
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 19-1661, 19-1857

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

Plaintiffs-Appellees/Cross-Appellants,

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff-Appellee,

v.

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

Defendants-Appellants/Cross-Appellees,

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

Third Party Defendants/Appellees.

Nos. 19-1729, 19-1922

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

Plaintiffs-Appellees/Cross-Appellants,

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff-Appellee,

v.

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

Defendants-Appellants/Cross-Appellees,

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

Third Party Defendants.

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

**MARTHA’S VINEYARD COMMISSION’S REPLY TO THE
AQUINNAH TRIBE’S OPPOSITION TO MOTION FOR LEAVE
TO FILE AMICUS CURIAE BRIEF**

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The Martha's Vineyard Commission ("MVC") submits this reply to the Tribe's¹ opposition to its Motion for Leave to File Brief *Amicus Curiae*.

I. INTRODUCTION

The MVC filed for leave to submit a brief *amicus curiae* in support of the plaintiffs-appellees/cross-appellants, the Aquinnah/Gay Head Community Association, Inc. ("AGHCA") and the Town of Aquinnah, MA (the "Town"), (collectively, the "Town/AGHCA"), as the MVC is in agreement with the Town/AGHCA's position that the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 et seq., did not repeal the Settlement Act's² grant of general permitting jurisdiction to the Town and the MVC. The MVC noted from the outset that its statutory review of the proposed development did not include any aspect of the gaming use.

As set forth in the motion for leave and accompanying *amicus* brief, the submission of the MVC is appropriate and necessary as the statutory role of the MVC is put at issue in the Tribe's opening brief. Against that backdrop, the proposed *amicus* brief will provide this Court with a broader context and

¹ As used herein, "the Tribe" shall mean defendants-appellants/cross-appellees the Wampanoag Tribe of Gay Head (Aquinnah); the Wampanoag Tribal Council of Gay Head, Inc.; and the Aquinnah Wampanoag Gaming Corporation.

² MVC jurisdiction in this matter derives from a 1983 settlement agreement entered into by and between the Tribe, the Commonwealth, the Town and the AGHCA which was later codified in federal law as the "Settlement Act." Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of

perspective from which to assess the parties' positions by providing clarity and detail as to the role, purpose and regulatory planning authority of the MVC as well as detailing the historical relationship between the MVC and the Tribe concerning MVC review of the gaming facility and other development projects.

In opposing the MVC's motion for leave, the Tribe sets forth two primary objections: First, the Tribe suggests that the MVC brief has "nothing uniquely helpful or informative to add" and, second, the Tribe asserts that the MVC motion and brief fail to meet the federal courts' criteria for a "proper" *amicus* brief. The MVC respectfully submits that the Tribe is wrong on both counts. As expanded upon below, the Tribe's opposition inaccurately characterizes the content and purpose of the MVC brief and incorrectly asserts that the 3464-word brief fails to comply with relevant criteria for page and word count as well as disclosures regarding funding.

Briefly stated, as a regional planning agency statutorily charged with the review and regulation of land use in the environmentally distinct setting of Martha's Vineyard – including projects of a certain magnitude including the project proposed by the Tribe – the MVC is uniquely situated to provide this Court with additional context and information concerning the regulatory authority that is at issue in this matter as well as to provide clarity concerning the MVC's efforts to

1987, Pub. L. No. 100-95, 101 Stat. 704 (the "Settlement Act") (previously codified at 25 U.S.C. § 1771 *et seq.* (2012)).

establish an informal review process that was ultimately rejected by the Tribe. The MVC brief addresses the following items of potential interest to this Court: the jurisdiction and authority of the MVC, as well as its planning and regulatory functions, as set forth in Martha's Vineyard Commission Act (Chapter 831 of the Acts of 1977, as amended); the MVC's generally applicable permitting and land use requirements; and the purpose and process of MVC review. As the fairness of the MVC and the review process is also put at issue by the Tribe, the MVC brief seeks to provide this Court with clarification concerning the fair and uniform application of MVC review to all qualifying development projects designed to mitigate and ameliorate detrimental island-wide impacts.

It is for these proper reasons that the MVC seeks leave of this Court to file a brief *amicus curiae* in support of the Town/AGHCA's position that this Court should affirm the decision of the District Court holding that IGRA did not impliedly repeal the Town's statutory authority to enforce generally applicable local regulatory, permitting, zoning and licensing requirements not related to the specific operations of a gaming facility.

II. THE CONTENT OF THE MVC BRIEF IS APPROPRIATE FOR *AMICUS CURIAE* SUBMISSION

An *amicus curiae* brief permits a nonparty with the opportunity to provide the Court with a different perspective than the parties' briefs and to offer the Court additional context from which to assess their relative positions. It has been said

that the role of an *amicus* is to “assist the court ‘in cases of general public interest by making suggestions to the court, by providing supplementary assistance to existing counsel, and by insuring a complete and plenary presentation of difficult issues so that the court may reach a proper decision.’ ” *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 308 F.R.D. 39, 52 (D. Mass.) *aff’d*, 807 F.3d 472 (1st Cir. 2015), citing *Sierra Club v. Wagner*, 581 F.Supp.2d 246, 250 n. 1 (D.N.H.2008) (quoting *Newark Branch, N.A.A.C.P. v. Town of Harrison, N.J.*, 940 F.2d 792, 808 (3d Cir.1991)). An *amicus* may be able to offer background information that places the issue in a historical context and provides further support for the party whose position the *amicus* endorses. *See, e.g., Doe v. Acton-Boxborough Reg’l Sch. Dist.*, 468 Mass. 64, 70 n.12 (2014).

