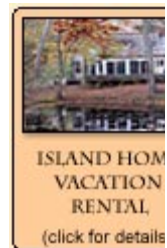


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Aquinnah Selectmen Will Hear Public on Lawsuit Appeal

By Nelson Sigelman

Under public pressure, the Aquinnah selectmen agreed to hold a public hearing Monday to discuss whether the town will go forward with an appeal of a ruling by a state Superior Court judge who held that the town has no legal means to enforce town zoning regulations on tribal lands by virtue of the Wampanoag Tribe of Aquinnah's (Gay Head) sovereign immunity from suit.

Mike Hebert, chairman of the selectmen who is considered the critical swing vote, said he would go into the meeting with an open mind. But he said the decision rests ultimately with the selectmen, not the voters.

The time limit for an appeal expires Dec. 12. If the town, the original plaintiff in the suit, decides not to appeal, it will be left to the representatives of the Benton family and the Aquinnah/Gay Head Community Association, Inc., formerly named the Gay Head Taxpayers Association to continue a legal battle with significant implications that extend beyond the borders of Aquinnah.

With more than 30 residents spilling out of the selectmen's meeting room Tuesday night, the three-member board voted to rescind its Nov. 18 vote not to appeal the judge's decision. The retrenchment was necessary in order to comply with state guidelines governing possible conflicts of interest.

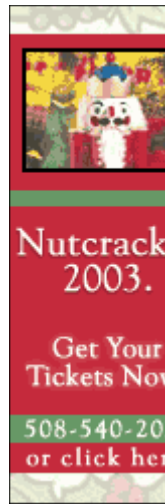
In the earlier vote, Mr. Hebert voted against appealing. Mr. Hebert's wife is a tribal member and tribal secretary. Carl Widdiss abstained. Mr. Widdiss is a member of the tribe and does contracting work for the tribe. Jim Newman voted in favor of an appeal.

Where a possible conflict may exist, public officials are required to make a public disclosure of any facts in order to dispel an appearance of conflict. When conflicts do exist that would prevent official action by small boards, town officials can still vote by invoking what is termed the rule of necessity.

In order to "correct a technicality," Mr. Hebert said he would invoke the rule of necessity and ask for a revote. In the event, two selectmen agreed to rescind the earlier decision and selectman Carl Widdiss abstained.



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Michael Stutz, an Aquinnah resident and land bank commissioner, said the selectmen were required to reveal the extent of any conflict.

"It's already done," said Mr. Hebert.

Mr. Hebert said his connection to the tribe is common knowledge and he would do "what is best for the town of Aquinnah. Just because you don't happen to agree doesn't mean it is wrong."

Mr. Hebert filed a disclosure form dated Nov. 25 with the town clerk. As of Wednesday, Mr. Widdiss had not.

At Tuesday's selectmen meeting, the selectmen were presented with a petition with 48 signatures which read: "We the undersigned voters and residents of Aquinnah ask the selectmen to appeal the herring creek decision. We also request a discussion of this subject during the special town meeting on Dec. 2."

Mr. Hebert, with the support of Walter Delaney, town moderator, said the special town meeting scheduled for later that evening was not the place to discuss the lawsuit, given the lack of proper notification. Mr. Hebert proposed a public hearing at which time selectmen could hold a non-binding straw vote.

Elise Lebovit, town voter, asked why the voters were not the ones deciding the question, when it was originally a decision of town voters to fund the lawsuit.

Mr. Hebert said it was the selectmen's decision to make. That did not mean, he said, that the selectmen would not do what the majority of voters asked.

Russell Smith, a former selectman and legislative liaison, said he did not question the motives of the selectmen and added "Everyone who lives in town has an interest in how this lawsuit comes out."

Mr. Hebert said the town and tribe had tried to avoid a lawsuit. He added that he was confident a group could be formed to avoid further legal proceedings "by coming up with something of our own."

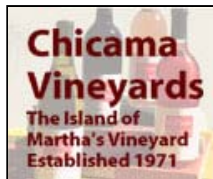
If the current decision stands, the only appeal in zoning disputes between the tribe and the town would be with the tribal council. The tribe would no longer be bound by local and state regulations.

Mr. Hebert said his focus is with the town. He said he was "not quite as worried about what will happen statewide."

Adrianna Ignacio, a tribal member, said some residents did not respect the tribe or tribal people. She accused critics of the selectmen's decision of paranoia, small-mindedness, and prejudice.

John Walsh said the ability to resolve conflicts with the tribe had been eliminated by the judge's decision.

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, 2003, by Justice Richard F. Connon.

Judge Connon's ruling on June 11 in favor of the tribe removed the legal boundaries set out in the 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.

The Settlement 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. 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.

Aquinnah selectmen joined 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.

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