5/02/01
The Martha's Vineyard Times

Aquinnah Goes to Court to Compel Wampanoag Tribe to Observe Town Building Rules

By Nelson Sigelman

The construction of a small wooden shack on the shore of Menemsha Pond without a building permit has triggered a lawsuit against the Wampanoag Tribe of Gay Head (Aquinnah) by the town of Aquinnah in Edgartown Superior Court.

Despite the unprepossessing nature of the six-by-eight foot prefabricated structure, at issue is one of the fundamental tenets of the settlement agreement signed between tribal members and town property owners on Sept. 8, 1983. That agreement, ultimately known as the Indian Claims Settlement Act of 1987, led to federal recognition for the tribe and an agreement that the tribe is 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 issue of whether the tribe can construct a building without a building permit is only the latest clash growing out of a stand by tribal officials over the tribe's rights as a "sovereign nation," and the view of town officials, some of whom are themselves tribal members, that the terms of the settlement agreement limit tribal authority even on tribal lands. The tribe and town are currently in disagreement regarding the authority of the tribe to issue firearms permits.

The latest legal question arose when Jerry Wiener, Aquinnah zoning officer and building inspector, saw the new building and dock as he drove past the shellfish hatchery in March. Mr. Wiener called tribal officials.

"They said they didn't need a permit," said Mr. Wiener. "I said they did need a permit."

Subject Under the Law

In a letter dated March 28, 2001, sent to Beverly Wright, tribal chairperson, as a formal cease and desist order, Mr. Wiener said it had come to his attention that the tribe was constructing a building and pier within the coastal district, as defined by the Aquinnah zoning bylaws, with no town building or zoning permits. In his letter, Mr. Wiener references the

settlement agreement, pointing out the specific reference to the "Cook Lands," the parcels on which the structure and dock are located.
He said, "The Settlement Agreement specifically provides as follows with respect to the Cook Lands: Any structure placed on this property shall be subject to all Federal, State and local laws, including town zoning laws, State and Federal conservation laws and the regulations of the Martha's Vineyard Commission …"
In his letter, Mr. Wiener said he would welcome a statement "of the tribe's position on this matter." No letter was forthcoming, but in a meeting with town selectmen on April 17, Ms. Wright again insisted that no town building permit was needed.
In a two to one vote, the selectmen voted to instruct Mr. Rappaport to move ahead with legal action. The dissenting vote was cast by selectman Carl Widdiss, a tribal member.
The tribe has referred the matter to a federal solicitor in the Department of the Interior, which holds the lands in trust for the tribe.

Lawsuit Filed

On Tuesday, Ron Rappaport, Aquinnah town attorney, filed a seven-page complaint in Edgartown Superior Court on behalf of Jerry Wiener, Aquinnah building inspector and zoning officer. Named as defendants are the Wampanoag Aquinnah Shellfish Hatchery Corporation, and the Wampanoag Tribal Council of Gay Head, Inc. (Aquinnah). The law suit is expected to move to federal court.
After outlining the separate state and federal agreements and acts that settled the Wampanoag land claims, the complaint states, "The Hatchery Corporation and the Tribe contend that their construction activities are not subject to local permitting, notwithstanding the fact that all prior buildings of the tribe have been subject to local permitting."
The complaint asks that the court stop any activity until such time as the applicable permits have been obtained. It further asks the court for a "declaration of the extent to which the Hatchery Corporation and the tribe are subject to local law, including the Aquinnah by-laws and other applicable law, requiring the issuance of a building permit."
Commenting on the complaint, Mr. Rappaport said the action is not adversarial. He said the issue was likely to come up again, and fortunately the first issue is a small shed.
Mr. Rappaport said the town is charged with the public responsibility to make sure that building codes and zoning laws are enforced. He said it

would be up to the courts to decide "where the jurisdiction of the town begins and ends and where the jurisdiction of the tribe begins and ends."
Mike Hebert, chairman of the board of selectman, said that clearly there are two different points of view. Mr. Hebert, who is married to a tribal officer, said the action by the town is not punitive.
"If this wasn't challenged, down the road it would be something else," he said. "It is one of those things that needs to be cleared up."

Building an Argument

Tribal officials acknowledge the construction of a building without a building permit but say a building permit from the town is not necessary because the building complies with tribal zoning bylaws which mirror those of the town. According to the official tribal logic, therefore the building complies with town bylaws.
Laurie Perry, tribal administrator, said that in the past the tribe sought building permits because at the time the tribe did not have its own zoning bylaws and building codes and therefore "there was no question about concurrent jurisdiction."
She said that over past few years the tribe conducted a series of public committee meetings to develop the bylaws, which were adopted in the spring of 2000. Asked if that information was ever shared with town officials she said, "absolutely."
Asked if Mr. Wiener was aware of those zoning bylaws, she said he should have been aware of the tribe's regulations because the selectmen were aware of them. Asked to speak to the specific issue of whether tribal officials had told town officials that the tribe would not seek building permits in the future, Ms. Perry said, "I did not personally, and I can't speak to whether the land use planning committee did."
Asked if, in fact, that would be an important point, Ms. Perry said, "Well, I would think so, but I am only telling the story as I know it."
Ms. Perry said tribal bylaws are more stringent than the town's because the tribe must "pay more attention to archaeological matters." Asked who is the tribe's building inspector, Ms. Perry said the tribe does not as yet have a building inspector. Asked who is charged with inspecting the building, she said, "We don't have a building inspector now because the building isn't done. The building inspector inspects the building when it is completed."
She said once the building is complete the tribe will contract with a building inspector.

On the subject of the language in the settlement agreement, Ms. Perry repeated that the tribal zoning bylaws had incorporated precisely and by reference the bylaws of the town, and the tribe issued its own building permit.
Asked if the tribe is complying with the settlement agreement, she said, "Yes."
Asked how the tribe is complying with the town's zoning bylaws if the tribe does not have a town building permit, she said, "Because the tribe has its own land use commission that is following the town's bylaws and zoning regulations."
Asked the same question, Jim Fuller, tribal economic development director, said, "Well, we have a permit from ourselves."
Mr. Fuller promised that further details regarding the tribe's position would be revealed "when we get to federal court."
Mr. Fuller said a "public hearing" was held before the tribe issued its own permit this fall. Asked if the town had been notified of the decision not to seek a town permit, he added that a copy of the tribe's zoning bylaws were delivered to the town, including the procedure for the issuance of future tribal permits.
Asked if someone reading it should have inferred that the tribe would not seek a building permit in the future, Mr. Fuller said, "Yup."
But both Mr. Wiener and Mr. Hebert said they were not aware of either the tribe's new zoning bylaws or the tribe's intention to no longer seek building permits. Commenting on the lack of communication, Mr. Hebert said there were opportunities for the tribe to come forward during recent meetings to discuss the town and tribe memorandum of understanding that provides for public safety services.
"Obviously, communication does need to improve," said Mr. Hebert.

5/09/01
The Martha's Vineyard Times

Tribe Agrees to Cease and Desist

The Wampanoag Tribe of Gay Head (Aquinnah) has temporarily agreed to comply with a cease and desist order issued by the Aquinnah building inspector for a shed and pier constructed on tribal land without building permits while the matter is before the courts.

In a letter dated May 3, 2001, addressed to Ron Rappaport, Aquinnah town attorney, Robert Mills, an attorney with the Hyannis law firm of Wynn and Wynn, wrote that the tribe has asked the Department of Justice, through the Bureau of Indian Affairs, to enter an appearance for it since the land is owned by the United States of America as trustee for the tribe.

Mr. Wynn said, "Until such time as the Department of Justice makes a determination as to whether or not they will defend the action, I have instructed my client to abide by the cease and desist order."

Mr. Wynn said he was doing so in consideration of an agreement by Mr. Rappaport to a request for more time in which to respond to the complaint. A request for a temporary restraining order was to have been heard last Friday.

But Mr. Wynn added, "In no way should this letter be construed as an admission to the allegations contained in the complaint. The tribe maintains its philosophy of concurrent jurisdiction and inherent sovereign authority to regulate its affairs."

The latest action grows out of a lawsuit against the tribe by the town filed in Edgartown Superior Court last week.

The tribe insists it does not have to seek a building permit from the town to build on tribal property. The town insists the tribe must comply with town zoning bylaws as a condition of the Indian Claims Settlement Act.

The series of state and federal statutes which led to federal recognition for the tribe included an agreement that the tribe is 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 latest legal question arose when Jerry Wiener, Aquinnah zoning officer and building inspector, saw the new building and dock as he drove past the shellfish hatchery in March. In a letter dated March 28, 2001, sent to Beverly Wright, tribal chairperson, as a formal cease and desist order, Mr. Wiener said it had come to his attention that the tribe was constructing a building and pier within the coastal district, as defined by the Aquinnah zoning bylaws, with no town building or zoning permits.

In his letter, Mr. Wiener referenced the settlement agreement, pointing out the specific reference to the "Cook Lands," the parcels on which the structure and dock are located.

He said, "The Settlement Agreement specifically provides as follows with respect to the Cook Lands: Any structure placed on this property shall be subject to all Federal, State and local laws, including town zoning laws, State and Federal conservation laws and the regulations of the Martha's Vineyard Commission …"

The complaint asks the court for a "declaration of the extent" to which the tribe is subject to local law, including the Aquinnah bylaws and other applicable law, requiring the issuance of a building permit.
Tribal officials have acknowledged the construction of a building without a building permit but say a building permit from the town is not necessary because the building complies with tribal zoning bylaws which mirror those of the town. According to the official tribal logic, therefore the building complies with town bylaws.

8/22/01
The Martha's Vineyard Times
Editorial

Aquinnah Tomorrow

The Vineyard town of Aquinnah and the federally recognized, and perhaps sovereign Wampanoag nation share what was Gay Head, the Vineyard's westernmost community. The futures of the two political organizations are entwined, of course. But they are distinct as well, and their interests are not always congruent.
What lies ahead?
Confusion, naturally.
For example, it is difficult for a political leader such as a selectman to manage his or her allegiances when difficult issues divide the Indian and non-Indian voters. Indian leaders represent Indian interests, selectmen represent Indians who are town voters, as well as non-Indian voters, and even non-voting taxpayers as well. How will this be reconciled?
And consider that today in Aquinnah, the Wampanoag community has an important claim on the town's budget, but the taxes that fund that budget are contributed by taxpayers, Indian and non-Indian, most of whom, as is the case in every Vineyard town, do not live year-round in or vote in Aquinnah.
Also, there is significant room for differing interpretations of the power conferred upon the Wampanoag tribe by its federal recognition and the obligations accepted by the tribe in its agreement with the Gay Head Non-Resident Taxpayers. The settlement of the suit filed years ago by the non-resident taxpayers paved the way for federal recognition. There are current and future issues embedded in the language of that document. The working out of those issues will be difficult, at times contentious, and extraordinarily demanding of the town's political leadership.

The session sponsored Monday evening by the tribe, to introduce Island leaders to the principles and lawful powers of federally recognized Indian tribes, may have been an early effort to imagine the issues that lie ahead. And that's good. But in its generalized approach to the problems of town-tribe governance, in the shadow of the tribe-taxpayers' settlement agreement, the occasion was of limited usefulness.

The sensible approach is for town and tribe leaders to establish a small, standing, joint panel of professional, outside consultants to help interpret these issues, in advance of conflict where possible.

Trade Claptrap for Information

Forget the claptrap, sometimes vicious, sometimes silly, broadcast by the Vineyard Gazette, the Islands United, Nantucket SSA member Grace Grossman, and former SSA members Ron Rappaport and E.B. Collins.

If you would like to learn something about the fix the SSA and we find ourselves in, and the possibilities for working our way out, you ought to attend the Aug. 28 public meeting convened by J.B. Riggs Parker, the current Vineyard SSA member.

Mr. Parker, the hardworking Chilmarker who is leading the boatline to consider its 21st century options concerning finances, vessels, mainland ports, and regional transportation cooperation, is the most communicative SSA member the Vineyard has ever had. Islanders who have read his frequent Essays in The Times (archived online at mvtimes.com) know more about how the boatline works and how this boatline member thinks than has been the case in the last four decades. Mr. Parker has been to more meetings and explained the line's predicament and its strategic thinking in more forums than any of his predecessors.

