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Superior Court Hears Key Case

Aquinnah Lawsuit Against Tribe Will Decide Sovereignty Issues; Wampanoag Leaders Wanted Case Tried in Federal Court

By CHRIS BURRELL

The question of whether claims of sovereignty entitle the Wampanoag Tribe of Gay Head (Aquinnah) to skirt local and state laws will be decided in Dukes County superior court, rather than a federal district court in Boston where lawyers for the tribe wanted the case tried.

On the surface, the case turns on a simple matter of zoning enforcement. When the tribe built a small shed at its shellfish hatchery in March 2001 without obtaining a building permit, the town of Aquinnah filed a lawsuit demanding compliance with zoning bylaws.

Both sides instantly saw the case as significant, one that would both set a precedent for future town-tribe relations and test the terms of the Settlement Agreement of 1983 that laid the groundwork for the Wampanoags' federal recognition four years later.

"A genuine controversy exists on this issue requiring judicial guidance because the dispute is likely to reoccur," wrote Aquinnah town counsel Ron Rappaport in the complaint filed on May 1, 2001, in Dukes County superior court.

Lawyers for the tribe viewed the lawsuit literally as a federal case and motioned a month later to move the legal battle to U.S. district court in Boston. The argument by the tribe's lawyer, Robert Mills of Hyannis, hinged on federal recognition of the Wampanoags, which he said guaranteed the tribe "inherent sovereign authority," right to self-government and immunity from lawsuits.

Meanwhile, a taxpayers' association and one abutter of the shellfish hatchery both took legal action to join the town in the lawsuit against the tribe, concerned that the town leaders might lack the political resolve to pursue the case to its conclusion.

This week, the Hon. Douglas P. Woodlock, U.S. district court judge, was not convinced that the case should be heard in federal court, and remanded the lawsuit back to the superior court in Edgartown.

Judge Woodlock looked for guidance to the settlement agreement negotiated almost 20 years ago by the tribe, the town, the state and Aquinnah landowners. That agreement conveyed designated lands to the tribe, but assured that "those lands would be subject to zoning and to the civil and criminal jurisdiction of the commonwealth and the town."

The judge cited those terms before stating that "the federal act at issue here directs consideration of state and local law, not federal law."

Aquinnah selectman Karl Burgess welcomed the news. "It's where we thought it should be, and we're pleased with that," he said. "We're not so concerned about the shed. The main issue is the settlement agreement."

Neither Mr. Mills nor Wampanoag tribal chairman Beverly Wright returned telephone calls from the Gazette.

Before the tribe began construction on its shellfish hatchery in March 2000, it sought building permits from the town. But when it came time to build a shed and a pier platform on the Cook Lands, a coastal area bordered by Menemsha Pond, the tribe issued its own permit under its own procedures.

The board of selectmen voted 2-1 last year to bring the issue to trial. Selectman Carl Widdiss, a tribal member, cast the dissenting vote, telling the Gazette he hoped the town and the tribe could strike an accord out of court and save the town legal costs.

Given the go-ahead, Mr. Rappaport argued the significance of the case: "The structures that the tribe seeks to develop on this wetlands property are small, however, the dispute goes to the heart of the relationship between the town and the tribe established in the settlement agreement and the state and federal implementing legislation," he said in his filing with the court. "If the tribe can simply ignore the town's carefully enacted zoning bylaws and build as it wishes, the town would be deprived of a significant benefit that it realized under the settlement agreement."

Last July, the Gay Head Taxpayers Association filed a motion in federal court to join the lawsuit, arguing much the same point. "The dispute over a shed is a relatively small one, but it has broader implications for the 19-year-old settlement agreement ratified by state and federal law. The tribal council's claim of immunity from the town's zoning laws threatens fundamental rights bargained for by the town and the taxpayers in the settlement agreement," wrote attorney James Quarles 3rd of the Washington, D.C., office of the law firm Hale & Dorr.

Mr. Quarles recalled that Aquinnah taxpayers originally formed their group to defend their interests because "many members of the town government were members of, or affiliated with the tribal council."

That same concern over town leadership also prompted another group to file a motion to join the lawsuit against the tribe. Last week, a Hingham lawyer, Michael Nuesse, representing members of the Benton family trust who own land abutting the Cook Lands, argued in his motion that the town is not enforcing the cease-and-desist order on construction at the shellfish hatchery.

"To date, the town has taken no action to enforce the stipulation in the face of the tribe's blatant illegal activity. The Benton Trust therefore finds it necessary to seek intervention in this action in order to protect its property against the continuing unpermitted, contemptuous and illegal activity of the tribe," wrote Mr. Nuesse.

According to Mr. Nuesse, the tribe has continued to dig trenches and extend the pier in defiance of the cease-and-desist order from building inspector Jerry Wiener, which was supposed to remain in effect pending an outcome in the lawsuit.

But two weeks ago, Mr. Wiener noticed activity going on at the shellfish hatchery and advised an electrical contractor there to stop work because he lacked a town-issued permit.

"I was very formal with him and said, 'If you're doing work without a permit, you run the risk of your license being suspended,' " Mr. Wiener told the Gazette yesterday.

It's unclear now when the lawsuit will be heard in superior court. Scheduling of cases is expected to take place next week; the fall sitting convenes on Monday.

"It's a very important case," said Mr. Burgess. "If the tribe were successful, the implication would be that it wouldn't have to adhere to town or state land use requirements. If you see the logic of it, the tribe owns land all over the Island and could choose to put something up without adhering to any town rules."

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