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Chilmark and Commission Will File Briefs in Sovereignty Case

By JULIA WELLS
Gazette Senior Writer

The town of Chilmark and the Martha's Vineyard Commission will add their voices to the Aquinnah court appeal over sovereign immunity, which is now expected to come before the Massachusetts Supreme Judicial Court this year.

Chilmark and the MVC will both ask for court permission to file amicus briefs in the case, which will test the strength of a 1983 Indian land claims settlement agreement between the town of Aquinnah and the Wampanoag Tribe of Gay Head (Aquinnah).

Eight months ago the Hon. Richard Connon, an associate justice of the superior court, found that the tribe cannot be sued because of sovereign immunity.

Two town groups have formally appealed the case - the Aquinnah/Gay Head Community Association Inc. (formerly the Gay Head Taxpayers Association), and the Benton Family Trust, a group of abutters to the tribally owned Cook Lands. Last month Massachusetts Attorney General Thomas F. Reilly announced that he would intervene in the case on behalf of the commonwealth.

The case centers on a local zoning dispute, but the ramifications could be far-reaching and in the end it could represent a challenge to the power of the Martha's Vineyard Commission to review future development projects.

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

"The selectmen are not acting in response to any perceived threat that the tribe would exercise their claimed immunity inappropriately, but to the fact that the community has a right to determine its own zoning. In so doing, the community decides what is detrimental to itself. It is the duty of the board of selectmen to defend that right," wrote the Chilmark selectmen in a letter to MVC executive director Mark London this week.

The commission voted last week to ask the court to allow it to file an amicus brief - also known as a friend of the court brief - in the sovereignty case. A letter went out to five of the six Vineyard towns inviting them to do the same.

"The commission does not perceive that the tribe wishes to exploit its claimed immunity from judicial process to undertake inappropriate development and notes that it has worked successfully with the tribe in the past. However, if allowed to stand, the exemption from land use controls would be in place for generations to come, and the commission believes that it is important to maintain a unified system of land planning and regulation in light of the Vineyard's unique and limited resources," Mr. London wrote in the letter.

Response to the letter has been mixed. Selectmen in Edgartown and Tisbury decided to not file amicus briefs. Oak Bluffs leaders were still undecided. "We just caught wind of it and we have asked our executive secretary to do some more research," said selectman Todd Rebello this week. West Tisbury selectmen discussed the issue at their regular meeting this week and board members agreed that they favored filing a brief, but selectman John Early was asked to consult with town counsel Ronald H. Rappaport before they take a formal vote.

Chilmark selectmen voted without dissent to accept the invitation.

"I thought it was interesting that the state came in as an intervener, and I thought it was proof conclusive of the validity of what Ron [Rappaport] has been saying all along - that this is a very important lawsuit. The state stepped up and said the same thing," said board chairman Alex Preston.

Mr. Rappaport is town counsel to five of the six Vineyard towns, including Aquinnah.

"I think it's an important issue that should be resolved. Clearly it has impact for Chilmark and the rest of the Island," Mr. Preston said.

Notably absent from the case is the town of Aquinnah, whose three selectmen voted two months ago to abandon the town appeal of what is expected in the end to be a landmark case.

Two of the three selectmen have relationships with the tribe, and the selectmen are now involved in closed-door talks with tribal members over zoning and land-use issues.

The court dispute began in March of 2001 when the tribe built a small shed and a pier at its shellfish hatchery without obtaining a building permit. The hatchery is located on the Cook Lands, one of a group of Indian common lands that were transferred to the tribe in 1983 under the terms of the settlement agreement. Signed by the town fathers and members of the tribe, the agreement contains explicit language noting that the tribe must comply with state and local zoning laws. State and federal legislation was later enacted to ratify the agreement, and eventually the tribe won federal recognition.

In the lower court ruling, Judge Cannon found that the doctrine of sovereign immunity trumps the settlement agreement, although the judge also noted the contradictions, writing that the town had received "a right but no remedy."

Now the case will move to a higher court. Attorneys for the two Aquinnah taxpayer groups who are appealing have filed formal requests to have the case heard by the Massachusetts Supreme Judicial Court. Attorneys for the MVC filed a memorandum in support of review by the state's highest court.

In a brief filed this week, assistant attorney general Thomas A. Barnico underscored the state's interest in defending its own legislation, and also the wider implications of the case.

"The commonwealth has a direct and substantial interest in the enforcement of the order of the town," Mr. Barnico wrote. He also wrote:

"The superior court held that the tribe is immune from the suit by the town of Aquinnah to

enforce applicable zoning regulations. If the superior court is correct in its view that the zoning laws are applicable but not enforceable, such immunity may extend in the future to the use of property acquired by the tribe anywhere in the commonwealth."

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