Here, the MVC is able to provide this Court with broader perspective and context by furnishing information as to the regulatory scheme, purpose and powers of the MVC generally and as applied to the development projects of the Tribe— matters not thoroughly addressed in the briefs of the parties. Specifically, the MVC hopes to assist this Court by providing specific information concerning i) its purpose, function and procedures and ii) its efforts to find a mutually agreeable process which would allow the MVC the opportunity meet its statutory review obligations without compromising the Tribe’s position as to sovereign immunity.

The Tribe mischaracterizes the MVC brief as duplicative of the Town/AGHCA’s brief and therefore, unnecessary. The Tribe attempts to discredit

the content of the brief by suggesting that it offers nothing more than a “rehashing of the underlying facts”. This is incorrect. In addition to amplifying on points made in the briefs of the litigants, the MVC’s brief provides new information concerning the structure, purpose, and processes of the MVC, generally and as relating to the Tribe, and provides clarity concerning inaccurate statements or mischaracterizations made by the Tribe about the MVC and/or the review process.

To be clear, the role, purpose and authority of the MVC and details of the historical relationship between the MVC and the Tribe concerning MVC review of the gaming facility and other development projects are not addressed “at length” in the Town/AGHCA’s brief. The Town/AGHCA’s brief does not address the statutory power or jurisdiction of the MVC, the non-gaming purpose of MVC review, the generally applicable criteria for referral to the MVC, or the process of DRI review – all of which are addressed in the MVC *amicus* and are necessary for understanding the context within which this dispute operates. Indeed, most of the discussion of the MVC in the brief of the Town/AGHCA is limited to footnotes. *See* Town/AGHCA Br. FN 6, 13 & 16. Contrary to the Tribe’s position, it is not improper for an *amicus* brief to amplify and to provide additional context for issues not fully addressed by the parties.

The MVC brief serves a further purpose in providing this Court with specific information on a number of MVC-related matters brought into issue by the Tribe. For example, in detailing the historic relationship between the parties, the MVC

brief offers clarification concerning the Tribe's assertions that the Town has "utilized the MVC to prevent the Town from issuing permits". Opening Br. 18. The Tribe further asserts that the gaming facility project was referred to the MVC as a "Development of Regional Impact" ("DRI") in an "attempt to block the Tribe's efforts to construct its gaming facility". By setting forth the general guidelines for DRI referral and review as well as the manner in which the MVC attempted to informally apply such standards to accommodate the Tribe with respect to the proposed gaming facility, the MVC is able to provide this Court with further context for the underlying dispute.

The MVC also seeks to clarify statements made by the Tribe concerning the interactions between the MVC and the Tribe around the informal review of the proposed facility. The Tribe describes the interaction with MVC as friendly but ultimately unsuccessful because the Town/AGHCA filed its motion for entry of final judgment at the District Court. Opening Br. 10. That description is misleading. While the Town/AGHCA's filing may have impacted the Tribe's interest in working with the MVC, it is misleading to suggest that the Tribe had accepted the informal process offered by the MVC. As explained in the brief, during the period of communication with the Tribe, the MVC made clear that the gaming use of the proposed facility would not be the subject of the review. Instead, the parties would focus on arriving at a consensus as to the nature of the impact that a development of this size and scope would have on the subject property and

the greater Vineyard community. The goal was to share information concerning the project and to find ways to mitigate adverse impacts – not to preclude the use of the facility for gaming. After an initial call which yielded little detail as to the plans for the project, and despite follow up, the Tribe declined to share any information concerning even the most basic aspects of the project such as site plan details, utility service and drainage plans, anticipated housing needs, municipal service requirements, etc. As stated in the MVC brief, once the Tribe declined to share information or participate in the informal process, it had no choice but to hold a public hearing (which the Tribe did not attend) and issue a decision declining to authorize the proposed project. However, that decision was issued without prejudice, allowing for future consideration. This information provides the Court with context within which to consider the Tribe’s version of the events, wherein the Tribe states that “on July 19, 2019, the MVC issued a decision, formally rejecting the project and prohibiting the Town’s authorities from issuing any permits for any project involving the Tribe’s gaming facility.” Opening Br. 10. As stated, that was not the case or the preference of the MVC.

III. THE MVC BRIEF COMPLIES WITH THE PROCEDURAL CRITERIA FOR THE FILING OF AN *AMICUS* BRIEF

Finally, the Tribe suggests that this Court should reject the MVC *amicus* brief because i) the Town and the MVC are interchangeable, ii) the brief was “funded” by the Town, and is therefore not in compliance with Fed. R. App. P. 29,

and, ii) the brief is somehow non-compliant with respect to page and word limits.

