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Bureau of Indian Affairs
Eastern Regional Office
Branch of Real Estate Services
545 Marriott Drive
Suite 700
Nashville, TN 37214

RE: Land-In-Trust Application of Oneida Indian Nation of New York per Letter dated September 20, 2005, Proposed Acquisition of over 17,300 Acres

Dear Sirs,

I am the County Attorney for Madison County and write on behalf of Madison County to respond to the Notification of September 20, 2005, and to address the application (the "Application") of the Oneida Indian Nation of NY ("OIN") to have in excess of 17,300 acres of land comprised of approximately 450 parcels, owned by the OIN, taken into trust by the United States.

The County of Madison opposes this extraordinarily broad, unprecedented Application, and does so on legal, substantive and practical grounds, certain of which will be set forth in this letter, while others (including the availability of this mechanism) will be addressed in the comments and materials prepared and submitted by our counsel (David Schraver of Nixon Peabody LLP), New York State counsel (Dwight Healy of White & Case LLP), and consultants engaged by the Counties (Center for Governmental Research) and New York State (O'Brien & Gere).

SHERRILL V. ONEIDA INDIAN NATION OF NEW YORK

The United States Supreme Court decision on March 29, 2005, in the landmark case of *City of Sherrill v. Oneida Indian Nation of NY*, 125 S.Ct. 1478, 161 L.Ed.2d 386, and the principles acknowledged and articulated therein, are central in the evaluation and determination of the Application. The importance of *Sherrill* in this analysis can not be overestimated. While the Bureau of Indian Affairs may previously have evaluated and determined trust applications on bases different from those articulated by the Court, the Bureau may no longer do so. As

recognized by the United States Circuit Court of Appeals for the Second Circuit in *Cayuga Indian Nation of New York et al v. Pataki et al*, 413 F.3d 266 (2d Cir 2005), *Sherrill* has “. . . substantially altered the legal landscape . . .” *Cayuga* at 273.

The Supreme Court in *Sherrill* began by recognizing “For two centuries, governance of the area in which the properties are located has been provided by the State of New York and its county and municipal units” and recognized that the area today is “overwhelmingly populated by non-Indians.” *Sherrill* at 1483, 1493; see also 1489. The essence of its decision was the acknowledgement of the importance of the existing, long standing governance of Central New York by the state, counties and local municipal units, and the preservation of such governance.¹ In reaching its decision the Court looked to the jurisdictional history, “the justifiable expectations of the people living in the area” and observed that “the appropriateness of the relief OIN here seeks must be evaluated in light of the long history of state sovereign control over the territory” *Sherrill* at 1490. The Court concluded that such justifiable expectations “grounded in two centuries of New York’s exercise of regulatory jurisdiction, until recently untested by OIN, merit heavy weight here.” *Sherrill* at 1490-91.

The Court repeatedly acknowledged the long standing area governance, the disruption that the disturbance of that governance would engender, the “attendant dramatic changes in character of the properties” (*Sherrill* at 1491) that would result from the reassertion of OIN sovereign control and unequivocally rejected it. In doing so, the Court recognized the unacceptability of checkerboard sovereignty² and its adverse impact, including on “. . . local zoning or other regulatory controls that protect all landowners in the area.” *Sherrill* at 1493.

After establishing the fundamental importance of the preservation and protection of this long standing state and local jurisdiction, the Court—near the conclusion of its opinion—suggests that if the OIN were to seek “sovereign authority over territory” there is a process under which it could be evaluated (*Sherrill* at 1493-94)—not a guarantee that it will be granted as the OIN appears to expect.³

The recognition of a process through which this can be considered does not diminish the principles the *Sherrill* Court established, and the same factors must be considered and applied in the Secretary’s evaluation, including: (1) 200 years of state and local governance; (2) the overwhelming non-Indian population and its justifiable expectations; (3) checker-boarding as seriously burdening the administration of state and local governments and having adverse impact on the landowners of neighboring patches; and (4) the attendant dramatic changes in the

¹ “Today, we decline to project redress for the Tribe into the present and future, thereby disrupting the governance of central New York’s counties and towns. Generations have passed during which non-Indians have owned and developed the area that once composed the Tribe’s historic reservation. And at least since the middle years of the 19th century, most of the Oneidas have resided elsewhere. Given the longstanding, distinctly non-Indian character of the area and its inhabitants, the regulatory authority constantly exercised by New York State and its counties and towns, and the Oneidas’ long delay in seeking judicial relief against parties other than the United States, we hold that the Tribe cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue. The Oneidas long ago relinquished the reins of government and cannot regain them through open-market purchases from current titleholders.” *Sherrill* at 1483.

² “A checkerboard of alternating state and tribal jurisdiction in New York State-created unilaterally at OIN’s behest would “seriously burde[n] the administration of state and local governments” and would adversely affect landowners neighboring the tribal patches. *Hagen*, 510 U.S., at 421, 114 S.Ct. 958 (quoting *Solem v. Bartlett*, 465 U.S. 463, 471-472, n. 12, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984)).”

³ The OIN Application consists of a two page letter and is devoid of detail, neither establishing need nor addressing the considerations set forth in the *Sherrill* Decision and the Secretary’s regulations under the land into trust process.

character of the properties should the Application be granted (including the freeing of the parcels from local zoning and other regulatory controls that protect all landowners in the area). As stated by the Court, in addition to these factors, among other things the Secretary must consider are “the Tribes’ need for additional land”; “[t]he purposes for which the land will be used”; “the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls”; and “[j]urisdictional problems and potential conflicts of land use which may arise.”⁴ *Sherrill* at 1493-94.

