

Attorney General's Opinion

Attorney General, Richard Blumenthal

March 13, 2008

Honorable Donald E. Williams, Jr. Honorable James A. Amann
Senate President Pro Tempore Speaker of the House
Honorable Martin M. Looney Honorable Christopher G. Donovan
Senate Majority Leader House Majority Leader
State Capitol State Capitol
Hartford, CT 06106-1591 Hartford, CT 06106-1591

Dear Senators Williams and Looney and Representatives Amann and Donovan:

This letter responds to your request for an opinion regarding the legality of proposed legislation to extend the State's ban on smoking in public places to the Foxwoods and Mohegan Sun Casinos (the "Casinos"). In particular, you ask whether extending the smoking ban to casinos that are owned and operated by the State's two federally recognized Indian tribes, the Mashantucket Pequot Tribe and Mohegan Tribe (the "Tribes"), would be barred by state or federal law or the Compacts that govern gaming on the reservations. In the event we conclude that extending the smoking ban to the Casinos is legally permissible, you ask whether there would be any legal impediments to enforcing such a ban.

At the core of each Compact is a key health and safety provision -- a critical mandate that health and safety conditions in every gambling facility be no less rigorous than state public health and safety standards. The statutory smoking ban is clearly and quintessentially a public health protection, applying broadly to all public buildings and facilities across the State. The Compacts extend this standard to the gaming facilities, unless the legislature creates an exception. The legislature has authority to make an exception for the casinos, but also to eliminate the exception, and apply the smoking ban as a broader public health standard.

Principles of sovereignty in no way bar this measure, because the Tribes have already agreed -- as a condition in the Compacts -- to adopt public health standards at least as rigorous as the State's public health laws.

The Compacts provide for enforcement generally of their provisions through action in federal court, but my strong hope is that discussions with the Tribes will lead to agreements extending the smoking ban to gaming facilities without a court dispute. For now, the General Assembly may move forward with confidence that its legality and constitutionality will be upheld if challenged. In the end, on so profoundly significant a public health issue as smoking, we should seek common ground and avoid conflict in the courts.

The Compacts which govern the operation of the Casinos require the Tribes to maintain health and safety standards applicable to the gaming facilities that are "no less rigorous than standards generally imposed by the laws and regulations of the State." Section 14(a).¹ Because the proposed smoking ban is clearly and expressly intended to protect the health and well being of the public who patronize the Casinos and the employees who work in them, the Tribes would be required to prohibit smoking within the Casinos to be in compliance with the Compacts. If the Tribes fail to do so, the federal court would have jurisdiction to enforce Section 14(a) under the terms of the Compacts, and would have the authority to enjoin the operation of gaming in the Casinos until the Tribes complied with the smoking ban. Section 13(c). The Tribes have waived their sovereign immunity from suit for actions to enforce any provision of the Compacts. *Id.*

Alternatively, if the smoking ban were extended to the Casinos as a condition of their state liquor permits, noncompliance with the ban could lead the State to take action to

suspend or revoke the Tribes' permits to sell liquor at the Casinos in the event of noncompliance with the ban.

Given the Tribes' status as sovereign entities under federal law a preferable course -- as a matter of comity and respect -- would be that the Tribes and the State come to an agreement to implement the ban, advancing the important health interests of tribal and non-tribal patrons and employees of the Casinos. Both Tribes have expressed an interest in discussions about an agreement on this issue.

On May 23, 2003, the General Assembly adopted 2003 Conn. Pub. Acts No. 03-45, entitled "An Act Concerning Second Hand Smoke in Work Places" ("Public Act 03-45" or the "Act"). The Act amended Conn. Gen. Stat. § 19a-342, which is located in the "Public Health and Well-Being" title of the General Statutes, to prohibit smoking in a wide range of public places, including state buildings, health care institutions, retail food stores, elevators, college dormitories, restaurants, and most public establishments with alcoholic liquor permits.² 2003 Conn. Pub. Acts No. 03-45 § 1. The legislature chose to exempt the Casinos³ from the Act at that time.

