TOWN OF AQUINNAH

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March 6, 2019

Cheryl Andrews-Maltais
Chairwoman
Wampanoag Tribe of Gay Head (Aquinnah)
20 Black Brook Road
Aquinnah, MA 02535

Re: Town Referral to the Martha's Vineyard Commission

Dear Chairwoman Andrews-Maltais:

We are in receipt of your letter of February 22, 2019, outlining the objections of the Wampanoag Tribe of Gay Head (Aquinnah)(the "Tribe") and the Aquinnah Wampanoag Gaming Corporation ("AWGC") to the Town of Aquinnah's (the "Town") referral of the proposed bingo facility to the Martha's Vineyard Commission ("MVC"). We have not had a quorum of the Board present since the receipt of your letter, so we have not been able to respond until now.

Let us be clear: the Board of Selectmen (the "Board") does not contest the Tribe's right to establish a gaming facility on its property. The Board does believe, however, that the Tribe's gaming rights are not without limits, and that the Tribe is required to engage with local and Island-wide planning authorities on issues peripheral to gaming functions, most importantly public safety and the regional impact of any proposed facility.

Your letter contends that the decision of the First Circuit Court of Appeals (the "First Circuit") in Commonwealth of Massachusetts v. Wampanoag Tribe of Gay Head (Aquinnah), 853 F.3rd 618 (1st Cir. 2017), cert. denied, 138 S. Ct. 639 (2018)(the "Aquinnah case"), resolves all issues relating to the construction of a bingo facility and that the Tribe is free to pursue construction without regard to any governmental review by the MVC or the Town. While the Aquinnah case reached the question of IGRA's implied repeal of the relevant settlement act; it did not address which of the peripheral functions of the Tribe's project are "regulable". We wish to note that Judge

Saylor did address this issue when he issued a preliminary injunction, and determined that certain local permits, including a building permit, would be required irrespective of the ultimate adjudication of the IGRA issue.[1] While the First Circuit reversed Judge Saylor's judgment, it did not address the scope of retained local powers.

The Tribe's position also ignores the First Circuit's decision in State of Rhode Island v. Narragansett Indian Tribe, 19 F.3rd 685 (1994) (the "Narragansett case"), which must be read in conjunction with the Aquinnah case.[2] In the Narragansett case, the First Circuit similarly ruled that that the Indian Gaming and Regulatory Act ("IGRA") impliedly repealed the Rhode Island Indian Claims Settlement Act, but went on to hold as follows:

> "The crucial questions which must yet be answered principally deal with the nature of the regulable activities which may -- or may not -- be subject to state control, e.g., zoning, traffic control, advertising, lodging. It is true that nondiscriminatory burdens imposed on the activities of non-Indians -- on Indian lands are generally upheld. But it is also true that a comprehensive regulatory scheme involving a particular area typically leaves no room for additional state burdens in that area. Which activities are deemed regulable, therefore, will probably depend, in the first instance, on which activities are deemed integral to gaming. Although the core functions of class III on the settlement land are beyond Rhode Island's unilateral reach, the distinction between core functions and peripheral functions is tenebrous, as is the question of exactly what Rhode Island may and may not do with respect to those functions that eventually are determined to be peripheral." (Internal citations omitted.)

The MVC is expressly charged with reviewing developments which, because of their magnitude, are likely to present development issues significant to more than one municipality on the Island of Martha's Vineyard. In our view, a gaming facility

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[1] A copy of the relevant pages of the transcript from that hearing is attached.

[2] The Rhode Island Settlement Act only gave regulatory power to the State, and not to the Town and State, as our Settlement Act does.

in Aquinnah will have impacts which will reach beyond the boundaries of the Town -- in addition to the direct public safety issues affecting the Town. All governmental entities on the Vineyard - including the Tribe, the Town and the MVC - share a responsibility to ensure that regional public and safety concerns are properly addressed.