While the Court pointed to Title 25 U.S.C. §465 and the regulations promulgated thereunder, it requires an application of the principles established by the Court, and under such analysis the OIN Application must be denied.

GOVERNANCE

In addition to the practical benefits of comprehensive state laws, rules and regulations instituted and implemented by elected representatives (more fully addressed in the O’Brien & Gere report), the preservation of governance at the local level (which our citizens have enjoyed for nearly 200 years and have the justifiable expectation of retaining) preserves and advances important values, among them democracy and community

“Localities are not simply arbitrary collections of small groups of people who happen to buy public services or engage in public decision making together. They are often communities, that is, groups of people with shared concerns and values, tied up with the history and circumstances of the particular places in which they are located. People live in localities, raise their children there, and share many interests related to their homes, families, and immediate neighborhoods. Much of the power of the idea of home rule is connected to the idea of locality as “home” and of the distinctive connection of government as “rule” with placed based association.”⁵

Local communities and their citizens elect representatives that comprise their local governments. These representatives prepare master plans; determine zoning and other regulations; exercise general police powers involving public health and safety; determine what public services are to be provided (including policing, fire protection, education, highway maintenance, and sanitation) and how to fund them. If the local elected officials and that which they implement do not reflect the values and priorities of the community, these officials can and are replaced, and acceptable programs and policies instituted.

Throughout this process, the actions and activities of these local governments are transparent and subject to review. Documents are subject to Freedom of Information disclosure. Budgets, revenues and expenditures are published; meetings must be announced in advance and are open to public scrutiny; actions are subject to judicial review and reversal. These are rights that are the cornerstone of our democratic system.

⁴ Essentially none of which are addressed in the Application.

⁵ “Home Rule for the Twenty first Century,” *The Urban Lawyer*, *The National Journal on State and Local Government Law* (Spring 2004), p. 259.

Recognizing the role of the people, the importance of their rights, and the need to protect both, the New York State Constitution established, in Article IX, a bill of rights for local governments. With respect to the territory of a local government, the provisions of Article IX Section 1(d) are telling, providing in part:

“No local government or any part of the territory thereof shall be annexed to another until the people, if any, of the territory proposed to be annexed shall have consented thereto by majority vote on a referendum and until the governing board of each local government, the area of which is affected, shall have consented thereto upon the basis of a determination that the annexation is in the over-all public interest.”

These fundamental rights are real and are exercised.⁶ Through it, our democracy is preserved, protected and advanced.

“[t]he strength of free peoples resides in the local community. Local institutions are to liberty what primary schools are to science; they put it within the people’s reach; they teach people to appreciate its peaceful enjoyment and accustom them to make use of it. Without local institutions a nation may give itself a free government but it has not got the spirit of liberty.”⁷

PARTICULAR FACTUAL QUESTIONS RAISED
LETTER OF SEPTEMBER 20, 2005

Specific questions regarding the property were raised in the Bureau’s letter of September 20, 2005, to be addressed in addition to our comments on the proposed acquisitions generally. Those questions are as follows:

- 1- The annual amount of property taxes currently levied on the property;
- 2- Any special assessments, and the amounts thereof, which are currently assessed against the property;
- 3- Any governmental services which are currently provided to the property by our jurisdiction;
- 4- If subject to zoning, how the property is currently zoned.

The answers to questions 1, 2 and 4 are provided in the attached Madison County Property Data Sheets (attached to and made a part hereof as Exhibit A) (“Data Sheets”) as well as in the submissions by O’Brien & Gere and the Center for Governmental Research (incorporated herein by reference). The first segment of Exhibit A provides a key to these Data Sheets. Such sheets include information such as parcel identifiers, acres, location, zoning, use, historic sales information, assessed values, adjacent uses, taxes by tax type (including special

⁶ See City of Oneida and East Shore of Oneida Lake case studies, *infra*.

⁷ Alexis de Tocqueville, *Democracy in America*, p. 62-63, (J.P. Mayer ed. 1969)

districts), revenue impacts, contiguity to the 32 acre property on Route 46 in the City of Oneida, and certain delinquent tax information. There is a variety of parcel information that we have been unable to obtain or verify due to the limited time provided within which to respond and the extraordinary number of parcels to be considered. Certain of the missing but necessary information is highlighted on these Data Sheets. In depth, parcel by parcel data collection and analysis is essential to the evaluation and processing of the Application. Additional data is provided (or identified as needed to be obtained) and issues raised in the O'Brien & Gere and CGR reports, as well as in our scoping comments (submitted to the Eastern Regional Office Director, Franklin Keel, by our counsel, David M. Schraver, on January 23, 2006), and those of New York State (Department of Environmental Conservation Commissioner, Denise M. Sheehan, also submitted to Mr. Keel the same date).

With respect to point 3, governmental services, the Data Sheets and the O'Brien & Gere reports address certain governmental services that are more parcel specific (for example, fire and water districts). Services applicable to all parcels are set forth on the attached Exhibit B, as well as discussed in both the O'Brien & Gere and CGR reports.

Other parcel specific data is set forth in Exhibit C, namely photographs of the subject parcels identified by tax map parcel number and containing narrative information regarding each parcel. Lastly, additional data is contained in various exhibits referenced herein.

CONTEXT

The OIN has acquired over 17,000 acres, in a very short period of time,⁸ scattered over two counties and twenty-two cities, towns, villages and school districts.⁹ Although covering a short period of time, we have significant experience with how the OIN acts and would govern those parcels and interact in the communities. This experience has come in the context of the OIN unilaterally, upon acquisition of the parcels, declaring the property to be Indian Country, free from local and state regulation and taxation.

