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Judge Declines To Review Ruling On Wampanoag Immunity

By Nelson Sigelman

A state Superior Court judge will not reconsider his ruling that the town of Aquinnah has no legal means to enforce town zoning regulations on the Cook Lands by virtue of the Wampanoag Tribe of Aquinnah's (Gay Head) sovereign immunity from suit.


In a decision handed down on Nov. 6 in Dukes County Superior Court, Justice Richard F. Connon denied a motion to alter or amend his decision issued on June 11 in favor of the tribe.

The judge also refused to set aside his finding, and send the case to be decided at a higher level, presumably the state Supreme Court, and rejected a motion to reconsider filed by the UMB Bank of Kansas City, Mo., trustee of the Thomas P. Benton Trust, abutters to the property at the center of the zoning dispute. He took no action on a request by the Martha's Vineyard Commission to intervene in the case.


Judge Connon's earlier ruling removed the legal boundaries set out in the 1983 settlement agreement signed between tribe members, non-resident property owners, the town, and state, on Sept. 8, 1983 which led to federal recognition of the Wampanoag Tribe of Gay Head. The agreement included provisions that made the tribe subject to the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts and the town of Gay Head, since renamed Aquinnah.

The town's motion to reconsider asked the judge to rethink his decision in light of two arguments not addressed in the court's June 11 opinion: That by agreeing to be bound by zoning laws in the settlement agreement, the tribe agreed to accept judicial enforcement, which is part and parcel of those laws; and that the tribe only achieved status as a federally recognized tribe as a result of the legislation approving the settlement agreement and in effect had no sovereign immunity to waive.

In his decision issued last week Judge Connon wrote: "The movants' papers in support of reconsideration reiterate numerous arguments concerning the proper interpretation of language in the settlement Agreement and the Federal Act and the correct application of the complex precedent governing waiver of tribal




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immunity. These arguments were ably and forcefully asserted in the original motion for summary judgement and carefully considered by this court in rendering its decision. The court therefore declines the movants' invitation to revisit these issues, leaving the propriety of its decision for resolution by a higher court."

The next step is an appeal that many knowledgeable observers expect will go to the Supreme Court. Representatives of the Benton Family and the Aquinnah/Gay Head Community Association, Inc., formerly named the Gay Head Taxpayers Association, have said they will appeal. The taxpayers association is one of the original parties to the settlement agreement, which is at the heart of the decision issued June 11. Whether the town of Aquinnah, the original plaintiffs in the suit, will join in that appeal remains uncertain.

This week, Mike Hebert, chairman of the three-member Aquinnah board of selectmen, said the selectmen will meet with town counsel Ron Rappaport Tuesday evening to discuss the judge's decision before deciding on a future course of action.

All Sides React

Reacting to the Judge's decision, Mr. Rappaport said, "I think the decision is wrong as a matter of law for all the reasons we set forth in the town's initial brief, and in the motion to reconsider."

Mr. Rappaport said he thinks that if the decision is appealed ultimately it will be overturned. The stakes are high, said the town counsel, both for Aquinnah and the Island community as a whole.

"It has Island-wide implications and state-wide implications because if the decision is allowed to stand it means that the tribe can undertake any development activities without a remedy available of being sued and that is a real concern."

Mr. Rappaport said he is not suggesting the tribe would do that, but he said, "If this decision is allowed to stand it is for all time, and it raises very serious issues for the town and the Island."

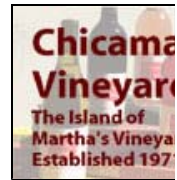
Reached in Washington where she was conducting business on behalf of the tribe's economic development, Beverly Wright, tribal chairperson, had another view. She said, "The tribe is very happy and pleased with the decision of Judge Connon."

Ms. Wright said statements to the effect that if the decision is allowed to stand the tribe could build anything it wants on tribal lands are simply "fear mongering."

She said tribal building and zoning regulations mirror and in some cases exceed existing town bylaws. She said people concerned that tribal laws could be changed in the future to make it easier to build overlook the fact that the town of Aquinnah is also free to change town bylaws.

"The native people of Martha's Vineyard and all other native people in the United States have always taken care of the environment and I think that statement stands," said Ms. Wright.

Larry Hohlt, president of the Aquinnah/Gay Head Community



Association, Inc., said that while the members of his organization were disappointed about Judge Connon's decision not to grant the motions for reconsideration, it is rare for a judge to admit that an earlier ruling was incorrect.

He said, "It is clear that this case now must be appealed since a case of this potential import should not be decided on a lower court level, especially in an instance where the Judge himself has stated that the result he reached is "patently unfair" and when his decision flies in the face of the prior agreements of the Town, Tribe, Commonwealth and our Association."

Mr. Hohlt, a seasonal resident and retired lawyer, said, "If allowed to stand, this decision will mean that the Tribe will be able to develop any land owned by it or owned in trust for its benefit without having to comply with the zoning and land use requirements and approval procedures of any of the Towns on the Vineyard or of the Martha's Vineyard Commission."

Based on past comments, the community association might be left to fight the legal battle on its own. Selectman Carl Widdiss, a Wampanoag tribal member, has consistently opposed the lawsuit. Jim Newman, newly elected member of the board, has supported an appeal.

Following the decision in June, Mr. Hebert, considered the swing vote on the three-member board, said he was satisfied with the judge's decision and thought it was time to leave the issue behind. Although Mr. Hebert authorized Mr. Rappaport to join the motion to reconsider with the backing of his fellow selectmen, at the time he also stood by earlier comments that he thinks there is no need to pursue the lawsuit.

This week, Mr. Hebert, who is married to a tribal official, said, the Judge's decision last week was "pretty much what I expected."

Mr. Hebert said he did not want to comment further until he had discussed the issue with his fellow selectmen.

Mr. Newman said that, while he thinks it is necessary to move forward with an appeal and he intends to support such a vote, his overriding concern is that the issue not become divisive.

History of Dispute

The construction by the tribe of a small wooden shed and pier on tribal lands on the shore of Menemsha Pond without town permits in the winter of 2001 triggered the lawsuit by Jerry Wiener, Aquinnah building inspector and zoning officer, against the Wampanoag Aquinnah Shellfish Hatchery Corporation and the Wampanoag Tribal Council of Gay Head (Aquinnah). The case was heard in Dukes County Superior Court on Feb. 12.

At the heart of Judge Connon's decision is the finding that there is no language in the settlement agreement explicitly setting aside the tribe's sovereign immunity from suit, which it acquired as part of federal recognition as an Indian tribe.

After reviewing the language of the settlement agreement and the issue of Native American sovereignty, Judge Connon wrote: "This

Court acknowledges that in negotiating the Settlement Agreement the Town intended to bargain not merely for a hollow right to apply substantive zoning law to the environmentally sensitive Cook Lands but also for the practical power to enforce that law against the Tribe in a judicial forum. However, absent clear consent by the Tribe to such judicial intervention, this Court is constrained to conclude that the Town received a right but no remedy, to the detriment of the citizens of not only the Town but the Commonwealth. In the view of this Court, said result is patently unfair.”

PO Box 518, Vineyard Haven, MA 02568-0518
Telephone: 508-693-6100, Classified/Legal Ads: 508-693-6110
Fax: 508-693-6000, E-mail: mvtimes@mvtimes.com

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