Other than one non-public meeting with one member of the Board and our Town Counsel, the Tribe has not provided the Board with specific information about the proposed facility. Our letter to you of January 8, 2019 (a copy of which is attached hereto), sets forth certain parameters discussed at that meeting, but leaves open a large number of questions, such as the hours of operation of the facility; the expected traffic volume; and construction details, including the type of septic facility, among several other issues. The Town cannot staff for police needs or plan for providing public safety functions, without these details. We have asked for a public meeting on several occasions, but that meeting has yet to happen.

All of us (the Tribe, the Town, and the MVC) should be meeting to discuss the proposed facility and what measures, if any, would be appropriate to mitigate the potential impacts that the facility could have. The Board's efforts to hold such a meeting are offered in good-faith, and our referral to the MVC is intended to generate broader public discussion.

Our goal is not -- as you state -- to block the construction of the proposed facility. We reiterate our invitation to the Tribe to meet with us to discuss these issues so that, hopefully, we can work together to identify procedures and to establish concrete protocols to address and mitigate any negative regional impact that the Tribe's proposed facility may have on other Towns on Martha's Vineyard; and b.) the Town's public safety concerns.

We have intentionally chosen not to respond to various other statements made in your letter, and continue to hope that the processes envisioned here would be productive and would serve our respective and shared constituents well.

Please let us hear from you by March 13, 2019.

Very truly yours,

AQUINNAH BOARD OF SELECTMEN

Gary Haley, Chairman

Julianne Vanderhoop

Jim Newman

cc: Ronald H. Rappaport, Esq., Town Counsel (w/ enc.)
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February 22, 2019

Aquinnah Board of Selectmen
Town of Aquinnah
955 State Road
Aquinnah, Massachusetts 02535

Re: Town Referral to Martha's Vineyard Commission

Dear Selectmen:

The Aquinnah Wampanoag Tribe (a/k/a Wampanoag Tribe of Gay Head (Aquinnah))("Tribe") and Aquinnah Wampanoag Gaming Corporation ("AWGC") are aware of your letter to the Martha's Vineyard Commission ("MVC") asking the MVC to consider the Tribe's gaming facility as a "Development of Regional Impact" and assert jurisdiction over the Tribe's gaming project. Consistent with the findings and decision of the First Circuit Court of Appeals reversing the District Court's determination that the Tribe was unable to operate a gaming facility without first obtaining approvals from the Commonwealth, Town and MVC, neither the MVC nor the Town has any jurisdiction over any matters integral to gaming. This issue has been litigated all the way to the United States Supreme Court, the Tribe has prevailed, and this issue is now a matter of settled law. Therefore, we formally request that you withdraw your referral to the MVC.

Further, the Town sent the letter without any prior notice to the Tribe, the AWGC, or tribal officials, and the Town did not even provide a concurrent courtesy copy to the Tribe or the AWGC, which cannot be viewed as an oversight. Accordingly, it is now clear that the Town's recent engagement with the Tribe for a government-to-government dialogue regarding how to work collaboratively with the gaming facility project was disingenuous. Rather, it appears that the Town's engagement was simply an insincere ruse while the Town worked secretly to interfere with the Tribe's gaming facility – despite the Town's representation to the District Court that "the town is not going to stand in the way" if the Court ruled in the Tribe's favor on the Indian Gaming Regulatory Act ("IGRA") issues . This conclusion is reinforced by the fact that there is not a single science-based concern among the several assumptions and assertions cited in the Town's letter to the MVC. In other words, the Town's decades-long opposition to a gaming facility on the Tribe's lands continues, despite the Town having lost at the First Circuit Court of Appeals and at the United States Supreme Court.

Even after losing in the highest court in the land (at no small monetary cost to all parties), the Town now seeks to do indirectly what it now knows cannot be done directly. Therefore, unless the Town

formally withdraws its letter to the MVC, and acknowledges that the Town lacks jurisdiction over all matters integral to the Tribe's gaming operation, the Tribe will no longer engage in discussions with the Town on gaming matters whatsoever.