What his critics don't like is the message: That change and politicized decision making have put the Vineyard's mainstay transportation link in a jackpot that will require hard choices to escape, if the goal is economical and convenient transportation for Islanders, seasonal residents, and the necessaries of their lives; that thoughtful partnership with our mainland ports can no longer be ignored; and that our interests are today more closely aligned with Woods Hole and New Bedford than with Nantucket.

It's time for thoughtful Islanders to exchange self-serving flapdoodle for the facts. We can begin Tuesday.

Feb. 20, 2002
The Martha's Vineyard Times

Tribe/Town Lawsuit Has Broad Implications

By Nelson Sigelman

Construction last winter of a small wooden shack and dock on the shore of Menemsha Pond by the Wampanoag Tribe of Gay Head (Aquinnah) without a building permit from the town of Aquinnah set the stage for a legal battle about to unfold in federal court that could have significant implications for future tribal relationships with the entire Island community.

Arguments are scheduled for March 6 in United States District Court in Boston in a lawsuit that pits Jerry Wiener, Aquinnah building inspector and zoning officer, against the Wampanoag Aquinnah Shellfish Hatchery Corporation and the Wampanoag Tribal Council of Gay Head (Aquinnah).

In court papers, tribal lawyers claim that the town and the state have no jurisdiction over the tribe on lands held in trust by virtue of the tribe's sovereign immunity as a federally recognized Indian tribe.

But that claim, if supported, would dismantle the fundamental elements of the settlement agreement signed between tribal members and town property owners, the town, and state, on Sept. 8, 1983. That agreement eventually led to federal recognition of the Wampanoag Tribe of Gay Head. Signed by all parties, the agreement was ultimately embodied in legislation known as the Indian Claims Settlement Act of 1987 and 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.

Conly J. Schulte, an attorney with the law firm of Monteau, Peebles, and Crowell of Omaha, Neb., which represents the tribe, said that the distinction is that nowhere in the settlement act does it reference the tribe, only tribal lands. He said the distinction between the tribe and lands is important. Otherwise, he said, the tribe would have to "come groveling before town boards every time it wants something. You don't treat tribes like that."

But in his motion filed with the court, Ronald Rappaport, town attorney, wrote, "The tribe's position is nothing more than an attempt to back out of the core provisions of the Settlement Agreement, and to ignore Congress's division of power in the Settlement Act."

Rooted in History

The lawsuit began when Mr. Wiener saw the new building and dock as he drove past the tribe's shellfish hatchery in March. Mr. Wiener called tribal officials.

"They said they didn't need a permit," said Mr. Wiener. "I said they did need a permit."

In a letter dated March 28, 2001, sent to Beverly Wright, tribal chairperson, as a formal cease and desist order, Mr. Wiener referenced the settlement agreement, pointing out the specific reference to the "Cook Lands," the parcels on which the structure and dock are located.

He said, "The Settlement Agreement specifically provides as follows with respect to the Cook Lands: Any structure placed on this property shall be subject to all Federal, State and local laws, including town zoning laws, State and Federal conservation laws and the regulations of the Martha's Vineyard Commission …" Tribal officials acknowledged the construction of a building without a building permit but said a building permit from the town was not necessary because the building complied with tribal zoning bylaws which mirror those of the town, therefore the building complied with town bylaws.

In a 2-1 vote last April, the selectmen agreed to instruct Mr. Rappaport to move ahead with legal action. The dissenting vote was cast by selectman Carl Widdiss, a tribal member.

The town is represented by Mr. Rappaport and the Boston firm of Hill and Barlow.

The tribe is represented by Robert Mills of the Hyannis law firm of Wynn and Wynn as well as Monteau, Peebles and Crowell, which represents Indian tribes across the country.

The case is being closely watched by members of the Gay Head Taxpayers Association (GHTA). According to a history provided by the association, the group's involvement dates back to 1974 when the tribe filed a lawsuit in U.S. District Court seeking to reclaim lands deeded to the town in 1870. The lawsuit immediately affected private land titles and made it difficult to get mortgages or title insurance because of the cloud placed over titles. When it became clear the town would not defend against the lawsuit, the GHTA, and later the state, intervened in the lawsuit.

A long period of negotiations led to the 1983 settlement agreement entered into by the tribal council, the town, the GHTA, and the Commonwealth. As a result, the lawsuit was dismissed with prejudice, by agreement with all parties.

This week, commenting on the case, Larry Hohlt, a seasonal resident of Aquinnah and president of the Gay Head Taxpayers Association, said, "It is

regrettable that litigation was necessary, since it is clear from the underlying agreements and federal and Commonwealth legislation that, except for very narrow areas such as relating to hunting, all trust and other tribal lands, whether owned now or acquired in the future, are subject to all federal, Commonwealth, and town laws, ordinances, and regulations."
He said, "In this instance, it is the town of Aquinnah's building regulations. But the results of this litigation obviously could have great significance for and impact on other towns on the Vineyard or elsewhere, depending on when and where the tribe chooses to acquire and develop real property."
Beverly Wright, tribal chairperson, could not be reached for comment.

The Arguments

Both sides agree on the facts of the case. The tribe built a small shed to house electrical equipment for the hatchery and a pier platform on what is known as the Cook Lands without town permits.
But that is where the agreement ends. Citing local history and court decisions rooted in the history of Indian tribes across the country, both sides disagree on the extent to which the settlement agreement affects the inherent rights of the Wampanoag tribe.
In a motion for summary judgement, attorneys for the town argue that for 17 years following the settlement agreement, "the parties have governed themselves as though all tribal land is subject to the town's zoning and land use regulations."
The town charges that the tribe's claims of immunity fail "as a matter of law" because the tribe expressly waived its sovereign immunity in the settlement agreement, and Congress expressly abrogated the tribe's immunity over land use matters in the implementing statute.
The town's motion further states "the dispute goes to the heart of the relationship between the town and the tribe established in the settlement agreement and the State and Federal implementing legislation. If the tribe can simply ignore the town's carefully enacted zoning by-laws and build as it wishes, the town would be deprived of a significant benefit that it realized under the settlement agreement."
Countering the argument that the settlement agreement pertains to the lands but not the tribe, the town refers to a previous case involving the Narragansett Indian Tribe and argues that the intent of Congress was clear and could not have been to exempt tribal land use activities that might violate state or local law.

The town further argues that procedures the tribe may have enacted cannot supplant town regulations, in part because to allow tribe rules to supplant town rules would interfere with the rights of other town residents to seek internal town or judicial review.

In fact, the lawsuit states that abutters were not properly informed, and there was no review by a duly appointed building inspector of the plans or the structure. And the tribe failed to satisfy any of the most basic protections afforded by zoning bylaws in issuing a permit for the shed, according to the town.

The tribe argues that "the primary issue in this case is whether the Wampanoag Tribe is immune from a civil suit by the plaintiff to enforce the town's zoning ordinance procedures."

The attorneys referred to a 1999 decision in favor of the tribe stemming from a discrimination lawsuit brought by a former tribal employee which said: "In view of the absence of a clear and unequivocal expression by Congress of an intention to abrogate the sovereign immunity of the [Wampanoag] Tribe, the court holds that the tribe retains its traditional sovereign immunity from the exercise by Massachusetts of jurisdiction over the Tribe."

The tribe's attorneys said that the town's position, if upheld, "would render the Tribe nothing more than a private voluntary organization. There is nothing that even remotely suggests that this was ever intended by Congress."

According to the tribe's version of events, the tribe followed all tribal regulations in permitting the shed. The lawsuit states that a notice of the tribe's application and a public hearing on the application was hand delivered to abutting landowners and a hearing was held.

In their counterclaim, the tribe's attorneys say that by attempting "to exercise unconsented jurisdiction over the tribe the plaintiff has run roughshod over the tribe's common law right of sovereign immunity …"

Referring to the notion that the settlement act and sovereign immunity are intertwined, the attorneys argue that the tribe's retained sovereignty predates the "birth of the Republic."

"Neither the Settlement Agreement nor the Massachusetts Settlement Act affected the State's jurisdiction over the tribe because it never had any to begin with," the tribe asserts.

2/27/02
The Martha's Vineyard Times
Editorial

Aquinnah at a Crossroads

Aquinnah, the Island's westernmost community, is remote and tiny. It is also the purest surviving remnant of the Vineyard's earliest history and a living symbol of 300 years of civic change, replete with imperfection and conflict. Today, Aquinnah is at a crossroads. What happens next will exert a profound influence on the future of Aquinnah, but it will affect the lives of Islanders in other Vineyard towns as well.

How will the sovereign Wampanoag nation and the handsomely endowed but modestly financed political subdivision of Martha's Vineyard and Massachusetts, where the tribe's federally recognized inholding exists, work out their linked but separate futures?

As Nelson Sigelman reported on Feb. 21, construction of a small wooden shack and dock on the shore of Menemsha Pond by the Wampanoag Tribe of Gay Head (Aquinnah) a year ago without a building permit from the town of Aquinnah has led to a legal battle that will soon unfold in federal court. The question is whether the Wampanoag tribe will continue to be subject to town and state regulation.

Mr. Sigelman reports this morning a proposed development in Aquinnah on Indian land that would build upon the decision that the tribe hopes for from that federal lawsuit, a decision that would place tribal ambitions beyond the limits of the non-Indian community of Aquinnah.

The tribe claims that the state and the town government of Aquinnah, representing the town's registered voters, many of them Indians, have no jurisdiction over activities of the tribe on lands held in trust for the Wampanoags by the Secretary of the Department of the Interior.

The sovereign immunity of a federally recognized Indian tribe trumps town, regional, and state regulation, the Indians argue.

If the court's decision favors the Wampanoag position, Mr. Sigelman explained, it would dismantle the fundamental principles of the settlement agreement signed between tribal members and town property owners, the town, and state, on Sept. 8, 1983. That agreement eventually led to federal recognition of the Wampanoag Tribe of Gay Head.

That agreement became the foundation for legislation known as the Indian Claims Settlement Act of 1987 and 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 Aquinnah.

The danger facing Aquinnah could not be clearer. As Ronald Rappaport, Aquinnah's attorney, argues in his powerfully written motion on the town's behalf, "The tribe's position is nothing more than an attempt to back out of

the core provisions of the Settlement Agreement, and to ignore Congress's division of power in the Settlement Act."
The Gay Head Taxpayers Association and the town have a lot at stake in this lawsuit, as do residents of the other five Vineyard towns. If the court, by its ruling, extinguishes the regulatory authority guaranteed to the town and the Martha's Vineyard Commission by the 1983 settlement agreement and later by the Settlement Act, the non-Indian political community of Martha's Vineyard, not just Aquinnah, will find itself sadly at odds with an important part of itself.
The triumph of the 1983 agreement was that it provided for a limited, workable linkage between the tribe and the town that prescribed a mutual respect for rights and aspirations of both parties. A wrong turn now will certainly wreck that hard-won foundation for comity.

3/13/02
The Martha's Vineyard Times

Federal Judge Questions Jurisdiction in Town, Tribe Lawsuit

The Wampanoag Tribe of Gay Head (Aquinnah) and town of Aquinnah faced off in federal court in Boston last week over the town's authority to enforce zoning regulations and the limits of tribal sovereignty.
But U.S. District Court Judge Douglas P. Woodlock questioned his jurisdiction in what he said appeared to be a zoning case which is a matter of state law. Following sharp questioning of both sides, Judge Woodlock gave the attorneys for the tribe and the town one week to submit briefs arguing why the case should even be heard in federal court.
Aquinnah attorney Ron Rappaport originally filed the town's lawsuit in Dukes County Superior Court, but the tribe's attorneys asked that the case be heard on the federal level.
The lawsuit stems from the construction by the tribe of a small shed next to the Wampanoag shellfish hatchery on tribal trust lands. The tribe claims that the town and the state have no jurisdiction over the tribe on lands held in trust, by virtue of the tribe's sovereign immunity as a federally recognized Indian tribe.
But the settlement agreement signed between tribal members and town property owners, the town, and the state, on Sept. 8, 1983, and the subsequent legislation granting federal recognition included provisions

which make the tribe subject to the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts and the town of Aquinnah (then Gay Head).

