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Town and Tribe Collide in Court

Case Set for Wednesday Hearing Has Far-Reaching Implications; Outcome Hinges on Issue of Tribal Sovereignty

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Arguments are set for next week in a court case that will decide whether the Wampanoag Tribe of Gay Head (Aquinnah) is subject to local zoning rules. The weighty case - whose outcome is expected to have far-reaching implications for every town on the Vineyard - hinges on the much larger issue of whether the tribe cannot be sued because of sovereign immunity.

If the tribe prevails on this claim, then compliance with local zoning becomes irrelevant, because without litigation there is no remedy for enforcement.

A special Dukes County superior court sitting is scheduled for 10 a.m. Wednesday in the Edgartown courthouse to hear the case, which was sent back to state court by a federal judge last fall.

The Hon. Richard F. Conan, an associate justice of the superior court, will preside over the session.

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 Wampanoags are the only federally recognized tribe in the commonwealth.

The case is complicated and involves a number of legal twists. In short form, attorneys for the tribe claim that because sovereign immunity protects the tribe from litigation, the case cannot properly be heard in state or federal court. Attorneys for the town claim that when it comes to zoning and land use law, the tribe waived sovereign immunity when it signed the 1983 settlement agreement with the town that later led to federal recognition.

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 of 2001, town officials went to court to compel the tribe to comply with 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.

Last fall U.S. District Court judge Douglas P. Woodlock sent the case back to state court. Judge Conan set a court date for this month to hear arguments in the case.

Late this week attorneys for the tribe filed a motion to dismiss the case, claiming that because sovereign immunity protects the tribe from litigation the state court has no jurisdiction to hear the case.

"We are asserting the court does not have subject matter jurisdiction to even hear this case, and we are saying that the tribe's Congress has never terminated the tribe's sovereign immunity," said Douglas J. Luckerman, a Lexington attorney who recently came on as counsel to the tribe on the case.

"Perhaps they would have benefited from raising the issue of sovereign immunity in 1983," Mr. Luckerman added.

Town attorneys have another view, and it is anchored in the 1983 settlement agreement between the town and the tribe that later led to federal recognition.

"By agreeing to be subject to zoning [in the 1983 settlement pact], the tribe necessarily 'agreed' to the judicial review provisions ... which grant the land court and superior court jurisdiction to hear zoning enforcement actions," wrote Aquinnah town counsel Ronald H. Rappaport in a recent brief on the case.

"The settlement lands are subject to the jurisdiction of the commonwealth and the town. . . . [T]he tribe waived and Congress abrogated the tribe's sovereign immunity," Mr. Rappaport also wrote.

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 in 1987.

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.

Attorneys for the tribe also filed a motion yesterday to continue the case; Mr. Luckerman said the continuance was requested as a courtesy to allow attorneys for the town time to respond to the motion to dismiss.

He conceded that it will be up to Judge Conan to decide.

"It will be up to him to make a decision as to whether he has the authority to look at the other motion that's in front of him," Mr. Luckerman said.

Mr. Rappaport was scheduled to meet with the Aquinnah selectmen late yesterday afternoon to

discuss the latest activity around the case; he had no comment about what he planned to say to the selectmen in executive session.

But he did comment on the significance of the case.

"This case is extremely important, not just to Aquinnah but to the Vineyard," Mr. Rappaport said. "An agreement was reached 1983 . . . and all the documents stated the tribe is subject to zoning. The tribe is asserting sovereign immunity, meaning they cannot be sued. If they were to prevail on that, then any development the tribe proposes to undertake on the Vineyard would be completely unregulated by any town boards or the Martha's Vineyard Commission. It's very important to get judicial guidance on this issue which has divided the town and the tribe for the last two years."

Judge Conan is expected to rule on the motion to dismiss and the motion for a continuance early next week. He 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.

James L. Quarles 3rd, a partner at Hale and Dorr in Washington, D.C., who represents the taxpayers' association, has a long association with town and tribe relations that goes back to the days of the settlement agreement.

In the brief accompanying his motion to intervene in the case, Mr. Quarles underscored the importance of the case.

"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. . . . 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 wrote.

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