The effects of these acquisitions have been profound. Our citizens lost their fundamental right to govern their own communities. It was the OIN's position that their checker-board of parcels was not subject to any local regulation, including local zoning, planning, building or environmental controls—and they operated in that fashion. While some properties have been developed (albeit, in certain instances contrary to local master plans and zoning) others have been neglected and left to deteriorate.¹⁰

⁸ Attached are two maps. Exhibit D-1 is a Community Map, showing among other information the OIN properties (by BIA group number), municipal boundaries, hamlets, school district boundaries, and other relevant information. Exhibit D-2 shows the aggregate land currently owned by the OIN, plus the progression of acquisition. By any measure, the acquisition of lands has been very recent. Prior to 1990, only 52 acres were owned. In the period 1990 to the agreement to engage in "good faith" negotiations, lands were acquired at the rate of approximately 650 acres per year. It was during the period of such "good faith" negotiations that its rate of acquisitions soared. During that period the OIN acquired approximately 6,400 acres, at the rate of approximately 4,300 acres per year--despite repeated requests to desist by the state, the counties and the mediator. Approximately 77% of its holdings in both counties have been acquired since 1998, while for Madison County alone the percentage is approximately 92%.

⁹ The target area of acquisition contains the critical infrastructure corridor of New York State, including the New York State Thruway, New York State Barge Canal System, rail, gas transmission, power and communications grids, covering the most populous one-half of Madison County and the westerly one-third of Oneida County, and having indirect but substantial adverse effects on the unclaimed balance of the two counties.

¹⁰ See case studies, *infra*, including "Deteriorating and Fallow Properties."

Although receiving the benefit of services and municipal infrastructure on which their enterprises and people depend for their extraordinary success,¹¹ the OIN and its enterprises paid no real property taxes, refused to collect and remit sales taxes on sales to non-Indians, and made no other binding contributions except service agreements for discreet services in a few localities.¹² They provided, as some mitigation, “silver covenant gifts” to school districts but, as the small Stockbridge Valley Central School District learned from bitter experience, the OIN could and would revoke those gifts at their will.¹³ The financial impact on the local municipal units has been severe. Given the size of Madison County’s budget, if accrued and current real property taxes, and current sales taxes, were collected Madison County could cut its real property taxes dramatically and begin to restore essential services such as bridge and highway repairs.¹⁴

The OIN acquisitions and expansion have been predatory. Lands have been acquired not to assemble a contiguous, comprehensive and governable reservation, but for commercial advantage.¹⁵ They have achieved a near monopoly in gas stations and convenience stores in the claim area,¹⁶ and sell gasoline at 5 cents or more per gallon less than the local competition, reaping all of the taxes (including excise taxes) in addition to the normal profit. Their tax advantage is not translated into materially lower prices, nor is their regulatory advantage. Meanwhile, their competition (those who remain) pay all real property taxes, are subject to ordinary regulation designed to protect the public such as environmental controls, weights and measures, public health provisions, etc., and collect and remit sales taxes to support the highway systems that bring customers to their door.¹⁷ Additional business opportunities can be targeted to which they could apply their immense advantages, with the likelihood of this increasing as their

¹¹ By their own account, the 1,000 member New York Oneida Tribe grossed \$200 million in the first year of operation of their Turning Stone Casino in 1993. More recent accounts derived from financial transactions put their annual net at \$70 million. Last year the Tribe itself announced that it now has assets in excess of \$1 billion. They continue to have the benefit of what has been judicially determined to be an illegal casino and the massive profits that the casino generates.

¹² Even those agreements were under funded and subject to both revocation and terms of adhesion. See, for example, the Verona Fire Department’s submission attached to the O’Brien & Gere report.

¹³ The OIN demanded the Stockbridge Valley Central School District fire a teacher with whom they had a political dispute. After thorough investigation and the District’s determination that there were no grounds to fire the employee, the OIN revoked its gift and plunged the School District into a period of financial chaos. The impact was dramatic, given that the Oneidas holdings represent 25% of the real property in the District, as is more fully explained in the affidavits of School Superintendent Randy C. Richards and Board President Michael P. Oot dated June 21 and 20, 2005, respectively, submitted in responding papers in tax enforcement litigation. Copies of these affidavits are attached to this submission as Exhibits E and F.

¹⁴ For further information regarding the impact, see the O’Brien & Gere and CGR reports, as well as the affidavits of Madison County Treasurer Harold Landers and Highway Superintendent Joseph Slivinski dated September 2, 2005, submitted with the County responding papers in recent tax enforcement litigation. Also see the statement of Joseph Slivinski at the January 11, 2006, NEPA scoping hearings. Copies of the affidavits and scoping submission are attached as Exhibits G, H and I, respectively.

¹⁵ They own many of the key commercial properties and intersections throughout Madison and Oneida Counties land claim area, including strip malls, significant tracts at both New York State Thruway interchanges, intersections of major state highways, and at the intersection of the New York State Barge Canal with Oneida Lake, as well as most of the valuable marina properties along the southeast and east shore of Oneida Lake. Purchases are of all types of properties and have continued.

¹⁶ And a complete monopoly on the east shore of Oneida Lake.

¹⁷ In contrast, the OIN has done what it wants, where it wants, recently clear cutting and filling a densely wooded wetland in the hamlet of Verona Beach, near Oneida Lake, to erect a large scale convenience and grocery store in direct competition with a recently established non-Indian individual operator.

opportunity to devote their considerable excess capital to the local gaming and convenience store businesses reaches the point of diminishing the returns.¹⁸

CASE STUDIES

The following are not intended to be comprehensive, but illustrative and provide further insight into the impacts and potential impacts of the OIN exercise of checker-board sovereignty:

A) City of Oneida: The City of Oneida provides several examples of the impact and potential impact:

1) Map: Attached as Exhibit K is a map of the inside district of the City of Oneida, showing the municipal boundaries, zoning, currently owned OIN property, gas station and convenience store information and, in an inset, an area at the southerly entrance to the City's inside district.