It is truly unfortunate that it has come to this. The Tribe reached out to the Town in good faith, believing that because the parties had reached the end of the extended litigation, the parties had also reached the end of the acrimony and the Town's opposition to the Tribe's exercise of its rightful sovereign right to offer gaming on its trust lands. The Tribe reached out in good faith despite the fact that the Town's actions have cost the Tribe several years of operation and millions of dollars in lost governmental revenue – earmarked by IGRA to fund essential tribal governmental services – which can now never be recovered. The Tribe is particularly disappointed because it shared with the Town that the Tribe, with the oversight of the National Indian Gaming Commission ("NIGC"), is addressing all issues of public health and safety in the same manner as any responsible government. The Tribe shared with the Town that the Tribe's own building codes are at least as stringent as other building codes on the Island and within the Commonwealth. The Tribe's building inspectors are highly qualified, state-certified and subject to the oversight of both the Aquinnah Tribal Gaming Commission and the federal government's NIGC.

Additionally, the Tribe has an agreement to develop its gaming facility with the Chickasaw Nation's Global Gaming Solutions ("GGS"), a Tribal entity which has successfully constructed and operates numerous gaming facilities, including the United States' largest casino resort at WinStar World Casino & Resort. GGS was chosen, in large part, because of its track record and reputation for excellence. The Tribe has expressed its commitment to pay its fair share for any needed services such as police, fire and EMS services, regardless of whether those services are provided by the Town or others. The Tribe has provided the Town with assurances that the gaming facility's design will be tasteful and in keeping with the architecture of the Island. Quite simply, any legitimate concerns about public health and safety, backed up by science rather than personal preference (or insidious opposition), would have been met through a continued dialogue. But only the Tribe and its political subdivisions (including its building inspectors and its Gaming Commission), together with the NIGC, have jurisdiction over matters integral to the gaming operation.

If the Town is truly concerned about issues of public health and safety, then it will withdraw its letter to the MVC, acknowledge its lack of jurisdiction, and take advantage of the opportunity to reconvene a government-to-government dialogue. Absent that, the Tribe must conclude that the Town's motivation for sending the letter to the MVC is to continue its long-standing agenda of interference with the Tribe's exercise of its sovereign rights regarding gaming, which is in direct defiance of the United States First Circuit Court of Appeals order (dated April 10, 2017).

The Town needs to be reminded that it lost the drawn-out and very costly litigation wherein the First Circuit Court of Appeals made clear that IGRA's preemptive scope usurps the Town's permit authority as it relates to the Tribe's gaming. *Massachusetts v. Wampanoag Tribe of Gay Head (Aquinnnah)*, 853 F.3d 618 (1st Cir. 2017), *cert denied*, 138 S.Ct. 639 (2018). The First Circuit has already made clear that discretionary permits under Town or Commonwealth (or any of their subdivisions) law cannot be used to prevent the Tribe's exercise of its gaming rights. The Tribe must also note that the First Circuit, in its unanimous opinion in favor of the Tribe, reaffirmed its decision in *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685 (1994), wherein it provided guidance regarding a similar provision in the Narragansett Tribe's settlement act. Noting IGRA's preemptive force, the First Circuit clearly stated that state law is preempted on all matters integral to the exercise of the Tribe's gaming rights. *Id.* at 705. Discretionary permits – whether issued by the Town, the MVC or the Commonwealth – allegedly required for the Tribe's gaming facility to move forward are clearly within IGRA's preemptive effect.

Please be advised that any repeated effort by the Town to stop the Tribe's gaming operation will be countered with an aggressive legal defense by the Tribe. Frankly, the Tribe is surprised that the Town would even raise the possibility of further litigation by trying to force the MVC into a position to pursue or be the recipient of litigation in the wake of the Town's unmitigated loss at the First Circuit and then again at the United States Supreme Court. Should further attempts to interfere with the Tribe's right to exercise its sovereignty in relation to its right to construct and operate a Class II gaming facility, the Tribe will seek all available remedies, including claims based on the Town's interference with the Tribe's economic development.