3/26/02
The Martha's Vineyard Times

Routine Aquinnah Special Meeting
Includes One Hot Tribe-Town Topic

By Nelson Sigelman

The town of Aquinnah will hold a special town meeting next Thursday. Under normal circumstances, the three articles that make up the special town meeting warrant would be considered normal mid–fiscal year bookkeeping. The warrant includes a request to transfer $600 between accounts to pay for property revaluation services and a request to take $2,720 from unexpended funds to pay the town's share of costs to keep two up-Island EMTs on duty at the Chilmark and West Tisbury fire stations during the month of June. But it is the third and last article, a request to appropriate $30,000 from the stabilization fund to pay for additional legal fees, that is expected to provide an indication of voter willingness to support the town's legal battle to force the Wampanoag Tribe of Gay Head (Aquinnah) to abide by town zoning and building regulations and by extension to the terms of the settlement agreement between the town, the non-resident taxpayers, and the tribe. A vote to appropriate money from the stabilization account requires a two-thirds majority.

In a town where many of the voters are also tribal members, town-tribal disagreements invariably cut across political and personal loyalties. At the heart of the issue is the town's authority to enforce zoning regulations. The lawsuit stems from the construction by the tribe of a small shed next to the Wampanoag shellfish hatchery on tribal trust lands without a building permit issued by the town. The tribe claims that the town and the state have no jurisdiction over the tribe on lands held in trust, by virtue of the tribe's sovereign immunity as a federally recognized Indian tribe.

But the settlement agreement signed between tribal members and town property owners, the town, and the state, on Sept. 8, 1983, and the subsequent legislation granting federal recognition, included provisions which make the tribe subject to the civil and criminal laws, ordinances, and

jurisdiction of the Commonwealth of Massachusetts and the town of Aquinnah (then Gay Head).

This week, Mike Hebert, one of three Aquinnah selectmen, said the town has exceeded its legal budget, in part because of the cost of the lawsuit. Mr. Hebert said irrespective of what voters decide, the bills will not go away and will need to be paid.

Mr. Hebert said he thinks the town is following the proper course in pursuing its lawsuit against the tribe. He said it is clear the town and the tribe are reading the settlement agreement differently and that they require a judgment from the court. He said now is the time to settle the question.

"Because if we don't settle it now, it is going to come up again and again," said Mr. Hebert. "It is much better to settle it over a small, fairly insignificant building than something much larger and more dramatic."

For Aquinnah selectman Karl Burgess, the town's defense of the settlement agreement is a matter of principle with far reaching implications beyond the matter of a small wooden shack.

Mr. Burgess said that when the tribe and town signed the settlement agreement, both sides agreed to a certain set of conditions. He said the tribe cannot back away from that agreement and the town has to defend it or "the agreement is worth nothing."

Mr. Burgess said he understands the issue puts some tribal members in a tough position, but the town is acting to protect the rights of the citizens of the town and that includes tribal members who could also find themselves next to something they do not want without the zoning protection afforded by town bylaws.

"We are a residential community. Those bylaws protect us all, including tribal members," said Mr. Burgess.

But not all town voters agree that the town should continue to pursue legal action against the tribe. Last month, William "Buddy" Vanderhoop, a tribal member and well-known charter boat captain and commercial striped bass fisherman, presented the selectmen with a letter signed by approximately 60 persons asking that the selectmen not interfere with any activities on tribal trust lands.

Mr. Vanderhoop has outlined plans for a gas station off State Road on tribal land that he proposed to lease to tribal council members. The tribe has yet to take any formal action on the proposal.

For Larry Hohlt, a seasonal resident of Aquinnah and president of the Gay Head Taxpayers Association (GHTA), it is "both appropriate and very important" that the town take steps to uphold its rights as expressly embodied in the 1983 Settlement Agreement.

Mr. Hohlt said, “The issues at hand involve some of the core principles of that settlement agreement and legislation, and the way in which they are resolved could have widespread and long-term impact not only in Aquinnah but throughout the Island as well.”
He added, “It is in the interests of all of the town's residents to have these important issues fully addressed and resolved."
The town’s case against the tribe was heard in federal court on March 6 in Boston. But U.S. District Court Judge Douglas P. Woodlock questioned his jurisdiction in what he said appeared to be a zoning case, which is a matter of state law. Judge Woodlock asked the attorneys for the tribe and the town to submit briefs arguing why the case should even be heard in federal court.
Beverly Wright, tribal chairman, was off-Island and could not be reached for comment.

4/17/02
The Martha’s Vineyard Times

Aquinnah Special Called for Legal Bill

Having failed to win voter approval to pay outstanding legal bills at an earlier special town meeting, Aquinnah selectmen will try again next week at a special town meeting.
Voters will be asked Tuesday to take action on only one warrant article, a request to transfer $30,000 from unexpended balances in current line item budget accounts.
Faced with concerted opposition by the Wampanoag Tribe of Gay Head (Aquinnah) at the April 4 special town meeting, Aquinnah selectmen failed by one vote to muster the two-thirds majority needed to pay current legal bills, a portion of which have been incurred as a result of the town’s lawsuit against the tribe.
Unlike the earlier town meeting, at which selectmen tried to take the money from the town’s stabilization fund, passage at next week’s meeting requires only a simple majority.
Town leaders have made it clear that irrespective of what voters may think of the lawsuit, the town has a responsibility to pay its bills.
The lawsuit stems from the construction last March by the tribe of a small shed next to the Wampanoag shellfish hatchery on tribal trust lands without a building permit issued by the town. The tribe claims that the town and the state have no jurisdiction over the tribe on lands held in trust, by virtue of the tribe’s sovereign immunity as a federally recognized Indian tribe.

4/24/02

Aquinnah Votes to Pay Legal Bills

Aquinnah voters unanimously approved a request to transfer $30,000 from unexpended balances in current line item budget accounts to pay the town's legal bills.
Aquinnah selectmen called the special town meeting for Tuesday after failing to win voter approval to pay outstanding legal bills at a special town meeting on April 4. Faced with concerted opposition by the Wampanoag Tribe of Gay Head (Aquinnah), Aquinnah selectmen failed at that time by one vote to muster the two-thirds majority needed to pay current legal bills, a portion of which have been incurred as a result of the town's lawsuit against the tribe.
Unlike the earlier town meeting, at which selectmen tried to take the money from the town's stabilization fund, approval for the transfers required only a simple majority.
The lawsuit stems from the construction last March by the tribe of a small shed next to the Wampanoag shellfish hatchery on tribal trust lands without a building permit issued by the town. The tribe claims that the town and the state have no jurisdiction over the tribe on lands held in trust, by virtue of the tribe's sovereign immunity as a federally recognized Indian tribe.

August 22. 2002
The Martha's Vineyard Times

Gay Head Taxpayers Ask to Join Legal Battle

By Nelson Sigelman

If a federal judge allows it, the Gay Head Taxpayers Association (GHTA) will return to the front lines to help defend the terms of the settlement agreement they helped negotiate between Wampanoag tribal members and town property owners, the town, and the state almost 20 years ago.
In a filing in U.S. District Court, the association has asked to intervene on the side of the town of Aquinnah in a lawsuit pitting the Aquinnah building inspector against the Wampanoag Shellfish Hatchery Corporation, and the Wampanoag Tribal Council. The lawsuit stems from the construction in

March 2001 by the tribe of a small shed next to the Wampanoag shellfish hatchery on tribal trust lands without a building permit issued by the town.
Larry Hohlt, a seasonal resident and GHTA president, said that while the association members were and continue to be very pleased with the way the town initially reacted, it could well happen that the town would decide not to pursue the litigation. Describing the decision to intervene, he said it is vitally important that the GHTA be in a position to defend the settlement agreement if that time comes. Mr. Hohlt said, "The fundamental issue is whether the principles set forth in the settlement agreement and embodied in the resulting federal and state legislation, namely, that the town's laws, regulations, and procedures will apply to all residents, will be upheld."
The tribe claims that the town and the state have no jurisdiction over the tribe on lands held in trust, by virtue of the tribe's sovereign immunity as a federally recognized Indian tribe. But the town and the GHTA say such a claim contradicts the terms of the settlement agreement.
The settlement agreement signed on Sept. 8, 1983, and the subsequent legislation known as the Indian Claims Settlement Act of 1987, included specific 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 stakes are high for both sides and go far beyond whether or not the tribe can build a small wooden shed without a building permit. Fundamentally, the lawsuit is about the town's authority to enforce zoning regulations, and the limits of tribal sovereignty.
Aquinnah town attorney Ron Rappaport originally filed the town's lawsuit in Dukes County Superior Court, but the tribe's attorneys asked that the case be heard on the federal level.
The case was heard in federal court on March 6 in Boston. But U.S. District Court Judge Douglas P. Woodlock questioned his jurisdiction in what he said appeared to be a zoning case, which is a matter of state law.
Judge Woodlock asked the attorneys for the tribe and the town to submit briefs arguing why the case should even be heard in federal court. Those briefs have been submitted, and a decision is pending.
It is assumed the judge would also rule on the motion to intervene when he issues a decision.

Standing or Not

Making his case in a seven-page motion dated July 25 in U.S. Federal District Court in Boston, GHTA attorney James Quarles, a partner in the

Washington law office of Hale and Dorr, said, “This dispute over a shed and a pier is a relatively small one, but it has broader implications for the nineteen-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. Taxpayers seek to intervene to ensure the protection of these rights.”

Mr. Quarles said it was important that the taxpayers be allowed to intervene “in the event that the town fails to vigorously pursue its claims though final judgement and appeal.”

As to why the GHTA had waited more than one year to intervene, he said the taxpayers “only recently” became aware of the possibility that the town might not vigorously pursue its claims. He said that to the extent the town would continue to pursue and fund the lawsuit, “through any appellate proceedings, the taxpayers intend to rely on the town.”

Speaking from his Washington, D.C., office this week, Mr. Quarles, an experienced litigator in the field of Indian law, said, “It is an important case because it is one way of testing the metes and bounds of the settlement agreement.”

He said, “You can contest an act because you do not think it is permitted or you allow it to happen and whether it was permitted or not as a result of your not contesting it becomes permitted.”

Arguing against the taxpayers association motion in a 12-page memorandum filed on Aug. 7, tribal lawyers said the GHTA has no right to join the lawsuit and asked the judge to deny the motion to intervene.

Conly J. Schulte, an attorney with the law firm of Monteau, Peebles, and Crowell of Omaha, Neb., which represents the tribe, said that the GHTA had failed to meet the standards necessary to intervene as a third party, nor had they filed their motion in a timely manner.

Mr. Schulte said, “The taxpayers waited for over a year to file this motion and have sat on their hands for the eight-plus months since the filing of dispositive motions in this matter. Their explanation for failure to take action, and their asserted need to intervene now, is a purely speculative assertion that the town may not appeal any adverse judgement.”

Citing numerous case law, among other arguments, Mr. Schulte said the taxpayers “fail to prove they have a direct and substantial interest in the subject matter of the litigation,” arguing that it is the building inspector, and not the GHTA who is designated to enforce the settlement agreement.

As for whether or not the town would continue to pursue the lawsuit, he said, “The taxpayers elect the town’s officials and the taxpayers have a voice in the political process through their ability to vote.”

The Long Legal Haul

But in a town where tribal, town, and family loyalties often overlap, GHTA members have been concerned that the town would not see the legal battle through over the long haul. Those fears were heightened following a special town meeting on April 4 when tribal members turned out in large numbers to defeat a request by the selectmen to transfer funds needed to pay current legal bills, a portion of which had been incurred as a result of the town’s lawsuit against the tribe. That vote was reversed in a later special town meeting.

Meeting in July, taxpayer association members decided that it was time to become a party to the lawsuit.

This week, Karl Burgess, chairman of the Aquinnah board of selectmen, said the issue must be decided, and the GHTA has every right to be involved. He said, “I welcome them into the fray because they are one of the ones who signed the settlement agreement. I believe they have every right to be a part of this and I want them there.”

Rooted in History

According to a history provided by the GHTA, the group’s involvement dates back to 1974 when the tribe filed a lawsuit in U.S. District Court seeking to reclaim lands deeded to the town in 1870. The lawsuit immediately affected private land titles and made it difficult to get mortgages or title insurance because of the cloud placed over titles. When it became clear the town would not defend against the lawsuit, the GHTA, and later the state, intervened in the lawsuit.