2) Governance: The importance to a community of its master plan and the right of its citizens to effect how the community is constituted is demonstrated by the current updating of the City's master plan and zoning ordinance.

The elected officials of the City of Oneida, together with City staff, a twenty-five member steering committee comprised of City residents, and a consultant worked together to draft a proposed comprehensive plan, intended to guide the City's development over the next fifteen years. *Oneida Daily Dispatch*, September 13, 2005, attached as Exhibit L-1.

From that effort, the new Comprehensive Plan was developed and, after a public hearing, it was adopted by the City Council, September 6, 2005, with the Council acknowledging "the efforts of many individuals and groups in the community."

Following the completion and adoption of the Comprehensive Plan, the City and its officials proceeded with its implementation. A new draft zoning ordinance was prepared, introducing revised mapping, new zoning classifications and other elements, amounting to "hundreds of changes" throughout the City. The Mayor reached out via the press and at public meetings advising that those concerned should communicate with the City. *Oneida Daily Dispatch*, November 28, 2005, attached as Exhibit L-2. A public hearing was called for and held

¹⁸ Contrary to the letter of Ray Halbritter conveying the Application that there is "no anticipated change of use of any of the land that is subject of this request. All uses have been in place for many years" (Letter of Ray Halbritter to Franklin Keel, Regional Director, Eastern Regional Office, Bureau of Indian Affairs, dated April 4, 2005, at 1), the uses neither have been in place for many years nor is it reasonable to expect no future change. Mr. Halbritter's thrust for many years has been the development of economic power. In a law review article in 1994 he asserted "Economic power in this country, and in this world, is the real power . . ." Ray Halbritter & Steven McSloy, *Empowerment or Dependence? The Practical Value and Meaning of Native American Sovereignty*, 26 N.Y.U. J. Int'l L. & Pol. 531, 564 (1994). In 1996, at Syracuse University's graduate school of business, he reiterated that economic power is the foundation for political power and advocated for Indian lands as free trade-zones, enjoying tax advantages to encourage businesses to locate there. *Syracuse Post-Standard*, April 4, 1996, attached as Exhibit J. On November 8, 2002, that vision was further articulated by Nation lawyer Eric Facer in a presentation at Syracuse University College of Law, in which the locating of businesses on tribal lands was advocated, touting tax and regulatory benefits, as well as potential benefits of Indian sovereign immunity. He advocated chartering entities under tribal laws and gave a specific example in which a New York State not-for-profit, for educational and health purposes, wanted to incorporate but did not want to face the required approvals by the State Education Department and New York State Health Department. He said we "avoid red tape" and that, in fact, is what the entity had done.

December 6, 2005, and the Council chamber was “standing room only”, with a variety of residents expressing different concepts and suggestions on a variety of aspects of the plan. *Oneida Daily Dispatch*, December 7, 2005, attached as Exhibit L-3. The Mayor and the Common Council acknowledged their concerns, delayed implementation, and continue to interact with the citizenry to develop the final ordinance. *Oneida Daily Dispatch*, December 12, 2005, attached as Exhibit L-4.

The rights of these citizens and communities to be self governing are real and are exercised. The imposition of a checker-board of OIN properties not subject to the master plan or zoning throughout this City deprives these citizens of that right and is detrimental to the City as a whole.

A concrete, example of potential conflict exists at the southerly entrance to the City’s inside district on Main Street between Route 5 and Elizabeth Street. See map inset, Exhibit K. The City of Oneida’s “calling card” is the entrance to the City along Main and Broad Streets from the south, improved by attractive nineteenth and early twentieth century homes, largely single family, in good repair and occupied by families, professionals and business leaders. The OIN has acquired, at the Main Street entrance, a strip center (until its acquisition, comprised of a mix of professional offices and retail), consisting of properties zoned manufacturing/industrial, and available for commercial use under the ordinance. They also acquired northerly, adjacent residential properties extending into the residential zone along Main and Elizabeth Streets. Acceptance of these properties into trust would permit the OIN to develop a project spanning all of the parcels inconsistent with the City’s master plan and zoning ordinance, such as a large commercial use, thereby disrupting the community. As it is, immediately before the OIN acquisition one these residential properties had under gone significant renovations to turn a once deteriorated property in to a handsome, occupied residential property. Since the OIN acquisition, it has languish vacant and it and its grounds are in a state of disrepair (see map, Exhibit K, item 3).

3) Deteriorating and under utilized properties: The OIN has acquired three of six strip centers in the City of Oneida, two of the three acquired having been active, commercial enterprises (Ames Plaza and Lynn’s Plaza) (see map, Exhibit K, item 4 and 5). Today, nearly all commercial tenants have been forced to vacate these plazas, along with their commerce which had benefited the community. The third plaza lies in great disrepair and is an eyesore to the increasingly important western entrance to the City (see map, Exhibit K, item 2). Other properties are addressed in the case study “Deteriorating and Fallow Properties,” infra.

