how the Town's exercise of regulatory authority would conflict with any of these laws. Moreover, NEPA predates the Settlement Act by more than a decade and cannot have repealed it.

the Town's generally applicable permitting rules and found that—unlike the Town's gaming-specific zoning requirements, which have since been enjoined—they were designed to protect "public health, safety, and the natural environment," not to regulate gaming, and therefore fell outside IGRA's exclusive field under *Narragansett*. *See* Add.1056-58.

The Tribe also quotes Supreme Court field-preemption precedent and legislative history for the proposition that a "comprehensive regulatory scheme" like IGRA's forecloses all other regulation in the same field. But this Court already defined IGRA's exclusive field in *Narragansett*, and IGRA's legislative history is fully consistent with *Narragansett*. The Tribe quotes a statement by Senator Evans that IGRA authorizes exclusive tribal jurisdiction within its field. *See* Opening Br. at 27.[15] In the sentence just before the one the Tribe quotes, however, Senator Evans explained that IGRA "should be construed as an explicit preemption of the *field of gaming* in Indian Country," which does not suggest that IGRA was also meant to occupy the field of everything even peripherally or tangentially related to the construction or operation of a gaming facility. S. Rep. No. 100-446, at 36 (1988) (emphasis added). Indeed, the Committee Report—which speaks for the Senate Committee on Indian Affairs rather than one senator who voted for IGRA "with

[15] The quotation is from the Additional Views of Senator Evans alone, not—as the Tribe's brief suggests—from the Senate committee's own report.

great reluctance," *id.* at 35—clarifies that IGRA "is intended to expressly preempt the field in the *governance of gaming activities* on Indian lands." *Id.* at 6 (emphasis added). This language is fully consistent with *Narragansett*.

In another attempt to expand IGRA's field beyond what *Narragansett* recognized, the Tribe (*see* Opening Br. 20-23) emphasizes NIGC's authority under IGRA to review tribal gaming ordinances to make sure they include health and safety standards for tribal gaming facilities. In practice, as the Tribe notes, the NIGC merely requires a tribal applicant to certify that it "has identified and enforces" such standards. 25 C.F.R. § 559.4. There is no conflict between the NIGC's authority to review tribal gaming ordinances and the Town's concurrent regulatory authority under the Settlement Act—the statutes are harmonized by treating jurisdiction as concurrent. *See Nevada v. Hicks*, 533 U.S. 353, 394 (2001) (O'Connor, J., concurring) (collecting cases discussing concurrent jurisdiction over Indian lands); *Pharm. Research & Mfrs. of Am. v. Concannon*, 249 F.3d 66, 75 (1st Cir. 2001) ("Where coordinated state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal preemption becomes a less persuasive one."), *aff'd*, 538 U.S. 644 (2003).[16]

[16] Despite the Tribe's contention to the contrary, there is no guarantee that NIGC could or would protect health, safety and the natural environment in the same manner and to the same extent as the Town or the MVC. The Town is unaware (*see* App.1117) of any ongoing federal oversight of the Tribe's construction project, and the Tribe has presented no evidence of any such oversight. Indeed, as discussed at

Finally, the Tribe points to two supposed canons of statutory construction to support its argument that IGRA repealed the Town's permitting jurisdiction. *See* Opening Br. at 37-38. The first is not a canon of statutory interpretation at all. The Tribe cites a single district-court case for the principle that "statutes intended for the benefit of Indian tribes should be interpreted and applied in a manner that affords all tribes in similar circumstances the same rights and privileges." Opening Br. 38. But the cited decision was applying a statute directing that *pre-1994 federal agency actions* treat Tribes alike. *Akiachak Native Cmty. v. Salazar*, 935 F. Supp. 2d 195, 210 (D.D.C. 2013). Federal *statutes* do not invariably treat all tribes alike; Congress has passed enough tribe-specific legislation to fill an entire chapter of the U.S. Code. *See* 25 U.S.C. ch. 19 (2012); n.1, *supra*. Where the question is whether a general statute impliedly repeals a tribe-specific statute, no court has ever placed the pro-implied-repeal thumb on the scale as the Tribe claims.