The first question you pose is whether the Tribes' sovereign status under federal law bars the legislature from extending the Act's provisions banning smoking in public places to the Casinos. We conclude that because the proposed law is intended to protect the public health and safety, it may be applied to the Casinos under the terms of the Compacts that govern operations of those establishments.

As you are aware, the Casinos are owned and operated by federally recognized tribes and are located on federal reservations. See generally, 25 U.S.C. § 1751 *et seq.* (the Mashantucket Pequot Tribe); 25 U.S.C. § 1755 *et seq.*; 59 Fed. Reg. No. 50, 12140 (the Mohegan Tribe). Because both the Mashantucket Pequot Tribe and the Mohegan Tribe are federally recognized, they are afforded a level of sovereignty that empowers them to regulate their own internal and social relations. *United States v. Mazurie*, 419 U.S. 544, 557 (1975). As a result, the State's "power to regulate [certain] activities is limited by federal law and, in the case of casino operations, by the terms of the Compacts" that govern the Tribes' gaming operations in the Casinos. *Batte-Holmgren v. Commissioner of Public Health*, 281 Conn. 277, 303 (2007).

The Tribes' authority to conduct Class III gaming, or casino-type games, in Connecticut is prescribed by the federal Indian Gaming Regulatory Act (IGRA).⁴ 25 U.S.C. § 2701 *et seq.* Under IGRA, federally recognized tribes may conduct gaming in states that permit similar forms of gaming only if they do so pursuant to a valid Compact negotiated between the State and Tribe or to federal procedures imposed by the United States Secretary of the Interior (the "Secretary"). 25 U.S.C. § 2710(d); *Mashantucket Pequot Tribe v. State of Connecticut*, 913 F.2d 1024, 1028 (2nd Cir. 1990), *cert. denied*, 499 U.S. 975 (1991). Compacts or procedures prescribed by the Secretary may include provisions related to "the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations." 25 U.S.C. § 2710(d)(3)(C)(ii).

Pursuant to IGRA, the Tribes' gaming operations are governed by two identical documents, the Federal Procedures (the Mashantucket Pequot Tribe) and a Compact (the Mohegan Tribe) (collectively referred to in this opinion as the "Compacts").⁵ The Compacts expressly include provisions governing state health and safety standards in the gaming facilities.

Section 14(a) of the Compacts governs health and safety in the gaming facilities and expressly provides:

Health and Safety Standards. Tribal ordinances and regulations governing health and safety standards applicable to the gaming facilities shall be no less rigorous than standards generally imposed by the laws and regulations of the State relating to public facilities with regard to building, sanitary, and health standards and fire safety. The State gaming agency may

require the Tribe to cooperate with any State agency generally responsible for enforcement of such health and safety standards in order to assure compliance with such standards.⁶

Thus, under the Compacts, the Tribes are required to have public health and safety standards that are at least as rigorous as the State's public health laws. As we stated in a prior opinion:

The phrase "health and safety standards" is not specifically defined in the compacts, but, by its terms applies broadly to include all of the State's health and safety laws. The smoking ban legislation involves an obvious and important health issue and therefore, implicates application of section 14 of the compacts.

2003 Op. Atty. Gen. (October 1, 2003).

We reiterate that opinion here. Clearly, the smoking ban is a quintessential public health law. The United States Surgeon General has determined that "there is no risk-free level of exposure to secondhand smoke." Office on Smoking and Health, U.S. Dept. of Health and Human Servs., *The Health Consequences of Involuntary Exposure of Tobacco Smoke: A Report of the Surgeon General, Executive Summary*, 9 (2006). "Eliminating smoking in indoor spaces fully protects nonsmokers from exposure to secondhand smoke. Separating smokers from nonsmokers, cleaning the air, and ventilating buildings cannot eliminate exposures of nonsmokers to secondhand smoke." *Id.*