The Tribe is demonstrably wrong on these points.

A. The MVC And The Town Are Not Interchangeable For The Purpose Of The *Amicus* Brief Or Otherwise

The MVC is one of 14 regional planning agencies in the Commonwealth established by state enabling legislation. It is comprised of 21 Commissioners elected by the residents of Martha's Vineyard or appointed by elected officials and its planning jurisdiction extends to the six towns located on Martha's Vineyard, including the Town of Aquinnah. The MVC is statutorily obligated to review a project or development which qualifies as a DRI and to attempt to fashion mitigation measures designed to ameliorate any potential island-wide impacts. Given the anticipated scope and impact of the proposed facility – in particular, the impact that a development of this size and magnitude would have on traffic, housing, public safety, sanitation and the environment, the Towns of Aquinnah and Chilmark, applying the statutory criteria and MVC guidance, each referred the gaming project to the MVC for review. The MVC was statutorily obligated to conduct that review.

The fact that the Town of Aquinnah is subject to the jurisdiction of the MVC for the purpose of DRI review does not make the parties “interchangeable”, thus disqualifying the MVC from submitting a brief. Nor does the MVC's support for the Town/AGHCA's position concerning IGRA and the Settlement Act disqualify

the MVC from participating as an *amicus*. A disagreement as to the substance of a brief is not reason for this Court to deny permission for leave to file.

If such connections were to disqualify a party from submitting a brief, the *amicus* brief filed in support of the Tribe's position by the National Conference of American Indians ("NCAI") and USET Sovereignty Protection Fund ("USET") (Document: 00117556072) would be subject to the same challenge, as the Tribe is a member of the USET Sovereignty Protection Fund, (*see*, <https://www.usetinc.org/about-uset/member-tribes/>). However, recognizing that such arguments are without merit, and in a clear acknowledgement that a difference of opinion as to the appropriate outcome of a dispute is not grounds for withholding consent for filing, the Town/AGHCA consented to *amicus* brief filed by NCAI/USET.

B. No Party, Party's Counsel, Or Other Person Contributed Any Money Intended To Fund Preparing Or Submitting The MVC *Amicus* Brief

The Tribe also calls into question the veracity of the MVC's certification pursuant to Fed. R. App. P. 29(a)(4)(E). In the proposed *amicus* brief, the MVC makes the unqualified certification that no party, party's counsel, or other person contributed any money intended to fund preparing or submitting the brief as required under Fed. R. App. P. 29(a)(4)(E). Although the MVC received no money intended to fund the preparation or submission of the brief from the Town or any other party, in the interest of transparency, the MVC noted that:

[P]ursuant to its enabling statute, the net annual expenses of the MVC (after deductions from sources) are paid pro-rata by each member town into a general fund pool on the basis of their respective equalized valuation for property tax purposes. Accordingly, it is possible that a small percentage of those funds submitted by the Town of Aquinnah to the MVC operating costs might be used for MVC legal matters; however, any such funds have been excluded for this specific purpose and the MVC certifies that Town did not directly contribute any monies to fund the preparation or submission of this brief.

MVC Br. 6, FN 1.

As a result of this undisputed fact, the MVC was able to properly certify that the Town did not contribute any money – directly or indirectly – for the purpose of funding the preparation and filing of the *amicus* brief.

C. The MVC *Amicus* Brief Complies With Page And Word Limits

Setting aside the Tribe’s position concerning the Town/AGHCA’s use of page and word limits, an issue addressed and seemingly disposed of in the Town/AGHCA’s Principal/Response Brief 51, FN 19, the Tribe’s argument that the proposed brief, consisting of 3464 words, does not meet the procedural criteria for submission must fail. *Amicus* briefs may be no more than one-half the maximum authorized by the rules for a party’s main brief (in this instance, 13,000 words) unless the *amicus* obtains “permission” for a longer filing. Fed. R. App. P. 29(d). The proposed brief falls well below the 6,500-word limit applicable to *amicus* briefs set forth in Fed. R. App. P. 29.

IV. CONCLUSION

For the foregoing reasons, the Martha's Vineyard Commission respectfully requests that this Court grant the motion for leave and allow the filing of the MVC's brief *amicus curiae*.

Respectfully submitted,

MARTHA'S VINEYARD
COMMISSION,

By its attorneys,

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Dated: April 13, 2020

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 29(d)(2)(c), 32(a)(5), (6) and 32(g), I certify that the attached *Martha's Vineyard Commission's Reply to the Aquinnah Tribe's Opposition to Martha's Vineyard Commission's Motion for Leave to File Amicus Curiae Brief* is proportionately spaced, uses 14-point Times New Roman type, and contains 2588 words, exclusive of the table of contents, table of authorities, and certificates of counsel.

/s/ Brian M. Hurley
Brian M. Hurley

Dated: April 13, 2020

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing *Martha's Vineyard Commission's Reply to Aquinnah Tribe's Opposition to Martha's Vineyard Commission's Motion for Leave to File Amicus Curiae Brief* with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system on April 13, 2020.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system as follows:

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Dated: April 13, 2020