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Wampanoag Tribe Presses Claim for Sovereignty in Zoning Case

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A shed and a pier in the tiny town of Aquinnah were the fulcrum for court arguments this week that will ultimately test the question of whether the Wampanoag Tribe of Gay Head (Aquinnah) waived sovereign immunity when it signed a land claims settlement agreement in 1983.

The settlement agreement later led to federal recognition for the tribe.

"A pier and a shed are the triggering events, but the issues go to the heart of the relationship between the tribe and the town and they go to the heart of the settlement agreement. As you can tell, we need guidance, we need judicial guidance to tell us what the rules of the road are," declared Aquinnah town counsel Ronald H. Rappaport.

"The knife edge here is that when you're talking about sovereign immunity, to take away a tribe's sovereign immunity is a very, very serious act," countered Douglas J. Luckerman, a Lexington attorney who represents the tribe.

The two attorneys squared off in the Edgartown courthouse Wednesday afternoon during a special sitting of Dukes County Superior Court. The Hon. Richard F. Connon, an associate justice of the superior court, presided.

The Wampanoags are the only federally recognized tribe in the commonwealth.

On the face of it, the case involves a simple zoning dispute that began when the tribe built a small shed and 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 conveyed from the town to the tribe under terms of the 1983 settlement agreement.

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

The tribe moved to have the case heard in federal court, but last fall U.S. District Court Judge Douglas P. Woodlock sent the case back to state court because it involves a zoning dispute.

Attorneys for the tribe say the tribe cannot be sued because of sovereign immunity, while attorneys for the town say that when it comes to zoning and land use law, the tribe waived sovereign immunity when it signed the settlement agreement with the town that later led to federal recognition.

At the outset on Wednesday, Judge Connon allowed the Gay Head Taxpayers' Association and the Benton Family Trust, an abutter to the Cook Lands, to intervene in the case on the side of

the town.

There was a brief flurry over procedure as lawyers for the tribe asked to be allowed to argue first on their motion to dismiss, which had been filed late last week. (The central case revolves around motions for summary judgment, which means that there is no dispute about the facts in the case, only on the issues of law.)

Judge Connon said he would hear all the arguments at once, although he promised that he will later rule on the motion to dismiss before he rules on summary judgment.

Mr. Rappaport anchored his arguments in the history of the case, which includes four key events: 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 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.

"The facts are undisputed and it involves a simple question. There is no question that the Cook Lands are subject to zoning, and it was stated in four separate documents. The issue for you now to decide is whether the process and the plain language of those four documents should no longer apply," Mr. Rappaport said.

Mr. Rappaport, who has represented the town as its counsel for 21 years, spoke in a tone of gentle respect.

"Aquinnah is a small town, your honor, it's a town where tribal members hold a number of positions in town government, and it is a town where there is a pattern of working together," he said.

He noted that the tribe has in fact complied with zoning over the years, and he recounted the various building projects - and building permits - that the tribe has applied for and received.

"Applications were filed and granted, filed and granted, filed and granted," Mr. Rappaport said.

James L. Quarles 3rd, a partner at Hale and Dorr in Washington, D.C., who represents the taxpayers' association and was involved in the original settlement agreement, also used history as a backdrop for his argument.

"It is useful to take yourself back to 1983," Mr. Quarles said. He continued:

"The vision was that we were not going to have a traditional western Indian reservation in the town of Gay Head. Instead we would have an agreement and the rules would be clear and there would be no physical divisions in the town - the land would look the same.

"How did the parties do it? They did it in a very common sense way - they said to the town, you don't need to worry, we are going to be subject to zoning just like every other group in town. They didn't say they were immune. Congress acted and Congress acted clearly - the tribe has waived sovereign immunity and this case should be decided here. To hold that they have

sovereign immunity in this case would turn all these documents on their head."

Mr. Luckerman argued that there is a distinction between jurisdiction and sovereignty. "We wholeheartedly disagree that the word jurisdiction includes the power of the courts. It's a rule of federal law that when a tribe is federally recognized that law requires that it must be stated expressly and unequivocally for a tribe to waive its sovereign immunity," Mr. Luckerman said.

"It cannot be accomplished by ambiguous language or a gesture. There is a difference between the right to demand compliance with state law and the means to enforce it ... the Massachusetts Indian Land Claims Settlement Act of 1987 did not waive the tribe's sovereign immunity," he added.

Attorneys on both sides used case law to support their position.

Among other things, Mr. Luckerman pointed to a discrimination case involving the Wampanoag tribe that was decided by the Hon. Reginald Lindsay in federal court several years ago. In the decision, Judge Lindsay found that the settlement agreement did not abrogate sovereign immunity.

"We think the case is applicable," Mr. Luckerman said.

But Mr. Rappaport noted that the case centered on the internal workings of the tribe and not land use.

"Judge Lindsay looked at the settlement act and said that his case dealt with the inner workings of the tribe, while the settlement act placed burdens on the land and said the tribe has to comply with zoning," he said.

Both attorneys cited United States Supreme Court cases on Indian law.

"The Supreme Court could not have made it clearer, if you're going to waive sovereign immunity you've got to do it expressly and unequivocally. The Supreme Court has said often you can't get there by inference, it has to be front and center," Mr. Luckerman said.

But Mr. Rappaport noted a recent U.S. Supreme Court case involving arbitration for an Indian tribe that went the other way.

"Expressly saying you have waived immunity - that's not where the United States Supreme Court is and it's not where it is going. I see no difference between arbitration and zoning. Zoning is not just about setbacks and height limits, it's a statutory scheme. You can't agree to be subject to zoning and not have review in the courts," he said.

Mr. Luckerman said the tribe plans to enforce its own compliance with zoning rules.

"They want to take on more of this responsibility, it's not a matter of slighting the town, it's their desire to become the community they had dreamed of becoming," he said. "The plaintiffs are attempting to bootstrap the tribe and the catastrophic results that plaintiffs and the interveners are prophesying, we don't expect to happen. Being frustrated with the outcome is not enough to overturn Indian law."

Mr. Rappaport had another view.

"If the tribe's position is correct, then in effect they could build anywhere and no one could sue them over it. That is not a result that was contemplated in this agreement, and it should not be countenanced by you. I am not suggesting that the tribe would do anything wrong, I am simply suggesting that these are the rules of the game. And the consequences are where do people go for relief? The tribe would be the applicant, the permit granting authority and the adjudicator. You have one entity ruling all the rules of the game, and there's something the matter with that," he concluded.

As Mr. Luckerman's arguments came to an end, Judge Connon broke in with questions.

"What you are saying is that when Congress passed this act [in 1987] imposing these restrictions, they didn't mean it?" the judge said.

"Well, we don't know," Mr. Luckerman began, but the judge broke in again.

"If the court buys your argument, if I rule against you on the motion to dismiss and then favor the defendants on summary judgment, then the tribe will have the authority to build whatever they want to build on this land?" he said.

"Theoretically, yes," Mr. Luckerman replied.