As for the canon that statutory ambiguity should be resolved in favor of tribes, this Court recently reiterated that this "canon[] appl[ies] only in cases of textual ambiguity." *Littlefield v. Mashpee Wampanoag Indian Tribe*, 951 F.3d 30, 40 & n.4 (1st Cir. 2020). Here, there is no textual ambiguity: the Tribe is not relying on the text of IGRA or the Settlement Act, but instead on the argument that one impliedly

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pp. 47-48, *infra*, the scope of NIGC's oversight of construction activities is typically limited. Regardless, even if NIGC were providing some oversight, the Town's concurrent jurisdiction would not be supplanted.

repealed the other. Even were this canon applicable, it would not change the outcome. The "pro-Indian" canon is simply one tool of statutory interpretation, and it may be "offset" where, as here, the canon against implied repeal and other indicia of statutory meaning point the other way. *Chickasaw Nation v. United States*, 534 U.S. 84, 95 (2001) (refusing to find that the "pro-Indian canon is inevitably stronger" than other indicia).

Attempting to find ambiguity where there is none, the Tribe insists that recognizing the Town's permitting jurisdiction would "creat[e] an ambiguity in IGRA by applying the exact same language to different tribes and yielding different results." Opening Br. 39. But recognizing the Town's permitting jurisdiction would not require applying "the exact same [IGRA] language to different tribes"—it would simply require applying the Settlement Act's language to this Tribe. The Tribe asserts without citation that it would be the only tribe in the country subject to local permitting requirements. *But see Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 787 (1st Cir. 1996); *Narragansett*, 19 F.3d at 705 ("[T]he state continues to possess a quantum of regulatory authority."). Most other Tribes have not voluntarily entered into binding agreements that authorize local permitting jurisdiction. When *this* Tribe (not yet federally recognized) voluntarily entered into a settlement agreement that provided various benefits, including the resolution of disputed land claims, it also agreed that the Town would not lose its regulatory jurisdiction when the lands in

question were taken into trust. Far from leaving the Tribe with a "second-class tribal government," *id.*, enforcing that agreement and recognizing the Town's permitting jurisdiction under the Settlement Act would respect the Tribe's autonomy to negotiate agreements with separate sovereigns.

3. The Tribe's remaining merits arguments are a series of red herrings. *First,* the Tribe argues that it is fully capable of protecting health and safety on its own. Opening Br. at 21-23. Even were the Tribe correct, the Town retains authority under the Settlement Act to ensure for itself that the Tribe's plans and building methods pose no undue risk to public health, safety, and the natural environment. The Tribe's building inspector may be highly qualified or even superior to the Town's building inspector, but the Tribe has no right to displace the Town's authority with regard to health, safety, and environmental regulations that are not integral to gaming. *See Narragansett*, 19 F.3d at 705.

Second, the Tribe cites two Eighth Circuit cases—*Flandreau Santee Sioux Tribe v. Haeder*, 938 F.3d 941 (8th Cir. 2019), and *Flandreau Santee Sioux Tribe v. Noem*, 938 F.3d 928 (8th Cir. 2019), *petition for cert. pending*, No. 19-1056 (filed Feb. 21, 2020)—that supposedly illustrate IGRA's preemptive scope. But these out-of-circuit cases provide the Tribe no help. In both, the relevant question was whether federal law preempted a state taxation statute: in *Noem*, a use tax on nonmember purchases of non-gaming amenities at the Tribe's Class III

gaming facility; in *Haeder*, an excise tax on a contractor who performed renovation work at that same facility. Here, as explained above, the question is not whether IGRA preempts a state statute, but the extent to which IGRA impliedly repealed a preexisting federal statute. The preemption standards the Eighth Circuit applied are simply inapposite here. *See Narragansett*, 19 F.3d at 704 ("The rationale for encouraging preemption in the Indian context—that the federal government is a more trustworthy guardian of Indian interests than the states—has no relevance to a conflict between two federal statutes.").

