

Vineyard Gazette Online

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Key Tribal Sovereignty Case Returns

By JULIA WELLS

A special superior court sitting is now set for next month in Edgartown on a case that will ultimately decide whether the Wampanoag Tribe of Gay Head (Aquinnah) has the power to police itself when it comes to local zoning rules. The case will also decide the much larger issue of whether the tribe cannot be sued because of sovereign immunity.

The case has attracted little attention, despite the fact that the outcome could have far-reaching implications for every town on the Vineyard.

Last week the Hon. Richard F. Connon, an associate justice of the superior court, set Feb. 4 as the date for a special sitting in the Edgartown courthouse to hear arguments on the merits of the case.

Among other things, the case will test the strength of the 1983 settlement agreement between the town and the tribe that led to federal recognition of the tribe in 1987.

The dispute began when the tribe built a small shed and a pier at the tribal shellfish hatchery in March 2001 without obtaining a building permit. The hatchery is located on the Cook Lands fronting Menemsha Pond in Aquinnah, one of four land areas that were conveyed from the town to the tribe under the terms of the settlement agreement.

In May 2001 town officials went to court to compel the tribe to comply with local zoning rules.

In fact the tribe has complied with zoning rules over the years and has applied for a number of building permits, including a permit for the tribal housing project in Aquinnah and for the shellfish hatchery.

The shed that was built near the hatchery is meant to house electrical equipment, and on the face of it the zoning violation was considered minor. But the larger issues quickly bloomed when the tribe moved to have the case heard in federal court. Attorneys for the tribe claim that the Wampanoags have their own power of enforcement over local zoning regulations because they are an independent government entity, and they also claim that the tribe cannot be sued because of sovereign immunity.

Last fall the Hon. Douglas P. Woodlock, a U.S. District court judge, sent the case back to state court.

Protection from litigation because of sovereign immunity is considered the larger issue - if the tribe prevails on this claim then compliance with local zoning becomes somewhat irrelevant, because without litigation there is no remedy for enforcement.

The history of the case is rooted in four key events that took place in the 1980s: the 1983

settlement agreement, a state law adopted in 1985 ratifying the terms of the agreement, a federal law adopted in 1987 also ratifying the terms of the agreement and federal recognition of the Wampanoag Tribe of Gay Head in 1987. To date the Wampanoags are the only Native American tribe in Massachusetts to receive federal recognition.

The settlement agreement and the state and federal acts all contain explicit language noting that the land conveyed to the tribe is subject to state and local laws.

Between now and Feb. 4, Judge Conan is also expected to rule on a motion by two outside parties to intervene in the case on the side of the town: the Gay Head Taxpayers' Association and the Benton Family Trust, an abutter to the Cook Lands.

"This dispute over a shed and a pier is a relatively small one, but it has broader implications for the 19-year-old settlement agreement ratified by state and federal law," wrote James L. Quarles 3rd, a partner at Hale and Dorr in Boston who represents the taxpayers' association, in the motion to intervene in the case. "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," he concluded.

Judge Connon, who is the regional administrative judge, set the Feb. 4 court date last week.

Aquinnah town counsel Ronald H. Rappaport is representing the town in the case. The tribe is represented by Conly J. Schulte, a partner with Monteau & Peedles in Omaha, Neb., and Robert Mills, a partner with Wynn & Wynn in Barnstable.

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