The legislature clearly articulated that its purpose in passing the 2003 Act banning smoking from most bars and restaurants was to protect the public and employees from being forced to breathe secondhand smoke. In the floor debates on Public Act 03-45, the General Assembly discussed its purpose as "strik[ing] a landmark blow for the public health policy of this state." 46 Conn. S. Proc., pt. 6, 2003 Sess. 1583 (April 30, 2003) (remarks of Sen. Murphy). Senator Murphy explained that "[w]hat I think we're trying to protect in the underlying bill is to prevent the collateral damages of secondary consequences of people's decisions to smoke..." and to "keep[] a Class A carcinogen out of our work places." 46 Conn. S. Proc., pt. 6, 2003 Sess. pp. 1628, 1586 (April 30, 2003) (remarks of Sen. Murphy). Noting the numerous studies on the dangers of exposure to secondhand smoke, Senator Murphy stated that there are:

Three thousand deaths a year to non-smokers, based on secondhand smoke and the effects of it. Fifty thousand total deaths, premature deaths, smoker and non-smokers, due to the effect of secondhand smoke. Ten thousand low birth weight babies every year to symptoms that doctors prescribe were due to secondhand smoke and the effects of it.

46 Conn. S. Proc., pt. 6, 2003 Sess. 1584 (April 30, 2003). *See also* 46 Conn. S. Proc., pt. 6, 2003 Sess. 1585 (April 30, 2003) (discussing effect of secondhand smoke on bar and restaurant employees).

Thus, the intent of the 2003 Act was unquestionably and explicitly to protect the public and employees against the hazards of secondhand smoke. *Id.* at 1584-86.

There is no doubt that the purpose of extending the Act's provisions to the Casinos would be to protect the tens of thousands of non-tribal member patrons who visit the Casinos and the thousands of non-tribal member employees that work at the Casinos everyday. Since a state law extending the smoking ban to the Casinos would be a public health standard imposed by the laws of the State, the Tribes would be required under Section 14(a) of the Compacts to abide by that law by imposing a similar tribal law that would "be no less rigorous" than the State law.

Because the federal law that permits the Tribes to operate the Casinos within the state requires them to comply with the terms of the Compacts, 25 U.S.C. §§ 2701 *et seq.*, and the Compacts require the Tribes to comply with health and safety standards established by Connecticut law for other public facilities, Section 14(a), the extension of the smoking ban to the Casinos would be legally permissible and would not intrude on or implicate the Tribe's sovereign status.⁷

Your second question is whether there would be any impediment to enforcing the smoking ban at the Casinos. There are two legal avenues to enforce application of the Act, should the General Assembly expand its reach to the Casinos.

The first potential enforcement remedy would be for the State to bring an action in federal court to enforce the Compacts. As stated, the Tribe's failure to comply with the smoking ban, if the ban is extended to the Casinos, would violate the health and safety provisions of Section 14(a) of the Compacts. The Compacts provide a specific enforcement mechanism for violations of their provisions. Specifically, under Section 13(c) of the Compacts, if the State determines that the tribal gaming operations are "not in compliance with the provisions of this Compact," the State must notify the Tribes of the specific violation of the Compact and the action needed to remedy the violation. If the Tribes fail "to comply with the any provision of this compact following receipt of a valid notice from the State gaming agency requesting correction of such non-compliance," Section 13(c) grants the federal court jurisdiction over any claim initiated by the State to enforce the Compacts. In particular, Section 13(c) allows the federal court "to enjoin a class III gaming activity located on the Reservation and conducted in violation of this Compact." The Tribes have waived their sovereign immunity from suit for actions brought in federal court to enforce the Compacts. *Id.*

Second, although the Tribes are "entitled" to permits for the sale of liquor at the Casinos, Section 14(b) of the Compacts expressly conditions such permits on the Tribes' compliance with "laws and regulations of the State applicable to sale or distribution of alcoholic beverages." If the smoking ban is extended to the Casinos as a condition of a state liquor permit, and the Casinos do not comply with the ban, then the State may take action to suspend or revoke the Tribes' permits to sell alcohol at the Casino under state laws and regulations governing liquor sales. General Statutes § 30-47(7) (allowing suspension or revocation of a liquor permit for violation of any regulation adopted under chapter 545); Regulations of Conn. Agencies, Sec. 30-6-A24(a) (prohibiting unlawful conduct). Although the revocation or suspension of a liquor permit would not directly mandate the cessation of smoking, it would create a significant incentive for the Tribe to comply with the smoking ban.