A long period of negotiations led to the 1983 settlement agreement entered into by the tribal council, the town, the GHTA, and the Commonwealth. As a result, the lawsuit was dismissed with prejudice, by agreement with all parties.

The lawsuit that roused the GHTA began when Jerry Wiener, Aquinnah town building inspector, saw that a newly built shed to house electrical equipment for the hatchery and a pier platform had been built on what is known as the Cook Lands without town permits in March 2001. Mr. Wiener called tribal officials.

“They said they didn’t need a permit,” said Mr. Wiener. “I said they did need a permit.”
In a letter dated March 28, 2001, sent to Beverly Wright, tribal chairperson, as a formal cease and desist order, Mr. Wiener referenced the settlement agreement, pointing out the specific reference to the “Cook Lands,” the parcels on which the structure and dock are located.
He said, “The Settlement Agreement specifically provides as follows with respect to the Cook Lands: Any structure placed on this property shall be subject to all Federal, State and local laws, including town zoning laws, State and Federal conservation laws and the regulations of the Martha’s Vineyard Commission …” Tribal officials acknowledged the construction of a building without a building permit but said a building permit from the town was not necessary because the building complied with tribal zoning bylaws which mirror those of the town, therefore the building complied with town bylaws.
In a 2-1 vote last April, the selectmen agreed to instruct Mr. Rappaport to move ahead with legal action. The dissenting vote was cast by selectman Carl Widdiss, a tribal member.

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The Martha’s Vineyard Times

Aquinnah and Town Clash Over Permitting Again

By Nelson Sigelman

Electrical work adjacent to a small wooden shed last week sparked the latest confrontation between the Wampanoag Tribe of Gay Head (Aquinnah) and the town of Aquinnah, when the town building inspector insisted that a permit from the town was needed before work could continue.
In a letter sent following the inspection, Beverly Wright, chairman of the Wampanoag Tribe, accused Jerry Wiener, Aquinnah town building inspector, of harassing and “threatening with loss of license” the contractor hired to do the work. Ms. Wright said the tribe “does not recognize any authority of the town inspector on tribal lands.”
One tribal employee present during Mr. Weiner’s inspection of the work area last Thursday went so far as to say that Mr. Wiener could be arrested for trespassing on tribal lands.

But Karl Burgess, chairman of the Aquinnah selectmen, said, "As our town building inspector, Mr. Weiner has all rights to go in and inspect it."
He added, "Any threat of action against him for being on tribal lands was very unprofessional and unprovoked on Jerry [Wiener]'s part. He was just doing his job as directed by the town."
At the heart of a law suit now in U.S. District Court is the tribe's unwillingness to recognize town permitting authority in the construction in March 2001 of a shed and pier next to the Wampanoag shellfish hatchery on tribal trust lands. At issue are the limits placed on tribal authority in the terms of a settlement agreement signed almost 20 years ago between tribal, local, state, and Federal parties.
The settlement agreement, signed on Sept. 8, 1983, and the subsequent legislation known as the Indian Claims Settlement Act of 1987, included specific 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.
With respect to the Cook Lands on which the shed is built, the Settlement Agreement specifically provides as follows: "Any structure placed on this property shall be subject to all Federal, State, and local laws, including town zoning laws, State and Federal conservation laws, and the regulations of the Martha's Vineyard Commission . . . ."
According to Mr. Weiner, last Thursday he went to the grounds of the tribal hatchery, where an off-Island electrical contractor hired by the tribe was working without a town permit. The contractor, Tom Cunningham of Leicester, said he had a permit issued by the tribe and displayed a document that carried the tribal seal.
Told that a town permit was needed, Mr. Cunningham went to the town hall and applied for a permit in the name of the tribe to wire two pumps. Mr. Wiener issued the permit the same day.
Mr. Weiner said he had no wish to hurt the tribe or prevent any work from taking place at the hatchery. He said, "In my opinion, all I was doing is my job, seeing that work wasn't done in the town of Aquinnah without a permit."
Mr. Wiener was accompanied on his visit to the work site by an Aquinnah police officer. According to a police incident report, Brett Stearns, a tribal employee, asked if the town officials had a cease-and-desist order, which they did not. Mr. Stearns also made the comment that "technically he could have Mr. Weiner arrested for trespassing."
Reached by telephone at the tribal administration building, Mr. Stearns said his comment noted in the police report was in response to comments made

by Mr. Wiener to the electrical contractor. He said that as a tribal employee it is his understanding that no members of the public, including the town inspectors, have a right to access to tribal property, absent any prior agreement.

The day after Mr. Wiener's visit, in a letter dated Sept. 19, Ms. Wright said that the electrical work had been permitted by the tribe and insisted that the contractor hired by the tribe was not acting on the part of the tribe when he took out a town permit.

Ms. Wright wrote, "Please be advised that the contractor obtained a permit as an independent contractor and did not have the authority of the tribe to do so. The tribe does not recognize any permits from the town of Aquinnah for work performed on tribal lands."

She added, "To the extent that permit could be construed as a license for the town of Aquinnah building inspector to enter tribal lands, the tribe does not recognize that any such license or permission has been granted. The tribe has its own electrical inspector and does not recognize any authority of the town inspector on tribal lands."

In a reply dated Sept. 25, Mr. Weiner reminded Ms. Wright that the town had filed a lawsuit to enforce a cease-and-desist order prohibiting any further construction activity or use of the shed. He said that on May 3, 2001, the tribe, through its counsel, had agreed "that the cease-and-desist order issued by the building inspector shall be complied with pending further order of the court."

He said that when he became aware that trenching and the installation of wiring was occurring on the site in apparent violation of the cease-and-desist order and the prior stipulation, he informed the tribe's electrical contractor that no work could occur in the absence of a town permit.

Mr. Wiener said once the electrical contractor applied for a permit, it was issued.

He wrote, "Please be advised that, absent a court order to the contrary, no construction activity can occur on the Cook lands without obtaining proper town permits. In instructing the electrical contractor to this effect, I was following my statutory duties."

Yesterday, Ms. Wright said the agreement to cease and desist until the judge issued a ruling applied only to the "infamous shack."

Ms. Wright said the tribe has its own permitting process, which was approved by the tribal council. She said that process mirrors and in some cases may exceed the town process.

Asked how that process protects abutters, Ms. Wright said abutters are notified and have the opportunity to speak before the tribe's land-use commission.

Ms. Wright said, "We are a government, and as a government we have the absolute right to put processes in place in order to protect our tribal lands and businesses."

This week Mr. Burgess stood solidly behind the town building inspector. He said there is no validity to the claim that Mr. Weiner threatened the tribe's electrical contractor. He said it is simply a fact that any licensed contractor working in a town without a permit runs the risk of losing his or her license.

Referring to the existing agreement by the tribe to comply with a cease-and-desist order, Mr. Burgess said, "I don't know what they are trying to do. I think they should wait until the lawsuit is settled."

Mr. Burgess said he has no idea who issued the tribal permit or what expertise it is based upon. He said he did not know who was acting as the tribe's inspector.

According to Ms. Perry, the tribe's electrical inspector is James Rogers, a Vineyard Haven electrician.

Asked if he expects the incident to come before the selectmen, Mr. Burgess said, "I don't know that it will come up, because we are looking at it as a ridiculous incident."

The stakes are high for both sides. Larger building projects loom on the horizon. Last week, the tribe received word it has received a $500,000 grant from the federal Department of Housing and Urban development towards the construction of a community center on tribal lands. According to a report in the Cape Cod Times, the 5,000-square-foot building will cost over $1 million, with construction scheduled to begin in one year.

In the meantime, both sides continue to wait for some word from the court. Aquinnah town attorney Ron Rappaport originally filed the town's lawsuit in Dukes County Superior Court, but the tribe's attorneys asked that the case be heard on the federal level.

The case was heard in federal court on March 6 in Boston. But U.S. District Court Judge Douglas P. Woodlock questioned his jurisdiction in what he said appeared to be a zoning case, which is a matter of state law.

Judge Woodlock asked the attorneys for the tribe and the town to submit briefs arguing why the case should even be heard in federal court. Those briefs have been submitted.

In August, the Gay Head Taxpayers Association asked to intervene on the side of the town of Aquinnah, arguing that they should be allowed to help defend the terms of the settlement agreement they helped negotiate.

Decisions on both questions are still pending.

10/03/02

Chilmark's Benton Family Moves
To Join Town-Tribe Suit; Federal Judge
Sends Suit Back to State Court

By Nelson Sigelman

Citing enforcement inaction by the town of Aquinnah in the face of what they say is blatantly illegal activity by the Wampanoag Tribe of Gay Head (Aquinnah), the fiduciaries of a trust controlled by the descendants of painter Thomas Hart Benton have moved to join a lawsuit formerly in U.S. District Court and now headed to Massachusetts Superior Court in Dukes County. The suit by the town of Aquinnah seeks to force the tribe to abide by local, state, and federal laws.

This week, unaware that a federal judge had issued a remand order sending the lawsuit back to state court, the Benton family trust filed a motion in U.S. District Court asking to intervene on the side of the town of Aquinnah in a lawsuit pitting the Aquinnah building inspector against the Wampanoag Shellfish Hatchery Corporation, and the Wampanoag Tribal Council.

Aquinnah town attorney Ron Rappaport originally filed the town's lawsuit in Dukes County Superior Court, but the tribe's attorneys asked that the case be heard on the federal level.

The case was heard in federal court on March 6 in Boston. But U.S. District Court Judge Douglas P. Woodlock questioned his jurisdiction in what he said appeared to be a zoning case, which is a matter of state law.

Judge Woodlock asked the attorneys for the tribe and the town to submit briefs arguing why the case should even be heard in federal court.

In a remand order dated Sept. 30, Judge Woodlock sent the case back to Superior Court, thus endorsing the argument made by Mr. Rappaport at the outset.

Yesterday, the Benton family attorney said if need be the motion to intervene would be refiled in Superior Court.

The lawsuit stems from the construction in March 2001 by the tribe of a small shed next to the Wampanoag shellfish hatchery and pier on tribal trust lands without a building permit issued by the town. The Benton property abuts the tribal property.

At issue are the limits placed on tribal authority in the terms of a settlement agreement signed almost 20 years ago between tribal, local, state, and federal parties that paved the way for federal recognition.

The settlement agreement, signed on Sept. 8, 1983, and the subsequent legislation known as the Indian Claims Settlement Act of 1987, included specific 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 its response to the town's lawsuit, the tribe claims that the town and the state have no jurisdiction over the tribe on lands held in trust, by virtue of the tribe's sovereign immunity as a federally recognized Indian tribe.

In his filing, attorney Michael Nuesse, acting on behalf of UMB Bank of Kansas City, Mo., trustee of the Thomas P. Benton Trust, said that the family found it necessary to intervene in the lawsuit "in order to protect its property against the continuing un-permitted contemptuous and illegal activity of the Tribe."

Specifically, Mr. Nuesse said that following the filing of the town's lawsuit over the tribe's building activity in May 2001, the tribe agreed to a stipulation to abide by the town's cease and desist order pending further order of the court.

Despite that agreement, he said, the tribe continued to engage in building activity at the hatchery site, prompting the town's attorney to send a letter to the tribe on Dec. 1, 2001, stating that if work continued it would be brought to the attention of the court. Mr. Nuesse said, "In spite of continued activity, the town did not bring this violation of the stipulation to the attention of the court."

He said further building activity took place including the installation of new pilings "in an apparent attempt to construct an unpermitted dock at the site." He said the town was made aware of these activities but "has taken no action to enforce the stipulation in the face of the Tribe's blatant illegal activity."

In outlining the reasons why the court should allow the Benton family to intervene despite the fact that the town has already brought suit, Mr. Nuesse expressed concerns that the town might not "vigorously pursue its claims." He said, "To prevent the Benton Trust from intervening to protect its property rights, would be unfair and would tacitly protect the tribe from having to comply with their agreements and the town order to cease and desist."

Beverly Wright, tribal chairman, and the tribe's attorney, Robert Mills, did not return telephone calls yesterday seeking comment on the Benton family's action.