4) Unfair competition: The OIN aggressively targeted the convenience store and fuel business in the City of Oneida achieving a near monopoly and it reportedly used heavy handed tactics to achieve it (see case study “OIN convenience stores,” infra). For example, the Eisaman location on Route 365A (see map, Exhibit K, item 1) was individually owned and operated. The OIN acquired a former gas station property immediately across the street (Mathalia property) and, reportedly, subsequently contacted Eisaman to purchase his convenience store. Upon his initial refusal, threats were made regarding the opening of a competitive store at the Mathalia property. Knowing that the OIN had significant resources, paid no real property tax, collected and remitted no sales or excise tax, and apparently was not subject to the ordinary regulatory scheme, with the ability to develop and underwrite a fiercely competitive installation, this small businessman had no choice but to sell out. Interestingly, the Mathalia property has been and today remains vacate (See Exhibit C, photo 564).

5) Other: For additional detail as to the impact on the City of Oneida including governance related issues, the justifiable expectations of the people, serious burdens on the administration of local government and adverse impacts on the landowners of neighboring patches resulting from the checker-board nature of OIN holdings, see the letter from Mayor Leo Matzke to Franklin Keel, Eastern Regional Office Director of the Bureau of Indian Affairs of January 23, 2006, re “EIS Scoping Comments, Oneida Indian Nation of NY Trust Application.” In that submission the City addresses impacts on local infrastructure, community programs and services, including police protection, fire protection, water and sewer service, city planning and community development, Department of Public Works as well as fiscal, economic and social conditions.

B) East Shore of Oneida Lake: The circumstances on the east shore and southeast corner of Oneida Lake demonstrate the impacts of the acquisitions and activities of the OIN.

1) Map: Attached as Exhibit M is a map showing the populated east shore and southeast corner of Oneida Lake. As in the City of Oneida, properties have been acquired by the OIN in a checker-board fashion for commercial advantage. Affected are the Towns of Lenox (including the hamlet of South Bay) in Madison County and the Towns of Verona (including the hamlet of Verona Beach) and Vienna (including the Village of Sylvan Beach) in the County of Oneida. The map shows the shoreline, OIN properties (including marinas), and certain other features.

2) Governance: Population density, particularly in the summer, is high. The Village of Sylvan Beach also has been in the process of analyzing and establishing long term plans, and taking action pursuant to those plans including a significant updating of its zoning ordinance. The most recent update of the Village’s Comprehensive Plan was drafted largely in 1998 and adopted in 2001. The analysis was undertaken, incorporating a planning process which was formally adopted.¹⁹ As described in the attached materials, citizen participation, intergovernmental consultation, and environmental reviews are critical.

“Citizen participation is encouraged throughout the planning process to insure that the plan responds to the needs of the community as effectively as possible. An advisory committee of Village residents appointed by the Mayor and chaired by the Planning Board Chair has been formed to review drafts of planning reports. Public presentations, discussions, and hearings provide opportunities for involvement of any other citizens who are interested in taking part.

Citizen involvement is most important in identifying major issues and opportunities, identifying community goals, evaluating alternate plans, and selecting the preferred alternative.”

Public hearings were held and the Plan ultimately adopted.

¹⁹ Attached as Exhibit N is the Table of Contents from the Village’s Comprehensive Planning effort; the section entitled “Introduction-Planning Process” (pp. 1-7); the section entitled “Summary” describing the major village goal and general land use goals (p. 106); and the section entitled “Implementation,” describing further the goals of the Comprehensive Plan and methods of implementation (pp. 166-169).

Further analysis and planning has been undertaken utilizing the NYS Local Waterfront Revitalization Program.²⁰ As stated therein:

“While state governments can promote development and provide protection for critical resources, New York State recognizes that individual local towns and villages are in the best position to determine their own waterfront objectives and to adapt statewide approaches to specific local needs. Therefore, New York State’s program was created to promote development and provide protection for critical resources in accordance with statewide approaches, but is adapted to fit local needs and objectives.”

Again, citizen participation was encouraged and received.

Pursuant to these various plans it has developed, the Village of Sylvan Beach is presently in the process of comprehensively rewriting its local zoning ordinance. A hearing was held to involve the public in January, 2006.

Likewise, the Towns of Verona and Lenox have developed their plans and implemented their zoning ordinances, which are periodically updated with similar citizen involvement.

The presence of scattered parcels not subject to state and local jurisdiction and to the zoning and planning essential to these communities unacceptably and adversely impacts these communities; creates jurisdictional problems and potential conflicts of land use; and unacceptably disrupts the justifiable expectations of their citizens.

3) Unfair Competition: The southeast corner and east shore of Oneida Lake represents a striking example of the adverse impacts of checker-boarding and unfair competition.

Prior to the OIN’s acquisitions, the convenience store, marina and fuel business was disbursed over a variety of competitors.²¹ After acquiring these scattered parcels and businesses, today the OIN has a complete monopoly in the land and marine fuel business, the nearest non-Oneida marine fuel facility located halfway across Oneida Lake; while the nearest Madison County land facilities are many miles away in the hamlet of Lakeport, City of Oneida and Village of Canastota.

The east shore of Oneida Lake community has languished for a number of years without a modern grocery store. After years of inadequate or non existent facilities, Sunshine Market opened for business in 2004 (shown at Exhibit M, item 1). In order to do so, a clean up of the petroleum contaminated site, under the purview of and in accordance with the regulations of the NYS Department of Environmental Conservation, was first undertaken. Appropriate zoning approvals and building permits were obtained, as well as inspections completed during the course of remediation and construction. The location, financed by a local village businessman, opened and began to serve the community. It is subject to continued regulation, pays real property taxes and collects and remits sales tax.

²⁰ Attached as Exhibit O is the narrative introduction to the Village of Sylvan Beach draft Local Waterfront Revitalization Program, dated August 10, 2005, together with its Table of Contents.

²¹ Map at Exhibit M, items 1, 4 and 7 were land operations, each owned by a different competitor. Items 2, 3 and 6 were marine operations.

