

Follow up response to citizens' questions about the federal fee-to-trust acquisition process and the potential Pamunkey Indian Tribe casino development

The following is in response to some citizens' questions about the federal fee-to-trust acquisition process and the potential Pamunkey Indian Tribe casino development that arose following the Town Hall informational presentation on May 24, 2018. Below is the response to those citizen questions, as answered by Foley Quigley Law Firm.

1. *“Does the Chesapeake Bay act come into play with such a huge business development along the Chickahominy River/creek area?”*

Response: The National Environmental Policy Act (NEPA) applies to trust land application decisions. Therefore, under the federal Part 151 regulations governing the Secretary of the Interior's decision whether to approve a trust land acquisition application, the tribal applicant must submit environmental information concerning the proposed use of the land that satisfies the NEPA requirements. This NEPA review process typically involves a number of public meetings for interested persons to attend and submit information about any environmental concerns they have with the proposed development that is the subject of the trust application. This information would include anticipated environmental impacts and plans for mitigating adverse impacts. Any concerns about how the Chesapeake Bay Act may restrict the proposed development would be raised and addressed as part of this NEPA process.

In addition, as part of the Part 151 process, the Department of the Interior requests comments from state and local governments about the trust land acquisition application, especially about jurisdictional problems or potential conflicts of land use that may arise from the proposed development. Again, this is an instance where information about the interplay of the Chesapeake Bay Act may be submitted and considered as the Department is required under the Part 151 regulations to consider this land use conflict information when evaluating whether to approve the trust land application.

Any Pamunkey Tribe trust land application involving a tribal casino development will also be subject to the federal Part 292 regulations. Under these regulations, if a tribe does not qualify for a “land claim settlement,” “initial reservation” or “restored land” exception, the tribe must seek a so-called “Secretarial Two-Part” determination from the Department of the Interior. Under this process, the Secretary must consult appropriate state and local officials in evaluating whether the proposed gaming development will “not be detrimental to the surrounding community.” Again, this would include information about anticipated environmental impacts and plans for mitigating adverse impacts, including information about how the Chesapeake Bay Act may restrict the proposed development.

2. *“How will traffic flow in and out of this casino/resort be handled?”*

Response: Generally, traffic flow patterns, along with air and noise quality issues, etc.,

associated with any trust land application for a proposed tribal casino development are addressed as part of the NEPA review process described in response to the questions above. Likewise, this is something that would be discussed and analyzed as part of the Part 151 “comment” process and the Part 292 “consultation” process described in response to the questions above. Often, off-reservation impacts such as possible disruptions in traffic patterns arising from a proposed tribal gaming development are mitigated using a “cooperative inter-governmental agreement” that is negotiated between the tribe and the local government. In sum, the answer as to how traffic patterns will be handled with respect to any potential Pamunkey Tribe casino development is to be determined after receiving input from local citizens/governments under the NEPA, Part 151 and Part 292 processes.

3. *“The land was bought by a Mr[.] Yarbrough he paid 3.2 million, when the land goes into trust who pays Mr. Yarbrough for his land?”*

Response: Once the Secretary of the Interior’s makes the decision to approve a trust land acquisition application, the Secretary will issue a deed stating that title to the land is held in trust in the name of the United States on behalf of the tribe. Generally, at some point prior to this in the trust land application process the tribe has acquired an ownership interest in the land. Typically, a partner of the tribe in the tribal casino development like Mr. Yarbrough will acquire the proposed casino site land first and then enter into an agreement to transfer the land to the tribe upon receipt of notice that the Secretary is prepared to approve the trust land application. The price for the transfer to the tribe is determined by the tribe and its tribal development partner – it could be the same price the tribal development partner paid for the land, or a price that is more than the amount the tribal development partner paid for the land, or the tribal development partner may have simply agreed to gift the land to the tribe without any payment. And the agreement may be that land will be gifted directly by the tribal development partner to the United States to be held in trust for the tribe.

4. *“If the Native Americans pay for it where do they get the funds?”*

Response: Again, what payment, if any, that the tribe making the trust land application must pay to acquire ownership in the land is determined in the “open market.” Like any other governmental body, the tribe can use any financial means available to it to make the payment. This could be funds the tribe holds in its general treasury account from any number of sources, including other commercial tribal enterprises, tribal government revenues and federal government development program sources. Often, the payment for the land is financed by loans/bonds taken out by the tribe as part of the casino development project, with such terms as the banks and other lenders demand (this can include the tribal development partner agreeing to wait for receipt of its payment associated with the land acquisition cost until cash flow from the constructed and opened casino permits).

5. *“Am I correct the NA’s can not use the land at all till it would be put in trust?”*

Response: No, like any other landowner in Virginia, the tribe and/or its tribal

development partner can use any land they own in any manner that is consistent with current state and local zoning laws and land use regulations. This land is also subject to state and local taxation and property taxes. Once the land is accepted into trust, however, the land is not subject to state regulatory jurisdiction nor state/local taxation. Again, it is not uncommon in tribal casino development situations for the tribe to negotiate, in lieu of local taxes, a “cooperative inter-governmental agreement” with the local government units that includes some form of reimbursement to the local units to cover the cost any anticipated increase in local services borne by the local units with respect to the casino development (this amount is sometimes offset by the anticipated increase in tax revenues gained by the local unit from an increased income/sales/property tax base provided by the ancillary developments on land subject to local taxation arising from the tribal casino development).