In a town where tribal, town, and family loyalties often overlap, some residents have been concerned that the town would not see the legal battle through over the long haul. Those fears were heightened following a special town meeting on April 4, 2002, when tribal members turned out in large numbers to defeat a request by the selectmen to transfer funds needed to pay current legal bills, a portion of which had been incurred as a result of the town's lawsuit against the tribe. That vote was reversed in a later special town meeting.

In August, the Gay Head Taxpayers Association (GHTA) also voiced concerns about the town's willingness to pursue the lawsuit in filing a motion to intervene on the side of the town of Aquinnah, arguing that they should be allowed to help defend the terms of the settlement agreement they helped negotiate more than 20 years ago.

In a seven-page motion dated July 25 filed in U.S. Federal District Court in Boston, association attorney James Quarles, a partner in the Washington law office of Hale and Dorr, said, "This dispute over a shed and a pier is a relatively small one, but it has broader implications for the nineteen-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. Taxpayers seek to intervene to ensure the protection of these rights."

Mr. Quarles said it was important that the taxpayers be allowed to intervene "in the event that the town fails to vigorously pursue its claims though final judgement and appeal."

In his remand order, Judge Woodlock declined to address the GHTA motion to intervene, saying the state court should be left free to make its own judgment about intervention.

The site of the shed continues to be a flash point in tribal-town relations. On Sept. 18, Jerry Weiner, Aquinnah town building inspector, visited the site and told an off-Island electrical contractor no work could take place without a permit issued by the town.

That brought a quick letter from Beverly Wright accusing Mr. Wiener of harassing and "threatening with loss of license" the contractor hired to do the work. Ms. Wright said the tribe "does not recognize any authority of the town inspector on tribal lands."

In a reply dated Sept. 25, Mr. Weiner reminded Ms. Wright that the town had filed a lawsuit to enforce a cease-and-desist order prohibiting any further construction activity or use of the shed. He said that on May 3, 2001, the tribe, through its counsel, had agreed "that the cease-and-desist order issued

by the building inspector shall be complied with pending further order of the court."
He wrote, "Please be advised that, absent a court order to the contrary, no construction activity can occur on the Cook lands without obtaining proper town permits. In instructing the electrical contractor to this effect, I was following my statutory duties."
In later comments, Ms. Wright said the agreement to cease and desist until the judge issued a ruling applied only to the "infamous shack."

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The Martha's Vineyard Times

Tribe-Town Legal Fight Gets to Court

By Nelson Sigelman

In the freshly painted, second floor courtroom of the Dukes County Superior Court, attorneys for the Wampanoag Tribe of Gay Head (Aquinnah) and the town of Aquinnah squared off yesterday over the limits of tribal sovereignty. In the balance are the limits imposed on the tribe in a settlement agreement between tribe members and town property owners, the town, and the state almost 20 years ago.
On its face, the lawsuit pits Jerry Wiener, Aquinnah building inspector and zoning officer, against the Wampanoag Aquinnah Shellfish Hatchery Corporation and the Wampanoag Tribal Council of Gay Head (Aquinnah) in a case that many knowledgeable observers expect to be a protracted battle reaching perhaps to the Supreme Court.
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 the town building inspector. The decision, whenever it comes, will determine whether or not the tribe is subject to local and state laws and regulations as agreed to in the settlement agreement or, by virtue of the tribe's sovereign immunity, that the town, state, and courts have no jurisdiction over actions of the tribe.
A ruling on yesterday's arguments could come within three months.
More than 20 tribal leaders and tribal members, some party to the original negotiations that led to federal recognition of the Wampanoag tribe, sat side by side with town officials and residents as attorneys for both sides took their respective places before Judge Richard F. Connon, associate justice of the Superior Court.

Ron Rappaport, Aquinnah's town attorney, was joined by James Quarles, a partner in the Washington law firm of Hale and Dorr representing the Gay Head Taxpayers Association (GHTA), one of the original parties to the settlement agreement, and Michael Nuesse, acting on behalf of UMB Bank of Kansas City, Mo., trustee of the Thomas P. Benton Trust, abutters to the property on which the shed was built.

In separate motions the GHTA and the Benton family asked for and received permission from Judge Connon to intervene on behalf of the town.

The tribe was represented by Robert Mills of the Hyannis law firm of Wynn and Wynn, and Douglas J. Luckerman of Lexington, an attorney specializing in Indian law who has represented tribes across New England. He was recently hired to represent the Wampanoag tribe.

In arguing for permission to intervene, Mr. Quarles said that however the case turned out, his clients wanted to be in a position to go forward with an appeal. Mr. Nuesse said his clients were concerned that at some point the town might drop the lawsuit, and they wanted to be in a position to protect their interests.

Mr. Luckerman argued that the state court was without authority to even rule on the motions for summary judgment that brought the two sides to court yesterday, and he asked that the court allow arguments on a motion to dismiss the case. Mr. Rappaport said that whether the case was dismissed by the state court or not "the issue is sovereign immunity" and he asked that the case go forward.

Judge Connon said he would hear arguments on both the motion to dismiss and on the summary judgment motion at once, and he gave attorneys for both sides 30 days to file supplemental arguments.

In a step-by-step presentation Mr. Rappaport detailed the history of the settlement agreement. He said the "facts are indisputable" and involve a single question: Is the tribe subject to the conditions contained in the settlement agreement and the subsequent settlement act approved by the state legislature and Congress?

Mr. Rappaport said the language was plain regarding the Cook lands on which the shed was built. And it is that language which was at question. He asked why the legislature and Congress would have approved the agreements if the tribe were not subject to review by the courts.

Mr. Rappaport said, "I have been town counsel for 21 years. I'm not suggesting the tribe did anything wrong. I am simply saying these are the rules of the game that were agreed to."

He asked where the town and abutters would go for relief if the tribe does not comply with the requirements of zoning.

For the tribe's part, Mr. Luckerman focused exclusively on the issue of sovereignty. He said that regardless of the settlement agreement and the acts of the state legislature and Congress, the tribe never relinquished its sovereignty. He argued that nowhere in the settlement agreement did the tribe expressly relinquish sovereignty, and without either a specific act or language to that effect, that sovereignty remains intact.

Citing case law, Mr. Luckerman said that when the tribe gained federal recognition the rules were changed so that the entire body of Indian law over 200 years now applies.

"Jurisdiction over tribal lands is not jurisdiction over the tribe itself," he said.

Judge Connon asked Mr. Luckerman if the tribe were to prevail would it mean it could build whatever it wanted on the land.

"Theoretically, yes," said Mr. Luckerman.

At the conclusion of the arguments, as people filed out of the courtroom, Mr. Luckerman said he based his request for dismissal on state law, which requires that a court shall dismiss an action when it lacks jurisdiction. "We are saying that the tribe retains sovereign immunity, and sovereign immunity means that they can't be sued without their consent, so we are saying you can't even hear the motions before you."

Asked who would hear such motions, Mr. Luckerman said, "No one."

He said the tribe may be subject to the local and state regulations and laws, but, "The crux here is we think that if the tribe violates them there is nowhere for the town to go to enforce them other than to the tribe or Congress. There may not be remedies that they like, but there are remedies."

Mr. Luckerman said the Supreme Court has held in many cases that a state can have jurisdiction but nowhere to go to enforce it.

As Mr. Rappaport left the court he said that all parties to the earlier litigation had opportunity to express their views and the issues are plainly before the court.

"I look forward to his ruling," he said.

Legal Sides Set

In court papers filed in connection with the case, tribal lawyers claimed that the town and the state have no jurisdiction over the tribe on lands held in trust by virtue of the tribe's sovereign immunity as a federally recognized Indian tribe.

But that claim, if supported, would dismantle the fundamental elements of the settlement agreement signed between tribe members and town property

owners, the town, and state, on Sept. 8, 1983. That agreement eventually led to federal recognition of the Wampanoag Tribe of Gay Head. Signed by all parties, the agreement was ultimately embodied in legislation known as the Indian Claims Settlement Act of 1987 and 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 court documents originally filed in connection with the case, Conly J. Schulte, an attorney with the law firm of Monteau, Peebles, and Crowell of Omaha, Neb., which had represented the tribe, said that the distinction is that nowhere in the settlement act does it reference the tribe, but only tribal lands. He said the distinction between the tribe and lands is important. Otherwise, he said, the tribe would have to "come groveling before town boards every time it wants something. You don't treat tribes like that."

But in his motion filed with the court, Mr. Rappaport wrote, "The tribe's position is nothing more than an attempt to back out of the core provisions of the Settlement Agreement, and to ignore Congress's division of power in the Settlement Act."

Citing local history and court decisions rooted in the history of Indian tribes across the country, both sides disagree on the extent to which the settlement agreement affects the inherent rights of the Wampanoag tribe.

In a motion for summary judgement, attorneys for the town argued that for 17 years following the settlement agreement, "the parties have governed themselves as though all tribal land is subject to the town's zoning and land use regulations."

The town charges that the tribe's claims of immunity fail "as a matter of law" because the tribe expressly waived its sovereign immunity in the settlement agreement, and Congress expressly abrogated the tribe's immunity over land use matters in the implementing statute.

The town's motion further states "the dispute goes to the heart of the relationship between the town and the tribe established in the settlement agreement and the State and Federal implementing legislation. If the tribe can simply ignore the town's carefully enacted zoning by-laws and build as it wishes, the town would be deprived of a significant benefit that it realized under the settlement agreement."

In their counterclaim, the tribe's attorneys say that by attempting "to exercise unconsented jurisdiction over the tribe the plaintiff has run roughshod over the tribe's common law right of sovereign immunity …"

Referring to the notion that the settlement act and sovereign immunity are intertwined, the attorneys argue that the tribe's retained sovereignty predates the "birth of the Republic."
"Neither the Settlement Agreement nor the Massachusetts Settlement Act affected the State's jurisdiction over the tribe because it never had any to begin with," the tribe asserts.

The Stage Is Set

The lawsuit began when Mr. Wiener saw the new building and dock as he drove past the tribe's shellfish hatchery in March 2001. Mr. Wiener called tribal officials.
"They said they didn't need a permit," said Mr. Wiener. "I said they did need a permit."
In a letter dated March 28, 2001, sent to Beverly Wright, tribe chairman, as a formal cease and desist order, Mr. Wiener referenced the settlement agreement, pointing out the specific reference to the "Cook Lands," the parcels on which the structure and dock are located.
He said, "The Settlement Agreement specifically provides as follows with respect to the Cook Lands: Any structure placed on this property shall be subject to all Federal, State and local laws, including town zoning laws, State and Federal conservation laws and the regulations of the Martha's Vineyard Commission …" Tribal officials acknowledged the construction of a building without a building permit but said a building permit from the town was not necessary because the building complied with tribal zoning bylaws which mirror those of the town, therefore the building complied with town bylaws.
In a 2-1 vote that April, the selectmen agreed to instruct Mr. Rappaport to move ahead with legal action. The dissenting vote was cast by selectman Carl Widdiss, a tribal member.

Legal History

In May, Mr. Rappaport filed the town's lawsuit in Dukes County Superior Court, contending it was essentially a zoning dispute. The tribe's attorneys thought otherwise and asked that the case be heard on the federal level.
The first legal skirmish took place on March 6, 2002, in Boston in front of U.S. District Court Judge Douglas P. Woodlock.
Judge Woodlock questioned his jurisdiction in what he said appeared to be a zoning case, which is a matter of state law, and asked the attorneys for the

tribe and the town to submit briefs arguing why the case should even be heard in federal court.

As the lawsuit simmered, a disagreement on town meeting floor over the funding of legal bills indicated that not all members of the town supported the lawsuit. The fact that tribal, town, and family loyalties often overlap, and concerns that the town would not see the legal battle through over the long haul worried others in the town, most notably members of the Gay Head Taxpayers Association.

In 1974 the tribe filed a lawsuit in U.S. District Court seeking to reclaim lands deeded to the town in 1870. The lawsuit immediately affected private land titles and made it difficult to get mortgages or title insurance because of the cloud placed over titles. When it became clear the town would not defend against the lawsuit, the GHTA, and later the state, intervened in the lawsuit.

A long period of negotiations led to the 1983 settlement agreement entered into by the tribal council, the town, the GHTA, and the Commonwealth. As a result, the lawsuit was dismissed with prejudice, by agreement with all parties.

In July, the GHTA filed a motion in U.S. District Court asking to intervene in the lawsuit on the side of the town.

