

**Vineyard Haven, MA**  
34 °F / 1 °C

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# Martha's Vineyard **TIMES**

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**REAL ESTATE**

## State AG Will Join the Appeal In Indian Suit January 29, 2004

By [Nelson Sigelman](#)

The office of Massachusetts Attorney General Thomas Reilly has officially asked to join the legal battle to defend the terms of the settlement agreement that has governed relations between the Wampanoag Tribe, the town of Aquinnah, and the state for more than 20 years.

In a 32-page motion filed Friday with the state appeals court, Assistant Attorney General Thomas A. Barnico laid out the grounds for the state's action. Mr. Barnico argues that the state is an original party to the settlement agreement, that the outcome of the case would "directly and significantly" affect the state's ability to enforce its laws against the tribe, and that there is currently no other governmental body involved.


The state steps into the void left when the Aquinnah selectmen voted on December 8, 2003 not to appeal a June 11 ruling by Justice Richard F. Connon who held that the town has no legal means to enforce town zoning regulations on the Cook Lands by virtue of the Wampanoag Tribe of Aquinnah's (Gay Head) sovereign immunity from suit.

The attorney general's action is welcome news for the Aquinnah/Gay Head Community Association Inc., formerly named the Gay Head Taxpayers Association, party to the original Settlement Agreement. The association, along with representatives of the Benton Family Trust, abutters to the property in question, intervened to support the town and defend the settlement agreement only to be left by the selectmen last month to fend for themselves.

### Intervention Welcomed

Commenting on the state action, Larry Hohlt, president of the Aquinnah/Gay Head Community Association (AGHCA) Inc., said, "The Commonwealth's motion to intervene very succinctly and accurately summarizes all of the core issues in this case and appropriately states their potential import — not only to Aquinnah and other towns on the Island but throughout the Commonwealth."

Mr. Hohlt, a seasonal resident and retired lawyer, added, "All of the relevant governmental entities should be participating in this case, and in this regard we understand and are pleased that the Martha's Vineyard Commission's motion to file a brief in support of the appeal on an amicus basis has been granted."




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The Martha's Vineyard Commission voted last week to file arguments in the case as a friend of the court or amicus curiae, that is, someone who is not a party to a legal case but whose counsel provides information to the court on the legal issues involved.

Mark London, MVC executive director, said the outcome of the case has long-term implications for land use regulation, not just in the town of Aquinnah, which is designated a district of critical planning concern, but across the Island.

Chilmark selectmen last week voted to join the MVC filing. Tim Carroll, Chilmark executive secretary, said town leaders share the same zoning concerns as the MVC.

The AGHCA has asked that the case be taken up by the state Supreme Court. All sides expect the case to end up before the state's highest court.

Throughout the legal debate, it has been clear that the central issue is not 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 but the terms of the Settlement Agreement.

The agreement, signed between tribe members, non-resident property owners, the town, and the state on Sept. 8, 1983, included provisions that made the tribe subject to the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts and the town of Gay Head, since renamed Aquinnah.

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

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."

**A Direct Interest**

At an Aquinnah public hearing Dec. 8 on the question of whether to go forward with an appeal, Ron Rappaport, longtime Aquinnah town counsel, unsuccessfully urged the selectmen to appeal.

Mr. Rappaport said the settlement agreement acknowledged the tribe's sovereignty. The question was the limits imposed by the language making the tribe subject to local and state laws.

"That is a question which has significance, which is going to be with us for a long, long time and is going to go beyond the people in this room," he said.



In describing the state's grounds for intervention, Mr. Barnico gives weight to Mr. Rappaport's argument and the unambiguous language of the settlement agreement.

He wrote, "The Commonwealth has a direct and substantial interest in the enforcement of the order of the Town," noting that the state is a party to the 1983 Settlement Agreement which specifically provides in part that any structure placed on the Cook Lands "shall be subject to all Federal, State, and Local laws, including the Town zoning laws, State and Federal conservation laws, and the regulations of the Martha's Vineyard Commission...."

He wrote that Judge Connon's decision calls into question the powers reserved to the Commonwealth and its cities and towns under the agreement and by the federally recognized Settlement Act.

One question still unanswered is the extent to which Judge Connon's decision would affect tribal lands in other towns. Highlighting that uncertainty, Mr. Barnico 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."

He added the state "has a continuing interest in litigation that might impede its ability to enforce its laws against the Tribe or other Indian tribes."

Douglas Luckerman of Lexington, the Wampanoags' lead trial attorney, said he has known for a month the state action was expected. Mr. Luckerman said he was disappointed the state had decided to intervene without any discussion with the tribe.

Mr. Luckerman said that while it is true the state was a party to the original agreement, up to now they have shown little interest in the case. He said, "Where have they been since 2001?"

Mr. Luckerman, who recently represented the Narragansett Tribe in its tax dispute with the state of Rhode Island, said the attorney general's decision to file a motion to intervene does not change the issues or the facts.

"As far as I can tell," he said, "they are not saying anything different."

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