In contrast, the OIN in 2004-2005 chose to close an existing store, acquired previously (Map at Exhibit M, item 4), and develop a new “mega store” on an adjacent lot. Unlike the owners of Sunshine Market, the OIN applied for no zoning or building permits, had no municipal inspections, and in fact clear cut and filled a heavily wooded, six acre federal wetland without state or federal permits, regulation or oversight. The new facility greatly expanded the “grocery store” like offerings as compare to the OIN’s prior location, in direct competition with the new Sunshine Grocery, a short distance away. This “mega-store” was announced and opened in the Spring of 2005. In the course of dealing with the closed and adjacent properties, petroleum contamination was apparently found, tanks removed and soils excavated without DEC oversight or permits. This new “mega-store” operates apparently very successfully, has not been subjected to ordinary regulation, does not collect and remit sales and excise taxes, and is delinquent in the payment of real property taxes.

With respect to the marina business, the OIN also has operated without reference to applicable regulations. In the spring of 2000 at Marion Manor (Exhibit M at item 6) the OIN conducted dredging and filling activities without obtaining required permits, and did not face repercussions therefor. In contrast, other marine operators must comply with the permitting process, protective of the sensitive lake environment, or face repercussions.

C) OIN Convenience Stores—Case Study in Unfair Competition:

The OIN has established a chain of twelve(12) SavOn™ convenience stores on properties it has purchased since 1992. Seven (7) of those stores (58 percent) are located in Madison County and are within the most populated, northeast portion of the County. All are included in Group 2 of the properties requested to be taken into trust by the Nation’s April 5, 2005, Application.

In Madison County, these stores represent approximately \$5.1 million of assessed value (\$4.75 million in the Town of Lenox and the remainder in the City of Oneida; Oneida assessments have not been updated during the pendency of the Oneida land claim and the actual fair market value of these properties is likely to be several times their current assessment of \$1.254 million).

The annual property tax impact to Madison County taxing jurisdictions from taking these properties in-trust is currently \$204,528. The OIN SavOn™ stores generate huge volumes of business and put a heavy load on local highway infrastructure yet the OIN has not yet paid taxes due on these properties. Trust status will further exacerbate this inequity and burden.

All but one of the OIN stores are located far from any residential or OIN properties supporting OIN members. Most of these establishments sit on single, isolated parcels surrounded completely by non-Indian properties and occupy strategic locations along the busiest arteries entering and leaving the communities where they are located. Photos of these properties are provided in Exhibit C as indicated in the table below. These locations represent prime if not the best business commercial locations in the area.

Tax Map Parcel Number	Photo Number	Location
13.6-1-1	114, 135-137	Intersection of NYS Route 13 and NYS Route 31, two heavily traveled state highways
55.-1-3	206,209	NYS Route 46, adjacent to 32 acre "Territory"; southern entrance to City of Oneida
38.57-1-19	522	Intersection of westbound NYS Route 5 and NYS Route 46, two heavily traveled state highways
38.65-1-14	538	Eastbound NYS Route 5, City of Oneida
37.44-1-3	521	Stone Street and Route 365 A near Oneida Walmart and western entrance to the City of Oneida.
30.81-1-69	564	Lenox Ave, City of Oneida and eastern entrance to City of Oneida.
36.38-1-3	576-579	NYS Route 13, Northern entrance to Village of Canastota and adjacent to NYS Thruway (I-90) Interchange 34.

Of the seven OIN stores;

- One replaced a OIN operated store that was closed
- Five stores were purchased from competitors.
- One was newly constructed by the Nation.

In addition to the five stores purchased by the OIN, at least four nearby Madison County competitors closed in the face of competition. Six other nearby non-Indian stores serving the northeast portion of Madison County remain open. As a consequence, the percentage of convenience stores collecting and remitting taxes in this part of Madison County has decreased from 94 % to 46 %.

A major portion of convenience stores business in New York State is the highly taxed tobacco products and motor fuels. Nationwide, the tobacco and fuels generate two-thirds of convenience store revenue. In New York, the excise and sales tax generated by these products would make the percentage of tax revenue generated from sale of these items much higher than the percentage of store revenue. Despite US Supreme Court decision in *Department of Taxation and Finance of New York et. al. v. Milhelm Attea and Bros., Inc., et. al*, 512 U.S. 61 (1994). New York State has exercised forbearance in collecting state sales and excise in an effort to avoid violence and to facilitate resolution of New York tribe's long standing land claims.

This policy grants tribal businesses a huge competitive advantage in the convenience store market.²² This advantage coupled with the number and location of stores and the loss of

²² That competitive disadvantage is exacerbated by the inability to enforce regulatory standards which are so important to the health, safety and welfare of our citizens. See letter, New York Association of Convenience Stores to Franklin Keel, January 10, 2006, and "Drowning in Double Standards," attached as Exhibit P. The latter, compiled by NYACS illustrates the various discrepancies between tribal and non-tribal stores.

tax collecting stores forced out of business by unfair competition greatly impacts County of Madison sales tax revenues.

Estimating the tax revenue lost to New York State and local governments is difficult without accurate data on the volume of products sold. Federal and state regulations cover the reporting of these volumes by distributors and retailers but neither New York State nor the OIN have released reliable figures. Local estimates calculated without hard data set the loss to local governments for sales tax alone at several million dollars. Disclosure by the OIN of actual, verifiable sales data should be required as part of the evaluation of this Application.

The New York State Association Convenience stores and the Fair Application of Cigarette Tax Alliance websites (www.nyacs.org and www.factalliance.org) document the impact of this situation across New York State. The actual impact is likely to be tens-of-millions of dollars in Madison and Oneida Counties due to the number and competitive advantage to the OIN enterprises that have avoided paying taxes. Taking these properties into trust will forever cripple competitors and deprive local governments of revenue intended for their benefit by New York State tax structure and regulations.