In September electrical work by a private off-Island contractor adjacent to the shed sparked another confrontation when the town building inspector insisted that a permit from the town was needed before work could continue.

In October, citing enforcement inaction by the town of Aquinnah in the face of what they said was blatantly illegal activity by the tribe, the fiduciaries of a trust controlled by the descendants of painter Thomas Hart Benton also asked to join the town's lawsuit.

In his filing, Mr. Nuesse said that the family found it necessary to intervene in the lawsuit "in order to protect its property against the continuing un-permitted contemptuous and illegal activity of the Tribe."

Mr. Nuesse also expressed concerns that the town might not "vigorously pursue its claims."

By then, Judge Woodlock had issued a remand order sending the lawsuit back to state court, endorsing the argument made by Mr. Rappaport at the outset.

Last week, on the eve of yesterday's trial, Mr. Luckerman filed a motion to dismiss the case.

February 26, 2003
The Martha's Vineyard Times

Limits of Wampanoag Sovereignty Tested in Suit

By Nelson Sigelman

Earlier this month a Dukes County Superior Court judge heard arguments in connection with a lawsuit that could significantly alter the legal equation that has governed the Wampanoag Tribe of Gay Head's (Aquinnah) relationship with tribe and non-tribe members, and with the six Island towns, for almost 20 years.

The lawsuit, brought by the town of Aquinnah against the tribe on the basis of a dispute over the construction of a small shed in violation of town zoning regulations, is expected to test the legal boundaries set out in a 1983 settlement agreement signed between the tribe, town, residents, and the state, and later ratified by the legislature and Congress.

The town argues that the tribe is subject to local and state laws and regulations set out in the settlement agreement which paved the way for federal recognition.

Attorneys for the tribe argue that notwithstanding the settlement agreement the Wampanoag tribe did not give up the inherent rights of a sovereign Indian tribe and is not subject to the jurisdiction of the court, or the measures imbedded in the 1983 agreement.

Attorneys familiar with tribal sovereignty matters say that the issue is continually evolving as communities and tribes work out agreements. What would it mean if the Wampanoag tribe is free to exercise tribal sovereignty on tribal lands unfettered by the terms of the settlement agreement?

Based on the exercise of sovereignty by other tribes, the tribe, with some restrictions, would be free to do as it pleases on approximately 500 acres of land held in trust by the federal government, or any future lands taken into trust the tribe might acquire.

In a practical sense it could mean that disputes between the tribe and local businesses, and some criminal matters, would be dealt with in a tribal court. The tribe would also be free to build a gas station on tribal lands, something talked about in the past, subject to tribal land use policies without approval by the town or the Martha's Vineyard Commission (MVC).

In his arguments on Feb. 12 in Dukes County Superior Court, Ron Rappaport, town attorney, referred to that possibility when he told the judge that if the tribe's position was correct they could build anywhere and no one could sue them. He said in effect the tribe would be the applicant, the permit-granting authority, and the court.

In fact, that is the case on tribal lands across the country including Ledyard, Conn., home of the Mashantucket Pequot tribe, owners of one of the country's most successful casino operations.

Expect Reasonable Behavior

Douglas J. Luckerman of Lexington, the Wampanoags' lead trial attorney, said that among the arguments raised against the tribe is the "specter" that if the tribe is successful in the lawsuit it "will run amok."

Mr. Luckerman, who represents the Maliseet tribe, the Micmac tribe in Maine, and several other tribes in New England he would not identify, said raising the possibility of dire consequences is not a valid argument. For one thing he said the political and legal relationship between the tribe as a sovereign entity and the town is established by the Constitution. Mr. Luckerman said that as a federally recognized tribe, the tribe has the right to establish its own judicial system, police force, and land use regulations.

Asked what a non–tribal member, such as a contractor, would do in a billing dispute with the tribe, he said the person would need to pursue the matter in the tribal court system. He said in some specific contracts tribes will waive tribal immunity which then allows a person doing business with the tribe to retain the right to sue in local courts.

Without a waiver a person or business not satisfied with the outcome of a case in tribal court would have no recourse.

Mr. Luckerman said, "I think partly what is being left out here is that there is no evidence that the tribe is not going to operate in a manner that is reasonable."

He said the situation is not any different from that of someone trying to sue the state, which in the past was immune from suit. He said, "It is a little inequitable to hold the tribe to a separate standard, they are their own political entity."

Mr. Luckerman said the tribe would be free to build what it wants on tribal lands, but the rules would change for so-called fee lands, property the tribe owns but which is not considered tribal lands held in trust, a designation which requires federal approval.

The tribe would be free to expand its holdings, either on the Vineyard or elsewhere, by purchasing land and submitting an application to the federal government to take the land into trust.

Aside from land-use issues, an area of concern to tribal and nontribal members is police jurisdiction. Currently, the Aquinnah police respond to calls originating from tribal lands.

The tribe is working to create a tribal police force and is about to begin interviewing candidates for the newly created position of police chief. The tribe is also embroiled in a dispute with town selectmen and the town police chief over the right of the tribal council to issue weapons permits allowing Wampanoag natural resource officers, the tribe's de facto police force, to carry weapons.

In a story on the growing field of tribal law published in Lawyers Weekly ("Representing Indian Tribes," Dec. 22, 2002), attorney Robert F. Mills, one of the attorneys representing the tribe, said the outcome of the lawsuit would affect a number of jurisdictional issues. As an example, he said "hot pursuit" is an issue that needs clarification since each department will inevitably require the other's cooperation in a chase onto the other's land.

Just Like France

Beverly Wright, Wampanoag tribal chairperson, said that because the tribe believes it has the right to exercise sovereignty over tribal lands, that does not mean it would put up a 50-story building.

Asked, assuming the tribe prevails, if the tribe could someday build a gas station on tribal lands in Aquinnah, for example, she said that would be possible but only after the project met the tribe's "strict criteria."

Ms. Wright said the tribe intends to create its own judicial system and police force that would have jurisdiction over tribal members on tribal lands. She said the future could also include cross deputization and memos of understanding that would allow for cooperation between tribal and nontribal police and public safety officers.

"We are a government, we are building a nation here," said Ms. Wright, "and it seems we have to educate the people."

She said the things the tribe is doing does not differ from what "the town of Gay Head does, what Chilmark does, what France does, and it seems to be very hard for our readers [Vineyard newspaper readers] to understand that the Wampanoag tribe is a nation, we are a government."

Comparing the Wampanoag nation to France she said, "All the things that the government of France does that is what we are doing also."

Asked why, if the tribe is a sovereign nation, it does not bear the cost of educating children who live on tribal trust lands, instead of allowing the cost to be picked up by Aquinnah taxpayers, Ms. Wright said she had a "twofold" answer.

She said the tribe is striving to be self-sufficient and "hopefully, someday when that happens we will be able to give money to the town for our children to be going to school."
As an example she said the Oneida Tribe in New York, owners of a profitable casino, provides payments in lieu of taxes to the surrounding community.
She added that when the U.S. government signed treaties with the Indian nations it was with the understanding that the government "would educate our children, give us medical care and all the things that we are getting from the government now."

Pequot Tribe

Over the past decade the Wampanoag tribe and its financial backers have spent millions in pursuit of a casino. What the flow of casino profits would mean for the tribe and its relationship with the Vineyard community if they eventually succeed is uncertain.
In 1983 the federal government granted full recognition to the Mashantucket Pequot Indian tribe of Ledyard, Conn., owners of the highly profitable Foxwoods Resort and Casino.
The approximately 650-member tribe has its own judicial system, land use regulations, and police force, and exercises jurisdiction over tribal lands of some 1,400 acres surrounded by the towns of Ledyard, North Stonington, and Preston.
Patrice Kunesh, an attorney for the Pequots, said the exercise of tribal sovereignty is an evolving process. She said the tribe has learned a tremendous amount and is still learning every day.
She said that in a number of cases tribal courts have recognized the orders, judgements, and decisions of state courts and state courts have done likewise.
In the case of a crime committed on tribal lands, Ms. Kunesh said police jurisdiction and prosecution depends on whether the person who committed the crime is an Indian or non-Indian, and whether the victim is Indian or non-Indian. She said generally the tribe has jurisdiction over Indian people who commit crimes on the reservation. There is also an overlay of federal jurisdiction, she said.
She said that as the tribe grows in maturity, developing a legal and judicial system is quite a responsibility "and the tribe takes that very seriously."

Friction and Cooperation

Over the past 20 years the relationship between the Pequot tribe and its three bordering communities has been at times cooperative and contentious.
An application by the tribe 10 years ago to take 165 acres on a major highway into trust for future commercial use set off a nine-year legal battle that cost the three towns more than $1.2 million. The towns opposed removal of the property from the tax rolls and from the control of town and state agencies. The battle ended when the tribe withdrew its application.
Wesley J. Johnson Sr., Ledyard mayor, said the biggest issue affecting the tribal-town relationship has been the attempt by the tribe to take land into trust, thereby removing it from the tax rolls and local zoning and planning regulations.
He said that despite the end of one long legal battle he expects the issue of land use to arise again, and the tribe has a lot more money to spend than the town.
Nicholas Mullane, first selectman of North Stonington, a town of 5,000, said issues of jurisdiction over tribal lands "does at times gets argumentative." He said, "You really don't know when the sovereign group will want to exercise its rights or feel some issue is important enough to challenge whose jurisdiction it is under."

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The Martha's Vineyard Times

State Court Finds Wampanoags Immune from Suit; Appeals Promised, but Perhaps Not by the Town

By Nelson Sigelman

In a decision handed down last week, a state Superior Court judge ruled that the town of Aquinnah has the right to apply local zoning regulations to the Wampanoag Tribe of Aquinnah's (Gay Head) Cook Lands but has no legal means to enforce compliance with those regulations in court by virtue of the tribe's sovereign immunity from suit.

The full decision and related materials are available on the Times' web site, www.mvtimes.com.

An appeal of the ruling, issued June 11 by Justice Richard F. Connon in Dukes County Superior Court, by Aquinnah selectmen does not appear

likely based on the comments of Mike Hebert, chairman of the Aquinnah board. Mr. Hebert is considered the critical swing vote on the three-member board.

Following Tuesday night's selectmen's meeting, Mr. Hebert said he is satisfied with the judge's decision and sees no reason for an appeal.

"I think it is time to put this behind us," said Mr. Hebert.

Selectman Carl Widdiss, a Wampanoag tribal member, has consistently opposed the lawsuit. Jim Newman, newly elected member of the board, said he supports an appeal.

If the selectmen decline to appeal it would leave only the Gay Head Taxpayers Association (GHTA), one of the original parties to the 1983 settlement agreement that led to federal recognition of the tribe, and representatives of the Thomas P. Benton Trust, abutters to the tribal property at the heart of the lawsuit, to carry on the legal fight. Representatives of both parties have said they will appeal the judge's decision.

Larry Hohlt, a seasonal resident and GHTA president, said the decision was both very surprising as well as very disappointing. He said an appeal is planned.

Mr. Hohlt, a retired lawyer, said, "Obviously, this decision as it stands has widespread implications, not only for Aquinnah, but for the entire Island."

Dick Russell, spokesman for the Benton family trust, said the family will appeal the decision. Mr. Russell said the decision has ramifications well beyond a zoning dispute in Aquinnah.

"The integrity of the entire Island is potentially at risk here," he said.

The decision by Justice Connon weakens the foundation of the settlement agreement signed between tribe members, non-resident property owners, the town, and state, on Sept. 8, 1983. That agreement, which led to federal recognition of the Wampanoag Tribe of Gay Head, 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 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.

Patently Unfair

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 when it agreed to the terms of the settlement. Both sides requested summary judgment, granted where there are no genuine issues as to any material fact and where the moving party is entitled to judgment as a matter of law.

The court's decision reviews the substantial facts of the case, which were not in dispute. It describes the roots of the tribe's 1974 lawsuit against the town, which effectively blocked land transfers for years, and the settlement agreement dated Sept. 8, 1983, which led to tribal recognition.