6. *How will the Tribe’s law enforcement help with this situation [assumed increase in crime associated with casino openings]? I believe the majority of these crimes will be off the casino property so will the Tribe pay for extra police force required to address the increase in crime? The Tribe will need their own fire department but that is their issue. However, there will be an increase in the need for medical/fire/rescue to address the other developments that will follow. How will the Tribe address the need for these additional resources?”*

Response: It is not uncommon in tribal casino development situations for the tribe to negotiate, in lieu of local taxes, a “cooperative inter-governmental agreement” with the local government units that includes some form of reimbursement to the local units to cover the cost of any anticipated increase in local services borne by the local units with respect to the casino development. Generally, unless the tribe already has a well-established law enforcement/fire/rescue department, a tribe will contract for these services with local units to provide them on the trust land. As the tribe develops its own law enforcement/fire/rescue department internally, the tribe will often reach out to offer employment to local law enforcement/fire/rescue officers. In this way a balance of law enforcement/fire/rescue staff for the area around the casino emerges.

As to additional law enforcement/fire/rescue resources needed in connection with ancillary developments that may arise in the area following the tribal casino development, in addition to any funds available to local units from a “cooperative agreement” with the tribe, the increase in the local income/sales/property tax base is often used to meet these needs as determined by the local government.

In addition, the issue of local law enforcement/fire/rescue services needs and appropriate staffing levels arising from the proposed tribal casino development is often commented upon and addressed as part of the NEPA review, Part 151 and Part 292 processes to which the trust land application is subject. For example, the NEPA review looks at several things, including social issues like any anticipated increase in crime and fire/rescue incidences; Part 151 looks at the potential impacts on regulatory jurisdiction and “the removal of the land from the tax rolls”; and the Part 292 “Secretarial Two-Part” determination process looks at anticipated impacts to “social

structure, infrastructure, [and] services” and “economic development” that may be “detrimental to the surrounding community” and “identification of sources of revenue to mitigate them.”

7. *“Will the Tribe provide compensation to the citizens of New Kent County for the loss of value in their residencies?”*

Response: It is not common for a tribe provide direct compensation to local residents in connection with any trust land application for a tribal casino development. On the other hand, it is not uncommon in tribal casino development situations for the tribe to negotiate, in lieu of local taxes, a “cooperative inter-governmental agreement” with the local government units that includes some form of reimbursement to the local units to cover the cost of any anticipated increase in local services borne by the local units with respect to the casino development. Moreover, any loss of local government revenue from anticipated reduced property value would be commented upon and addressed as part of the Part 151 process (potential impact on “the removal of the land from the tax rolls”) and Part 292 process (anticipated impact on “housing”) to which the trust land application is subject.

8. *“The Tribe will be required to conduct a traffic study and New Kent County and the State needs to insist that all expenses for additional traffic controls is paid for by the project.”*

Response: Again, as a general matter traffic control measures, along with air and noise quality issues, etc., associated with any trust land application for a proposed tribal casino development are addressed as part of the NEPA review process to which the trust land application is subject. Likewise, this is something that would be discussed and analyzed as part of the Part 151 “comment” process to which the trust land application is also subject, and the Part 292 “consultation” process which may apply to the trust land application. Often, the need for off-reservation traffic controls arising from a proposed tribal gaming development is mitigated using a “cooperative agreement” that is negotiated between the tribe and the local government. In sum, the answer as to how additional traffic controls will be handled with respect to any potential Pamunkey Tribe casino development is to be determined after receiving input by local citizens/governments under the NEPA, Part 151 and Part 292 processes.

9. *“How will the Tribe pay for these burdens [assumed increased social costs] placed on New Kent (County)?”*

Response: Any assumed increased in social costs placed on New Kent County arising from the proposed tribal casino development will likely be addressed in a “cooperative inter-governmental agreement” between the tribe and local government units. These agreements typically provide that, in lieu of local taxes, the tribe make a contribution for some period and in such negotiated amount to the local units to cover the cost of any anticipated increase in local services borne by the local units with respect to the casino development, including the establishment of gambling addiction and other crisis services programs. These agreements often have a provision recognizing the anticipated economic benefits to the local area (increased employment and economic development) and an increased income/sales/property tax base

provided by the ancillary developments on land subject to local taxation arising from the tribal casino development, which local units can use in part to address any assumed increase in social costs.

In addition, addressing anticipated social costs to the local area is part of the NEPA review process which looks at several things, including social issues; the Part 151 process which looks at the potential impacts on regulatory jurisdiction and “the removal of the land from the tax rolls”; and the Part 292 “Secretarial Two-Part” determination process which looks at anticipated impacts to “social structure”, “services” and “community character” that may be “detrimental to the surrounding community,” as well as the anticipated cost “to the surrounding community of treatment programs for compulsive gambling attributable to the proposed gaming establishment” and “identification of sources of revenue to mitigate them.”