D) Deteriorating and Fallow Properties:

Of the 88 Group 2 parcels requested to be held in trust by the United States for the benefit of the OIN, approximately one third of them have large acreages that lie fallow or have buildings that are not being used. In many cases, those buildings are deteriorating and/or becoming dilapidated creating a public nuisance and life-risk hazard. This situation calls into question any tribal need for ownership or justification for these properties to be held in trust.

The photographs and observations in Exhibit C provide a mid-May 2005 snapshot of the condition and use of the properties in Group 2. The table below lists parcels with unused, deteriorating buildings or which are mostly unused. A spot-check of some of these properties during January 2006, reveals little if any evidence of use of the buildings and indeed, most continue to lay vacant, unused and are falling into poorer condition. In addition to safety and aesthetic concerns, they affirmatively diminish the communities and neighborhoods in which they are located and prevent others from putting them to effective, productive use to the benefit of the community as a whole. Even where such properties are maintained to some degree, their disuse is especially damaging to communities where the properties once were occupied by families, active commercial businesses, or working farms.

Tax Map Parcel Number	Photo Number.
19.-1-25	001-013
19.-1-27	032
13.22-1-7	076-098
13.22-1-8	076-098
13.22-1-9	076-098
13.22-1-11	076-098
13.23-1-6	109,111
13.-1-37	122-133
91.-1-51	186-189
54.-1-29.1	192

54.-1-32.1	198
55.-1-4.1	201,202
54.-1-31	203,204
54.-1-30	207,208
47.-1-42	224-227
54.-3-4	237
54.1-1-21.11	238-242
38.49-1-65	533
38.49-1-67.2	535
38.49-1-69	536
37.44-1-1	553,554
38.29-1-3	559
30.81-1-69	564
27.20-1-6	584,586
35.8-1-6	597-599
35.-1-28.1	601-604
35.-1-26	605, 606
28.-1-77.2	611
28.-1-77.1	613
28.-2-13.11	615

E) Water Systems Impact: Fundamental to a community is the availability and distribution of water. New York State has had a longstanding program of regulating and managing water resources.²³

In 1926 a cooperative effort, among the Cities of Oneida and Sherrill and Oneida Ltd. (located in Sherrill and in the Kenwood section of Oneida), was undertaken to find a reliable source of water for Oneida and for Sherrill-Kenwood and its enterprises. Three hundred thousand dollars (\$300,000)—an enormous sum in those times—was provided by Sherrill-Kenwood’s Oneida Ltd. to develop the source in Taberg and underwrite the transmission infrastructure costs. For the next 80 years there has been a series of agreements between the City of Oneida and the Sherrill Kenwood Water District (SKWD), renewed periodically without

²³ As described in the NYS Department of Environmental Conservation web site regarding its Water Supply Program (which encompasses a permitting process regulating the state’s water systems):

Conserve and Develop for Beneficial Uses

"To conserve and develop the waters of the state for all beneficial uses for the public" is the stated public policy of the State of New York.

The state's waters must satisfy domestic, municipal, agricultural, commercial, industrial, power and recreational needs and other beneficial public purposes.

The legislature has adopted programs to protect our water resources and regulate their use to ensure that our water resources remain adequate to meet these present and future needs.

Public Water Supply Program

Among the oldest of these efforts is the Public Water Supply Program, first established in 1905 and now administered by the New York State Department of Environmental Conservation (DEC). This program protects and conserves available water supplies by ensuring equitable and wise use of these supplies by those who distribute potable (drinkable) water to the public for domestic, municipal, and other purposes.

serious controversy. This Florence Creek Water System presently serves over 20,000 people in two counties, three cities, five towns, and four villages. See: “Oneida Water Letter,” City of Oneida Water Department, Spring 2005.

A problem has now arisen regarding capacities, in which the City of Oneida (due to over commitment of an inadequate supply) seeks to diminish system co-founder Sherrill Kenwood Water District and City of Sherrill’s water allocation by 60% (currently permitted by DEC at 2.20 million gallons per day (MGD)) to .900 MGD, in part to shift allocation to the benefit of the unplanned and unregulated golf course and casino development in Verona by the OIN (reportedly unilaterally using 400% of its allocation viz. .600 MGD vs. permit allocation of .150 MGD).²⁴

Certain details of the problem are illustrated in the following documents, attached as Exhibit Q:

- Letter, City of Oneida to Sherrill Kenwood Water District (SKWD) 7/20/05
- Article, “Oneidas pay \$40,000 for water pump,” Syracuse Post Standard, 8/3/05
- Letter, SKWD to City of Oneida 10/12/05
- Letter, City of Oneida to SKWD 11/9/05
- Article, “Verona Rejects New Water Contract,” Syracuse Post Standard, 1/6/06

As was pointed out in the October 12, 2005 letter from SKWD Chairman Nick Vanderwall to City of Oneida Mayor Leo Matzke²⁵, the loss of allocation is crippling to the Sherrill-Kenwood community, which has essentially just lost the greater region’s most important employer²⁶--leaving extensive first class facilities, in Empire Zones, with available low cost municipal power ready to be occupied. Historically, Sherrill-Kenwood’s use of water—due greatly to these enterprises—has exceeded 1.00 MGD, peaking at approximately 1.60 MGD in the 1990’s, only diminishing more recently as the local industry fell on hard times. The factories have recently been closed and are now being actively remarketed, with interested parties including industries typically utilizing large quantities of water. This redevelopment would greatly benefit eastern Madison and western Oneida counties.