Additionally, if the Town, or any other political subdivision of the Commonwealth, interferes with matters integral to the Tribe's exercise of its gaming rights, the Tribe will seek a judgment terminating and enjoining any and all Town jurisdiction over the Tribe's lands and affairs. The Tribe must remind the Town that District Court Judge Saylor himself acknowledged that the MOU had expired under its terms, but then decided to apply the doctrine of collateral estoppel, citing the *Shed* case, to rule that the MOU remained in effect. Judge Saylor's decision to that effect was vacated by the First Circuit's ruling affirming the Tribe's rights. No prior litigation addressed the precise question of whether the MOU had expired on its express terms, hence the doctrine of collateral estoppel did not apply. In other words, the MOU is no longer in effect, nor has it been for many years. While the Tribe has always been desirous of working within the spirit of the MOU as to matters not integral to its gaming operation, the Town's recent actions inform that the Tribe's desires are not reciprocated.

Again, we encourage the Town to withdraw the letter and re-engage in a respectful government-to-government dialogue. We are willing to try to work with the Town to address matters of concern related to public safety, such as providing for necessary law enforcement and emergency services. We are and always have been willing to provide fair compensation to the Town for such services, as allowable under the IGRA. We would prefer that the Town work collaboratively with us so that the gaming facility becomes a source of income and employment, community entertainment and enjoyment. There are countless examples where initial local skepticism and opposition were set aside and great community partnerships were forged because of tribal gaming facilities. That is what we desire and expect to have happen here. So once again, we are encouraging the Town to set aside the adversarial position it continues to take, and begin to forge a new relationship of respect and cooperation that will provide mutual benefits to both of our governments.

In Balance, Harmony and Peace,

Cheryl Andrews-Maltais, Chairwoman
Wampanoag Tribe of Gay Head (Aquinnah)
Aquinnah Wampanoag Gaming Corporation

Cc: Gary Haley
Jim Newman
Julianne Vanderhoop
Ronald Rappaport
Martha's Vineyard Commission

preliminary injunction under Rule 65 has been met. That is a four-part standard:

The first part is the moving party must demonstrate a likelihood of success on the merits. As I see it, the issue is a very narrow one. It is not the broad issue of whether gaming is permitted on tribal land, whether the Indian Gaming Rights Act preempts the Settlement Act, whether it preempts state laws or town zoning but rather whether the tribe can build a building without applying for a building permit and getting the required inspections along the way and ultimately an occupancy permit.

04:00PM

As I think Mr. Skinner said, rules apply until -- he didn't use the right past particle -- until proved otherwise. 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, or to put it another way, there are two likely scenarios. The first is that the tribe wins and they can open a casino in the former or what was intended to be the community center, but they'll need permits in order to do so.

04:01PM

The town could not enforce their laws in a nonneutral way in order to unduly burden or harass the tribe or to prevent them from opening the casino because they don't like gambling, but the tribe would nonetheless would have to demonstrate to the satisfaction of the town building inspector that the

building was safe and in compliance with code.

And the second option is that the tribe loses and that the community center cannot be turned into a casino, but under 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.

04:02PM Those are requirements of general applicability. They apply to all structures, as I understand it. They are for public health and safety, and they are independent of the gaming issue generally and the zonings issue specifically as it applies to casino gaming.

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.

There is also an overlay on this, maybe two overlays 04:02PM on this which also inform the decision. The first is the operational plan from 2011 under which the tribe agrees to use the permit and inspection services of the town, and the second is the conditions imposed by the Martha's Vineyard Commission when it approved the Wampanoag Community Center as a DRI in 2007, which, among other things, if the tribe altered its use,