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# Martha's Vineyard **TIMES**

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## Aquinnah Selectmen Deadlock on Appeal

By Nelson Sigelman

Aquinnah selectmen will not appeal a ruling by a state Superior Court judge that the town 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.

The three-member board of Aquinnah selectmen deadlocked Tuesday night after meeting with Ron Rappaport, town counsel, in executive session. One selectman favored an appeal, one did not, and the third abstained.

Barring any change before the time limit for an appeal expires on Dec. 12, the town of Aquinnah, the original plaintiffs in the suit, will be left standing on the sidelines in a legal battle with significant implications.

The certain appeal will now be left to the representatives of the Benton Family and the Aquinnah/Gay Head Community Association, Inc., formerly named the Gay Head Taxpayers Association.

Mike Hebert, chairman of the selectmen, voted against appealing. Mr. Hebert is the husband of a member of the tribe. Jim Newman voted in favor of an appeal. Carl Widdiss abstained. Mr. Widdiss is a member of the tribe.

Following Justice Richard F. Connon's decision on June 11 in favor of the tribe, officials across the Island urged Aquinnah selectmen to appeal. In a letter, John Early, West Tisbury selectman, said: "The ability to regulate land use through local zoning is fundamental to our system of town government."

But Aquinnah selectmen would go no further than to join a motion asking Judge Connon to reconsider his ruling. In a decision handed down on Nov. 6, Justice Connon refused to alter or amend his decision, setting the stage for Tuesday evening's discussion and vote.

In a telephone conversation, Mr. Widdiss did not elaborate on why he decided to abstain. "It was just my desire at this point in time," he said.



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Aquinnah will hold a special town meeting on Dec. 2. Asked why the decision was not left to voters, Mr. Widdiss said, "No comment."

In a telephone conversation yesterday, Mr. Hebert said he had not considered placing the question of an appeal on the special town meeting warrant but the timing would have been problematic. Mr. Hebert said the warrant was posted prior to Tuesday's selectmen's meeting.

Mr. Hebert said his no vote was based on his view that a legal opinion had been rendered and it was time to move on. "I think it is time to put the legal stuff aside and try to work with the tribe to come up with a procedure where they could simply report to the town what projects they are permitting," he said. "This is only a zoning issue."

In fact, if Judge Connon's decision stands it would affect all aspects of the tribe's relationship with non-tribal members and government agencies.

Mr. Hebert acknowledged that in the future the tribe could only be sued when contracts included a waiver of sovereignty by the tribe. But he held fast to the view that the current decision only affects zoning.

"At this point I think we can get a lot more accomplished working with the tribe to arrive at a mutually agreeable reporting process so that if the tribe were to issue permits for something we thought was inconsistent with our zoning bylaws we would have a process of objecting through their tribal council."

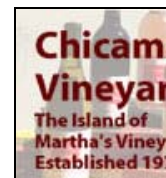
When it was pointed out that any decision of the tribal council would be final and the town would have no further recourse, Mr. Hebert said, "Well, that is what the judge said."

Larry Hohlt, president of the Aquinnah/Gay Head Community Association, Inc., said the vote by the selectmen was very unfortunate. He said the issues involved go "to the very core of the 1983 Settlement Agreement among the town, the tribe, the Commonwealth and our association."

The settlement agreement, which led to federal recognition for the tribe, 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.

In e-mailed comments, Mr. Hohlt, a seasonal resident and retired lawyer, said, "The lower court's decision flies in the face of that agreement and those laws. The issues at hand have tremendous potential impact not only on Aquinnah, but on all other towns in Martha's Vineyard as well. Put simply, if this lower court decision is allowed to stand, the tribe will have the right to develop any land now or hereafter owned by it or held in Trust for its benefit without regard to the land use or other requirements and approval processes of any town or of the Martha's Vineyard Commission. This is not what was bargained for and agreed to."

"Issues of this magnitude should not be decided on a lower court level. We have strongly supported the town of Aquinnah's efforts to



date on this case, and we encourage the selectmen to reconsider their apparent decision. As a party to the action, we will appeal.”

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.

Judge Connon’s ruling removed the legal boundaries set out in the 1983 settlement agreement 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.

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.

Last week, Ron Rappaport, Aquinnah town attorney, who is no longer authorized to pursue the legal battle, commented on the judge’s refusal to reconsider his earlier decision. Mr. Rappaport said that as a matter of law he thought the judge was incorrect.

As to the overall importance of the case, he said, “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.”

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](mailto:mvtimes@mvtimes.com)

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