The judge noted several paragraphs, all of which outlined the limits of tribal authority and sovereignty including the following regarding the Cook Lands: "The Town of Gay Head shall convey the so-called Cook Lands to the Tribal Land Corporation. Such property, however, shall not be part of the Settlement Lands, and shall remain subject to taxation and foreclosure in the same manner as any other privately owned property in Gay Head. Any structure placed on this property shall be subject to all Federal, State and local laws, including town zoning laws, State and Federal conservation laws, and the regulations of the Martha's Vineyard Commission ..."

Following the tribal council's adoption of a land use ordinance, the tribe's natural resource department submitted a permit application to the Tribal Land Use Commission to build a pier and shed, which was approved on Nov. 15, 2000. That construction led to the court case.

Citing numerous examples of case law, the judge returned to one theme: "an abrogation of tribal immunity cannot be implied, and Congress must unequivocally express that purpose."

He wrote: "It is clear from everything presented to this Court that the Town and the Tribe intended that the environmentally sensitive Cook Lands be subject to state and local land use requirements and that the Tribe be required to comply with the Town's substantive zoning laws. Common sense dictates that to effect the protection of the Cook Lands, the parties surely intended to include a meaningful remedy such as judicial review and enforcement. However, the relevant case law emphasizes that there is a difference between the right to demand compliance with state laws and the means available to enforce them, such that a tribe may be subject to substantive law while still retaining its immunity from enforcement of those laws in court."

Reviewing the language of the settlement agreement he wrote: "While this language clearly contemplates that federal recognition of the Tribe would impact its relationship vis a vis the Town, this Court concludes that as an

expression of waiver of sovereign immunity from suit, the reference to future tribal recognition in connection with state jurisdiction over the land falls short.
"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. 'If injustice has been worked in this case, it is not the rigid express waiver standard that bears the blame, but the doctrine of sovereign immunity itself. But it is too late in the day, and certainly beyond the competence of this court, to take issue with a doctrine so well established.' American Indian Agricultural Credit Consortium, Inc. v. Standing Rock Sioux Tribe, 780 F.2d at 1379. Accordingly, the Tribe is entitled to judgment as a matter of law on the complaint and on Count 1 of its counterclaim."

Tribe Claims Victory

Commenting on the decision, Beverly Wright, tribal chairperson, said, "We are very happy, we have a victory."
Ms. Wright said the tribe is still going to be a good neighbor and would work with the town to address mutual concerns. She said the tribe has regulations that mirror town regulations and in some cases are even more stringent.
She said, "I think we can move forward from here."
The tribal council was expected to meet last night to discuss the decision.
Leaving Aquinnah town hall following Tuesday night's cancelled annual town meeting, Gladys Widdiss, a tribal council member and one of the original parties to the settlement agreement, said, "I'm happy."
Ms. Widdiss, the mother of selectman Carl Widdiss, said tribal members signed the agreement at the time because they knew they were not in a position to do anything else.
She said people unhappy with the decision, "Need to get up to date on Native American law."

Lawyers Argue Case

In arguing before Judge Connon, Ron Rappaport, Aquinnah's town attorney, was joined by James Quarles, a partner in the Washington law firm of Hale and Dorr, representing the Gay Head Taxpayers Association (GHTA), one of the original parties to the settlement agreement, and Michael Nuesse, acting on behalf of UMB Bank of Kansas City, Mo., trustee of the Thomas P. Benton Trust, abutters to the property on which the shed was built.

The tribe was represented by Robert Mills of the Hyannis law firm of Wynn and Wynn and Douglas J. Luckerman of Lexington, an attorney specializing in Indian law who has represented tribes across New England.

Mr. Rappaport said he is obviously disappointed with the decision. He said, "I find it hard to reconcile certain specific findings the judge made with the ultimate outcome."

He pointed to the finding that the parties intended that the Cook Lands be subject to state and local land use requirements and to be subject to judicial enforcement. Mr. Rappaport said, "He also found that the result he is reaching is patently unfair. On that I agree with him."

Mr. Rappaport said that if the decision withstands the appeals process, the tribe could not be sued for any reason, in particular for land use issues which were heavily negotiated in 1983 and endorsed by the state and federal lawmakers.

Mr. Rappaport said the decision has important ramifications across the Island and the state, as noted by the judge in his decision.

But Mr. Rappaport said that any appeal would be up to the selectmen.

If there is an appeal, he said, he would expect to go directly to the state Supreme Court. Mr. Rappaport said that given the importance of the issues it fits all the criteria for the state's highest court to take the case directly.

Mr. Nuesse said the decision brings into question the validity of the original grant of land given to the tribe as part of the settlement agreement.

Mr. Luckerman said the decision is in accordance with the requirements of federal law. He said, "As the judge pointed out, there are certain standards that need to be met before a tribe can be deprived of its sovereign rights, and in this particular case the standards have not been met and so the tribe's rights are retained."

Asked to comment on the view that the tribe is escaping on a legal technicality from an agreement all parties understood and entered into in good faith, Mr. Luckerman said the United States enters into international treaties all the time that are almost not enforceable. He said the fact that the tribe agreed to come under the jurisdiction of town and state regulations "is different from saying they will comply."

Mr. Luckerman said that absent an agreement to waive sovereign immunity the decision means that the tribe cannot be sued in court. He said that is the same right held by the Commonwealth or the United States.
He said the tribe has adopted zoning regulations that mirror the town's regulations. He said fears that the tribe would run amok or do "whatever" on their land are "wholly unfounded."
Asked if the decision means that the town or abutters would not be able to go into state court to stop the tribe from issuing a special permit for a building that exceeds tribal or town regulations, Mr. Luckerman said any lawsuit would likely be turned away much the same way the current case was.
He said that based on his discussions with tribal officials, their intent is to redouble their efforts to work closely with the town and local community. He said, "That is not to say that they are going to allow the community to tell them what to do."

Town Officials Split

Mr. Hebert said the selectmen met in executive session Tuesday to discuss the judge's ruling but made no decision. Mr. Hebert said Chilmark selectmen have asked to meet with Aquinnah selectmen to discuss mutual issues of interest at their meeting on Tuesday, July 1. He said no official decision would be made until after that meeting.
Speaking personally, Mr. Hebert, who is married to a tribal official, said he is satisfied with the judge's decision and sees no reason to appeal.
"I think it is time to put this behind us," said Mr. Hebert.
Mr. Hebert said he has every confidence the tribe will abide by the rules and regulations they have adopted, and which mirror the town's own regulations.
Mr. Hebert said he originally agreed to pursue the lawsuit because he wanted an answer to the legal question. He says he got it in the form of Judge Connon's decision.
Regarding the issue of fairness noted by the judge, he said it is more important for the town to come together as a community than to trouble about what is fair and not fair.
Mr. Hebert said there are other people who can take the case to appeal. He said townspeople are tired of spending money on the case.
Asked what recourse non-tribe members have, absent the right to sue the tribe, Mr. Hebert said he needs to think of all the town's residents. Mr. Hebert said those people unhappy with the decision and seeking an appeal represent a minority in town.

Regarding the judge's view that the case is also detrimental to the citizens of the state, he said if the state were interested in protecting its rights it should have joined the case. "They chose not to," he said.
Jim Newman, elected selectman in May, said an appeal should not be left to other groups. Mr. Newman said, "It is a town issue and an Island-wide issue because it has ramifications for the entire Island, not just Aquinnah."
Mr. Newman said the case needs to be decided at the highest levels of judicial review so all sides can move on. He added, "I'm sure they would expect it to be appealed, I just don't want to see it become an us-or-them situation."
He said the case affects all town residents.
Mr. Widdiss could not be reached for comment.
Asked to respond to Mr. Hebert's comments that it is time to put the matter behind the town, Mr. Hohlt said the decision flies in the face of the agreement that the tribe, taxpayers and the state signed 20 years ago. He said the taxpayers association has been very pleased that to date the town has recognized the significance of the issues involved and their impact on all the residents of the town.
He said, "It would be very sad if the town were to decide not to appeal this very surprising decision."
He said the actions of the GHTA have all been in strong support of the town's efforts to defend the settlement agreement and the accompanying state and federal legislation. But he said, "If need be we will pursue this matter on our own. Not to do so would be unwise"

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The Martha's Vineyard Times
Editorial

Decision on Wampanoag Legal Immunity Must Be Appealed

It appears possible that the selectmen of Aquinnah will decline to appeal a state superior court decision that eviscerates the 1983 settlement agreement which paved the way for federal recognition of the Wampanoag Indian tribe. That would be a terrible dereliction of their executive responsibilities.
The agreement formed a basis for the act of Congress that established the sovereign existence of the tribe, but it was also the foundation for the modern relationship between the Wampanoag Indians, who are also voters and taxpayers of the town, and the non-Indian residents and non-voting taxpayers of Aquinnah. The town's voters, the non-resident taxpayers of

Aquinnah, and the Indians all agreed to abide by the terms of that settlement document.

As superior court Judge Richard F. 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.”

Without the ability to enforce the terms of municipal, regional, and state laws, the settlement agreement is meaningless, good government is not assured, and the rights of non-Wampanoags are crippled. It is not reasonable to conclude that although the intentions of all parties to the settlement agreement were made plain in the document, the interests of any party may not be pursued without the tribe’s consent to legal action. It’s not what was intended. It’s not what was agreed.

The Aquinnah selectmen have a moral as well as a political responsibility to join the non-resident taxpayers in seeking further judicial review. The selectmen, two of whom are closely associated with the tribe, represent the town’s interests, not the tribe’s and not the interests of just some of the townspeople. The town’s interests, as set out in the settlement agreement, must be upheld.

But the circle widens. It is also the case that Islanders in other towns have an interest here also in the enforcement of building, zoning, and environmental rules on a regional basis. There is no question that if Judge Connon’s decision stands, the tribe may adhere to the rules as it promised, or it may not. The Wampanoags will be able to choose, immune from any litigation to which they do not consent. And this may apply not only to Indian lands in Aquinnah, but to other properties bought by or for the tribe and held in trust for it by the Secretary of the Interior. It may even apply to land bought by Wampanoags elsewhere and held separately. This ground is uncertain, and it must be clarified.

In the end, if legal appeals are unsuccessful, it may be necessary to seek Congressional review of the circumstances in pursuit of legislation that explicitly limits the Wampanoag tribe’s sovereign immunity from lawsuits in those circumstances set out in the settlement agreement, where it has already agreed to submit itself to municipal, regional, and state regulations.

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The Martha's Vineyard Times

Judge Is Asked to Reconsider Wampanoag Decision

By Nelson Sigelman

A state Superior Court judge will be asked to 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.

James Quarles, a partner in the Washington law firm of Hale and Dorr, representing the Gay Head Taxpayers Association (GHTA), said he would file a motion to reconsider today or tomorrow, the deadline for such a motion.

The taxpayers association is one of the original parties to the settlement agreement, which is at the heart of the decision issued June 11 by Justice Richard F. Connon in Dukes County Superior Court.

A motion to reconsider is the first step in an appeal process that many knowledgeable observers expect could reach the Supreme Court. Mr. Quarles said a decision was made to file a motion to reconsider because it provides the judge an opportunity to consider the arguments much more quickly than would be the case with an appeal.

The thrust of the motion is that the tribe agreed to be governed by the town's zoning bylaws when it signed the settlement act and in so doing also agreed to the judicial review specifically called for in one section of the zoning enabling act.

Mr. Quarles will be joined in his motion by Michael Nuesse, acting on behalf of UMB Bank of Kansas City, Mo., trustee of the Thomas P. Benton Trust, abutters to the property at the center of the zoning dispute.

It is uncertain if Mr. Quarles will be joined by Ron Rappaport, Aquinnah's town attorney, the original plaintiff in the case against the tribe.

Yesterday, Mr. Rappaport said he is continuing discussions of the case with town selectmen and could not comment on the intentions of the town.

In comments last week, Mike Hebert, chairman of the three-member Aquinnah board of selectmen, said he was satisfied with the judge's decision and thought it was time to leave the issue behind.

Selectman Carl Widdiss, a Wampanoag tribal member, has consistently opposed the lawsuit. Jim Newman, newly elected member of the board, said he supports an appeal.

The settlement agreement signed between tribe members, non-resident property owners, the town, and state, on Sept. 8, 1983, 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 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."

In a press release issued last week, tribe chairperson Beverly Wright said, "This is a great victory for the tribe. The court correctly applied the law. Our federal settlement act provides that the Wampanoag tribe will be treated like the other tribes of our country; this decision is consistent with the treatment of other tribes nationwide."