To the extent that *Noem* and *Haeder* are relevant at all, they undermine the Tribe's argument. In both cases, the Eighth Circuit held that IGRA did not expressly preempt the taxes at issue because they did not target "Class III gaming activity," which "relates only to 'activities actually involved in the playing of the game, and not activities occurring in proximity to, but not inextricably intertwined with, the betting of chips, the folding of a hand, or suchlike.'" *Noem*, 938 F.3d at 935 (quoting *Navajo Nation v. Dalley*, 896 F.3d 1196, 1207 (10th Cir. 2018)); *see also Haeder*, 938 F.3d at 944. This language mirrors the distinction drawn in *Narragansett*, and is inconsistent with the Tribe's understanding of "peripheral" and "core" gaming functions.

Moreover, in *Haeder*, the Eighth Circuit expressly rejected the Tribe's argument that the NIGC's role in protecting health, safety, and the natural

environment preempts any state or local role. As the court explained, "[o]ther than requiring NIGC approval of a tribal ordinance stating that Casino construction will adequately protect the environment and public health and safety, the Commission does not actively regulate construction activity or prescribe what adequate protection of public health and safety requires." *Haeder*, 938 F.3d at 945. Here, under the Settlement Act, that responsibility squarely falls on the Town.

The Tribe latches onto the Eighth Circuit's conclusion in *Noem* that IGRA implicitly preempted the use tax, as well as language from *Haeder* stating that the excise tax would not "interfere with" construction or operation of the casino. *Noem*, 938 F.3d at 935-37; *Haeder*, 938 F.3d at 945. But *Noem*'s holding was based on a preemption balancing test that is irrelevant to the question whether IGRA impliedly repealed a preexisting federal statute. *See* 938 F.3d at 935 (describing this balancing test); pp. 46-47, *supra*. And nothing in *Haeder* suggests that applying generally applicable building rules would "interfere with" construction or operation of a gaming facility either—the Tribe is free to construct and operate its facility so long as it complies with the same rules that apply to everyone else.[17]

[17] The Tribe also cites *Video Gaming Techs., Inc. v. Rogers County Board of Tax Roll Correction*, 2019 WL 6877909 (Okla. Dec. 17, 2019), but that case merely held that "gaming equipment used exclusively in tribal gaming" is not "peripheral" to gaming. *Id.* at *10. That commonsense conclusion says nothing about whether generally applicable permitting rules are "integral" to gaming under *Narragansett*. Moreover, the court reached its conclusion based on the same preemption balancing test as in *Noem*, and there was no implied-repeal issue. *Id.* at *6-10.

Third, the Tribe repeatedly references tribal-state gaming compacts. It is unclear why the Tribe thinks these are relevant. Negotiation of gaming compacts is mandatory only in the context of Class III gaming, not Class II gaming. 25 U.S.C. § 2710. And the Town has no role to play in compact negotiation anyway—gaming compacts are negotiated between states and tribes. The Tribe notes that the Court in *Narragansett* encouraged the parties to resolve the scope of state and local jurisdiction through a gaming compact, and that the Commonwealth has negotiated a gaming compact with the Mashpee Tribe. But *Narragansett* involved a proposed Class III gaming facility, so the state and the tribe were "compelled to enter negotiations out of which will emerge a new balance of power." *Narragansett*, 19 F.3d at 706. Likewise, the Mashpee Tribe had proposed to construct a Class III gaming facility, so the Commonwealth had to enter into compact negotiations. By contrast, the Town has no obligation under IGRA to re-negotiate the scope of its permitting jurisdiction, which it already negotiated when it entered into the 1983 settlement agreement.[18]

[18] The Tribe quotes language from the Committee Report stating that the "mechanism" for "exten[ding] state jurisdiction" is a "tribal state compact." Opening Br. at 30. But the prior sentence makes clear that "state jurisdiction" in this context refers only to "regulation of Indian *gaming activities*." S. Rep. No. 100-446, at 6 (emphasis added). This case is not about extending state jurisdiction over gaming activities at a Class III gaming facility—it is about the existing scope of Town jurisdiction over activities peripheral to gaming at a Class II gaming facility.