In sum, we conclude that the extension of the smoking ban to the Casinos would be a health and safety law that may legally be applied to the Casinos under Section 14(a) of the Compacts. Should the smoking ban be amended to include the Casinos, we believe the ban would be enforceable in court under Section 13(c) of the Gaming Procedures or under the State's liquor laws.

As a matter of comity and respect, we suggest that the Tribes and the State seek an agreement to implement the ban -- thereby advancing the health interests of tribal and non-tribal patrons and employees of the Casinos alike, without the need for enforcement litigation.

I trust that this opinion responds to your concerns.

Very truly yours,
RICHARD BLUMENTHAL
ATTORNEY GENERAL
Susan Quinn Cobb
Assistant Attorney General

¹ There is no time limitation on the health and safety standards in the Compacts. Nor could there be, as health and safety exigencies continually arise, requiring development of new standards to address them. Health and safety imperatives -- affecting the public and the Casino employees -- require that these standards be continually updated and improved to keep pace with advances in scientific and medical research.

² The statutory sections specified in Section 1 Public Act 03-45 referring to establishments that have liquor permits and are subject to the smoking ban are: sections 30-20a, 30-21, 30-21b, 30-22, 30-22c, 30-28, 30-28a, 30-33a, 30-33b, 30-35a, 30-37a, 30-37c, 30-37e, 30-37f, 30-23 and after April 1, 2004, 30-22a and 30-26.

³ The Act does not apply to private clubs that obtained their liquor permits prior to the effective date of the Act.

⁴ Class III gaming is defined by the IGRA as "all forms of gaming that are not class I gaming or class II gaming." 25 U.S.C. § 2703(8). Class I games are social games of minimal value and class II gaming is bingo or card games allowed by the State. 25 U.S.C. § 2703(7) and (8).

⁵ The document that governs the Mashantucket Pequot Tribe's gaming operations is not technically a "compact" because it was imposed on the State by the Secretary of the Interior under the IGRA. 25 U.S.C. § 2710(d)(7)(vii); 1993 Op. Atty. Gen. (February 11, 1993). Because this distinction has no relevance to this opinion and the health and safety provisions of the two gaming documents are identical, we refer to both documents as the "Compacts" and our analysis applies to both Tribes.

⁶ In addition to Section 14(a) of the Compacts, the "Whereas" introductory paragraphs of those documents expressly state that they are intended to "protect the health, welfare and safety of the citizens of the Tribe and the State...."

⁷ While we recognize and respect the Tribes' sovereign status, that status is not absolute. *Rice v. Rehner*, 463 U.S. 713, 717 (1983), quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973). Under recent cases discussing application of state laws to tribal commercial enterprises that cater to and employ non-tribal members, we do not believe that a court would find that extending the smoking ban to the Casinos would interfere with tribal self-government. See *Rice*, 463 U.S. 713 (tradition does not recognize exclusive tribal sovereign authority over the sale of liquor on reservations); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2nd Cir. 1996) (applying OSHA to a Mashantucket Pequot commercial enterprise); *San Manuel Indian Bingo and Casino*, 475 F.3d 1306 (D.C. Cir. 2007) (impairment of sovereignty is negligible for purpose of application of the National Labor Relations Act to tribal commercial casino operation and did not impact tribal self-governance). It is estimated that 40,000 non-tribal patrons visit both Foxwoods and the Mohegan Sun on a daily basis and that each casino employs thousands of non-tribal members. At Foxwoods for example, approximately 9,000 people are employed by the Casino, and only 30 of these workers are tribal members. *Foxwoods Resort Casino*, Case No. 34-RC-2230 (NLRB Reg. 34 Oct. 24, 2007). Even without the Compacts, then, it is doubtful that inherent tribal sovereignty would preclude the application of the smoking ban.

In light of the specific terms of the Compacts expressly requiring adherence to state law relating to health and safety, we need not further address general concepts of Indian sovereignty to resolve the questions you pose.