Ms. Wright added, "We have ancient roots in this area, and we take seriously our responsibility to be stewards of the land and live in harmony with our neighbors. We intend to continue our efforts to work with the community toward a cooperative and beneficial future. The tribe's goal is to work with the town of Aquinnah on issues that affect both communities. We have a commitment to improving the lives of our people and in turn, we hope to improve the lives of all members of the community."

In comments last week following the decision, Mr. Rappaport said that if the decision withstands the appeals process, the tribe could not be sued for any

reason, in particular for land use issues which were heavily negotiated in 1983 and endorsed by state and federal lawmakers.
Mr. Rappaport said the decision has important ramifications across the Island and the state, as noted by the judge in his decision.

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State Judge in Indian Lawsuit Asked to Reconsider

By Nelson Sigelman

Their participation in any future appeal still uncertain, the Aquinnah selectmen joined with two other parties to ask a state Superior Court judge to reconsider his ruling in favor of the Wampanoag tribe.
In a motion filed Friday in Dukes County Superior Court, attorneys representing the town of Aquinnah, the Gay Head Taxpayers Association (GHTA), and the Thomas P. Benton Trust asked Justice Richard F. Connon to reconsider his decision, issued June 11 in Dukes County Superior Court, that the town of Aquinnah has no legal means to enforce town zoning regulations on the Cook Lands because the Wampanoag Tribe of Aquinnah (Gay Head) enjoys sovereign immunity from suit.
The language of the motion reflects the fact that a majority of the Aquinnah selectmen have expressed little enthusiasm for an outright appeal.
Although all three parties requested the court to reconsider its decision, Aquinnah is notably absent from an alternative request of the court, also included in the motion.
In the alternative, the Gay Head Taxpayers Association asks the court to vacate its ruling of law and send the case to a higher court. In essence, the GHTA is asking the judge to recognize the significance of the case, set aside his finding, and send the case to be decided at a higher level, presumably the state Supreme Court.
Opening another legal front designed to avoid the issue of sovereign immunity, Michael Nuesse, acting on behalf of UMB Bank of Kansas City, Mo., trustee of the Thomas P. Benton Trust, abutters to the property at the center of the zoning dispute, filed a separate motion for reconsideration, naming individual tribal members and employees "responsible for the unpermitted construction activities on the Cook Lands and in Menemsha Pond" as defendants.
The taxpayers association is one of the original parties to the settlement agreement, which is at the heart of Judge Connon's decision.

The settlement agreement, signed between tribe members, non-resident property owners, the town, and state, on Sept. 8, 1983, 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 jurisdictions of the Commonwealth of Massachusetts and the town of Gay Head, since renamed Aquinnah.

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.

The motion to reconsider asks 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.

The motion states: "The defendants negotiated, agreed to and signed the Settlement Agreement as a Massachusetts Corporation, not an entity having sovereign immunity."

Arguing that should the judge decline to reconsider his decision, he should then vacate his ruling, James Quarles, a partner in the Washington law firm of Hale and Dorr, representing the Gay Head Taxpayers Association, cited a previous Superior Court ruling in which Superior Court Judge Alan Van Gestel said the issues before him were of such "exceptional novelty" that they should be decided by the Appeals Court or the Supreme Court.

Mr. Quarles said, "Given the exceptional novelty of this case under Massachusetts law," and the far reaching implications that this decision will have during the period between Judge Connon's ruling and a decision by an appeals court, it would be appropriate for the court to vacate its ruling and send the case directly to a higher level.

He added, "Given the novelty and importance of the issues, it is likely that the Supreme Judicial Court will grant direct appellate review."

Yesterday, Douglas Luckerman, lawyer for the Wampanoag tribe, said the motion for reconsideration is simply a rehash of arguments already made unsuccessfully.
"It appears to me that they are trying to make hay with the judge's comments that he felt that for reasons we disagree with that the result is unfair. The last time I checked, this is a nation run by laws and the law on the issues that we have been arguing about are clear."

Time Will Tell

Mike Hebert, chairman of the Aquinnah selectmen, said he authorized Mr. Rappaport to join the motion to reconsider with the backing of his fellow selectmen. But the three-member board's willingness to ask Judge Connon to reexamine the legal issues is no indication that it is prepared to endorse an appeal to a higher court.
Yesterday, Mr. Hebert, considered the swing vote on the three-member board, stood by earlier comments that he thinks there is no need to pursue the lawsuit.
Mr. Hebert said the motion filed last week is different than an appeal. He said, "Ron [Rappaport] simply wanted the opportunity to point out to the judge something that he may not have given enough or any consideration when he made his decision, in that way this is still quite different from an appeal."
Following Judge Connon's decision, editorial writers for both Island newspapers and Vineyard officials have urged Aquinnah selectmen to participate in any appeal and seek a decision at the highest level.
Mr. Hebert said he is still willing to listen to people who would like to influence his views, but at this point he remains comfortable with the decision by Judge Connon. Should the judge change his mind, or send the case to a higher court, Mr. Hebert said he would have to give that a lot of consideration.
Mr. Hebert, who is married to a tribal official, said, "I never really looked at it as a lawsuit. I always looked at it as a mediation. I was looking for an independent party to give me the wisdom of his expertise."
Mr. Hebert said he knows that a lot of people are uncomfortable with the decision, but he thinks that will change.
"I can live with the decision as it stands, and I think that the town and the tribe will work together to make people comfortable with it in time," he said.

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Indian Law Expert Says Outcome
Of Tribe/Town Struggle Is Uncertain

By Nelson Sigelman

Last month, a Dukes County Superior Court judge ruled in favor of the Wampanoag Tribe of Gay Head (Aquinnah) and against the town of Aquinnah, in a decision which affirmed the tribe's status as a sovereign entity with special benefits and protections under the law, including immunity from suit.

Judge Richard F. Connon's ruling removed the legal boundaries set out in the 1983 settlement agreement signed by the tribe, town, non-resident taxpayers, and the state — and later ratified by the state legislature and Congress.

Should the tribe ultimately prevail against an appeal, tribe and non-tribe Island residents will travel a significantly altered legal landscape, with the guideposts rooted firmly in the case-history of native American law and tribal sovereignty.

In a telephone interview this week, Lindsay G. Robertson, a professor at the University of Oklahoma Law School and faculty director of the university's American Indian Law and Policy Center, spoke with The Times about the meaning of sovereignty and tribe/non-tribe relationships.

Foundations in Law

Professor Robertson, a specialist in Indian and constitutional law, said that the sovereign status of tribes has been defined over time by a series of Supreme Court decisions, statutes, and treaties. The fundamental Supreme Court case on tribal sovereignty, he said, is the opinion in the Cherokee Nation versus Georgia, 1831, "in which John Marshall characterized tribes as domestic dependent nations."

Mr. Robertson said that much of what Indian law has involved over the past 172 years "is just what those words mean."

The other bedrock principle, he said, is the recognition by the Supreme Court and Congress that today's tribes are the political descendents of the original political communities that were here when the first Europeans arrived.

Mr. Robertson said, “The powers that they exercise trace to those original tribal powers. They are not exercising powers that have been given to the tribes by Congress, and that is important because it means that the tribes are separate political communities.”

It is also at the heart of the term “federal recognition,” which operates to create a relationship between the Federal government and a tribe, but does not create a tribe. It was the 1983 settlement agreement which paved the way for the Wampanoag Tribe of Gay Head to become the state’s first and only federally recognized tribe.

Mr. Robertson said people often have a hard time seeing tribes as political entities, as opposed to ethnic or racial or heritage entities, but that is an important distinction, and it is one that the Supreme Court has reiterated in a lot of cases.

Immunity is Powerful

In successfully arguing their case before Judge Connon, tribal attorneys said that notwithstanding the terms of the settlement agreement, the tribe retained its inherent sovereign immunity.

Mr. Robertson said tribal sovereign immunity is something the Supreme Court has talked about several times, but the benchmark case involved the Kiowa Tribe of Oklahoma and a failed business deal off tribal lands. When the deal failed, the outside parties sued the tribe.

The Supreme Court held that recognized tribes enjoy sovereign immunity from suit, and that extends to off-reservation business transactions. Mr. Robertson said that immunity can be waived by the tribe, but it has to be a knowing waiver.

But in a follow-up case, the court ruled that the inclusion of an arbitration clause in a contract in the event of a dispute between both parties was sufficient to satisfy the explicit waiver standard. Although he said he was unfamiliar with all of the details of the Vineyard case, Mr. Robertson said it is possible that in the same way a Massachusetts appeals court may find that the language of the 1983 settlement agreement may be characterized as an explicit waiver of sovereign immunity.

The umbrella of sovereign immunity extends to the tribe and tribal entities or corporations, but it does not extend to individual tribal members. For example, should a tribe member, financed by the tribal development office, become involved in a business dispute, the individual could be sued but not the tribe.

“What sovereign immunity means is that the tribe cannot be named as a defendant in a lawsuit,” said Professor Robertson.

The 1983 agreement provided the tribe with approximately 500 acres of land held in trust by the federal government. In his decision, Judge Connon found that while the town could apply zoning bylaws to the Wampanoag’s Cook Lands, it could not enforce those laws in court.

Mr. Robertson said that while tribes are not subject to local or state laws on tribal lands held in trust, tribes are subject to federal restrictions, including environmental regulations. Federal jurisdiction is rooted in a legal relationship defined over time, which resembles that of a ward to his guardian, said Professor Robertson. The tribes are sovereign, but they are wards of the federal government.

Mr. Robertson said many people become confused when referring to Indian land because not all land owned or bought by a tribe is held in trust by the federal government.

One question Islanders have asked in the wake of Judge Connon’s decision is whether the tribe could build on lands outside of Aquinnah, free from the constraints of local zoning or the Martha’s Vineyard Commission. The answer is not clear cut.

Mr. Robertson said that although a tribe could purchase property in another community and build immune from suit over local zoning regulations, it is an unlikely scenario because financing would be difficult to secure, and the federal government could exercise its powers to stop any project.

Sovereignty issues arising over the enforcement of criminal laws are more complex. Exactly who has jurisdiction — tribe, state or federal officials — is determined by the nature of the crime and who is involved. In the case of minor criminal matters between two members of the tribe, the case would be heard in a tribal court.

Friction and Cooperation

The legal record in Western states provides many examples of tribe/non-tribe cooperation and friction. Asked to name a chief point of contention between tribes and their adjoining communities, Professor Robertson said it is taxes.

In the case of Western tribes, the fight often involves the sale of products such as tobacco, which carry a state excise tax. Tribe businesses on tribe land can sell the product tax-free.

Mr. Robertson said that although the courts have said the tribes must collect taxes on products sold to non-Indians, the Indian proprietors are often reluctant to do that. And the states cannot sue the tribes to collect the taxes. Mr. Robertson said the issue can become contentious because other local business people who must charge local taxes often have seen it as unfair competition.

Last year, one member of the Wampanoag tribe approached tribe officials with plans to build a gas station on tribe lands in Aquinnah. One selling point was the reduced cost of tax-free gasoline.

Money and economic clout are also the sources of the many cooperative relationships tribes have with adjoining communities.

Mr. Robertson said that in Oklahoma, tribes play a large role in the local community. He said that in the southeastern part of the state, local communities will often approach the Choctaw Nation if they want a new road or fire truck before they go to the state of Oklahoma, because the Choctaws are good citizens who use the same roads and rely on many of the same services and are willing to help pay the costs.

He said, "What creates the best relationships is when tribes and the local communities stop looking at each other as competing groups of individuals and start looking at each other as political communities who happen to be neighbors and have histories in the same part of the world as each other."

Mr. Robertson said communities must look at the various advantages that can accrue to a whole region by virtue of the presence of a federally recognized Indian tribe.

In the case of the Choctaw Nation, he said the tribe's ability to secure government contracts and attract other federal benefits has meant job opportunities for non-Indians that would otherwise not be present in the area.

He said the tribe has a good relationship with local communities for the most part, and the non-Indians are happy to cooperate with the Choctaws in thinking of ways to improve everyone's life through jobs, school construction, hospital construction, and a general rise in the standard of living.

"It takes having that attitude from both sides, and if you do, it is an opportunity," he said.