B. Under This Court's Earlier Decision, The Town May Not Use Its Permitting Authority To Regulate Gaming By Proxy, But The Town Has No Intention Of Doing That.

At bottom, the Tribe's implicit argument appears to be the same argument it made at the preliminary-injunction hearing: that *if* it applies for permits, the Town will treat it unfairly. *See* Opening Br. 18-20, 23. The District Court correctly found that assertion completely unsupported—and invited the Tribe to come back to court if the Town actually *did* treat it unfairly. Add.53. As the Tribe admits, it has sought permits from the Town for other projects, and each one has been granted. Opening Br. 36; *see* pp. 5-6, *supra*. Here, too, the Town will treat the Tribe like any other applicant. There is no evidence, past or present, that suggests otherwise. The Tribe suggests that the "MVC and the Town have such broad discretion that either can deny virtually any project for virtually any reason," Opening Br. 19, but this Court's opinion in the first appeal prevents the Town and MVC from interfering with or denying the Tribe's project because of its gaming purpose, and the Town and MVC will not do so. This Court should not presume otherwise. *See, e.g.*, *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001) ("[A] presumption of regularity attaches to the actions of Government agencies."). The Town's only interest is in fairly enforcing its generally applicable permitting rules pursuant to the Settlement Act to ensure that the Tribe's project is adequately protective of public health, safety, and the natural environment.

In sum, the District Court correctly held that IGRA did not impliedly repeal the Town's authority under the Settlement Act to enforce generally applicable permitting requirements on the Tribe's lands. But this Court need not—and should not—reach this issue in this appeal. The Tribe had an opportunity to challenge the District Court's decision on the permitting issue in the first appeal, and it passed that opportunity up, choosing to appeal only the gaming issue. As a result, it "forfeit[ed] any right to challenge that particular decision." *Matthews*, 643 F.3d at 12 (quoting *Bell*, 988 F.2d at 250).

IV. THE TOWN AND AGHCA PRESERVE THEIR ARGUMENT THAT IGRA DID NOT REPEAL THE SETTLEMENT ACT'S GRANT OF GAMING JURISDICTION.

The Town and AGHCA have noticed a cross-appeal in this case for the sole purpose of preserving for potential further review their argument—as briefed in the prior appeal—that IGRA did not repeal the Settlement Act's grant of gaming jurisdiction. The Town and AGHCA understand that the Court's decision in the prior appeal forecloses this argument at the panel stage. The appropriate disposition for the panel is therefore to affirm.[19]

[19] This brief complies with the standard 13,000-word limit for response briefs, *see* Fed. R. App. P. 32(a)(7)(B)(i), and the Town and AGHCA do not plan to file a cross-appeal reply brief.

CONCLUSION

For the foregoing reasons, the District Court's Third Amended Final Judgment should be affirmed.

Respectfully submitted,

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Dated: March 20, 2020

CERTIFICATE OF COMPLIANCE

I hereby certify that this Principal and Response Brief complies with the type-volume limitations set forth by Federal Rule of Appellate Procedure 28.1(e)(2)(B)(i) because it contains 12,992 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced 14-point Times New Roman typeface using Microsoft Word 2010.

Dated: March 20, 2020

s/ William M. Jay
William M. Jay

CERTIFICATE OF SERVICE

I hereby certify that, on March 20, 2020, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

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