The unregulated growth by the Oneida Indian Nation and its impact on the natural resources of the state is testimony to the adverse consequences envisioned by the United States Supreme Court 2005 *Sherrill*²⁷.

New York State has a comprehensive program of long standing for regulating the water supply, which integrates with the other state and local institutions (municipal governments, local and regional planning boards) to help assure rational growth and use of resources. To grant the

²⁴ This use by the Oneida Indian Nation has not only adversely impacted the full water system, but has dangerously jeopardized the local Verona community (See Syracuse Post Standard, 8/3/05 “Oneidas pay \$40,000 for water pump”); attached as part of Exhibit Q.

²⁵ In which SKWD offered to accept a 1.00 MGD reduction, meeting the then known full system wide shortfall; and seeking to retain a 1.20 MGD allocation, while problematic, believed sufficient to meet immediate demand.

²⁶ Oneida Ltd., once employing over 4,000 and the worlds largest manufacturer of flatware, has eliminated domestic manufacturing and closed all of its local manufacturing facilities in 2004 and 2005.

²⁷ A checker-board of alternating state and tribal jurisdiction in New York State—created unilaterally at OIN’s behest—would “seriously burde[n] the administration of state and local governments” and would adversely affect landowners neighboring the tribal patches. [Citations omitted]. 125 S.Ct. at 1493.

trust application and introduce an unregulated sovereign into the midst of these longstanding, developed communities is inappropriate, and is illustrative of “Jurisdictional problems and potential conflicts of land use that may arise...”²⁸

F) Solid Waste and Recyclables: Solid waste management has always been, and still remains, a topic that garners a great deal of time and attention in Madison County, from both county officials and citizens alike. The County has put forth a great deal of effort over the years to ensure the safe disposal of solid waste within its borders, as is illustrated by Section 2 of Local Law No. 3 of 2004, set forth below:

The safe and proper disposal of the solid waste generated by the people of the County of Madison has long been and remains a matter of serious public concern. In the 1960’s, virtually every municipality in Madison County provided a dump for use by local residents and businesses, as a traditional local government service. In response to growing concerns and increased public awareness of adverse environmental impacts caused by the operation of unlined dumps – such as drinking water contamination, disease carrying vectors, open burning, landfill gas migration, and the potential for other public health and environmental problems associated with historical waste disposal practices at unlined local dumps -- by 1974 all sixteen town, village and city dumps then operating in Madison County were phased out of service and replaced with a county owned and operated centralized sanitary landfill in the Town of Lincoln and three rural residential waste transfer stations located in the towns of Cazenovia, Hamilton and Sullivan. In the late 1980’s Madison County re-examined its long-term solid waste management plan to decide on an economically viable and environmentally sound long-term management program. This resulted in the adoption of a plan to pursue a comprehensive countywide recycling program in 1989 and a Comprehensive Solid Waste Management Plan approved by the New York State Department of Environmental Conservation on March 15, 1993 that is periodically updated by the County. Since the adoption of the Plan, the County has implemented an integrated system of waste management to achieve the objectives of the plan, which are to reduce, reuse and recycle so much of the waste stream of Madison County as is feasible, and to landfill the remainder in an environmentally secure public land facility.

Madison County has incurred significant debt and invested millions of dollars in the development, operation, and maintenance of the County’s integrated waste management system; spending approximately \$3,000,000.00 each year on the system. Waste management is a matter that is vitally important to the citizens of Madison County and will remain the focus of public concern. This being the case, it is essential that the County be able to continue to regulate the flow of all solid waste within its borders, as well as assure the necessary, predictable revenue stream provided by its local laws.

²⁸ *Sherrill* at 1493-94, 25 CFR 151.10(f)

Based on information available to Madison County, it is believed that the OIN currently contracts with private garbage haulers to dispose of its waste, and that waste is now disposed of at an appropriate county facility. The implementation of the County's flow control law as to OIN's waste—so important to fiscally sustain this environmentally sound, comprehensive integrated waste management system—required litigation.

The litigation involved a dispute between the County, the OIN and one of the OIN's contracted private waste haulers—Riccelli Trucking, Inc. Madison County commenced a lawsuit in NYS Supreme Court against Riccelli Trucking alleging seventy violations of the flow control law. The bulk of these violations related to waste removal from OIN lands and subsequent hauling of these wastes to a landfill located outside of Madison County, the commingling of recyclables and solid waste materials, and the unpermitted operation of a solid waste business in the County. The lawsuit was ultimately settled in August 2002. During the Riccelli dispute, the OIN took the position that it is entitled to control the disposal of its waste free from regulation by the County, believing it was therefore not subject to the flow control law.

The granting of land into trust status for 17,300 acres throughout the County, would increase the exposure to the Madison County integrated waste management system, with the potential that the OIN would renew its argument regarding "sovereign" garbage, potentially establish its own private waste hauling business with respect to the same, and otherwise diminish the system.

CONCLUSION

While we have appreciated receiving an extension of time to provide these comments, the magnitude of this Application and its impact on these established communities make it clear that our time was inadequate. We reserve the right to supplement and clarify this submission, and understand that as the OIN submits their supplemental or any responsive materials, we will have the opportunity to review and reply.

Nevertheless, given the principles established by *Sherrill*, a fair application of the Secretary's regulations, and common sense, the materials submitted herewith amply justify the denial of the Application.

Very truly yours,

S. John Campanie

CC: Honorable Charles E. Schumer
Honorable Hillary Rodham Clinton
Honorable Sherwood L. Boehlert
Honorable John M. McHugh
Michael Olsen, Esq.
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