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Top State Court To Hear Case State Supreme Judicial Court Agrees to Hear Appeal of Case Involving Sovereignty of Wampanoag Tribe

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Signaling its own interest in a case which has attracted attention around the country, the Massachusetts Supreme Judicial Court (SJC) agreed this week to hear the Aquinnah court appeal over sovereign immunity.

On Monday the SJC granted direct appellate review of the case that will ultimately test the strength of a historic 1983 Indian land claims settlement agreement in this remote town in the westernmost reaches of the Vineyard.

Massachusetts attorney General Thomas F. Reilly has also been allowed to intervene as a party in the case, and the Martha's Vineyard Commission and the towns of Chilmark and West Tisbury have been allowed to file amicus briefs.

"Protection of the unique qualities of Martha's Vineyard is an important priority for the commonwealth ... often given primacy over other interests," wrote Eric T. Wodlinger, the attorney for the MVC, in a 45-page amicus brief filed on behalf of the commission and the two up-Island towns.

"The state laws at stake go beyond zoning," wrote assistant attorneys general Thomas Barnico and Robert W. Ritchie in their 33-page brief.

Eight months ago the Hon. Richard F. Connon, an associate justice of the superior court, found that the Wampanoag Tribe of Gay Head (Aquinnah) cannot be sued because of sovereign immunity. The court dispute dates back to March of 2001 when the tribe built a small shed and a pier at its shellfish hatchery fronting Menemsha Pond without obtaining a building permit.

The implications of the case reach beyond the borders of Aquinnah and into every town on the Vineyard. At its most extreme the case could represent a challenge to the power of the Martha's Vineyard Commission to review future development projects.

Two town groups have formally appealed the case - the Aquinnah/Gay Head Community Association and the Benton Family Trust, a group of abutters to the tribally owned Cook Lands. Notably absent from the case is the town of Aquinnah, the original plaintiff. Under pressure from tribal members, the three Aquinnah selectmen decided late last year to abandon an appeal of the superior court ruling. The decision by the selectmen came amid deep divisions in Aquinnah, which is the second smallest town in the state and home to its only federally recognized tribe.

The decision by the state's highest court this week puts the sovereignty case on a clear track. All the principal briefs have been filed in the case, and attorneys for the tribe will have 30 days to

respond. After the final brief is filed, a date will be set for the SJC to hear arguments. A ruling is likely by the end of the summer or early fall.

The request for direct appellate review came from attorneys for the plaintiffs in the case. Attorneys for the tribe did not oppose the request, but they did oppose - without success - the request by the state attorney general to intervene as a party in the case.

"The town of Aquinnah as the original party to this litigation and an agent of the commonwealth best determines whether to pursue further litigation," wrote Douglas Luckerman, the Lexington attorney who represents the tribe, in a brief opposing the attorney general's motion to intervene.

The case has a number of twists, but the central theme is whether the tribe waived sovereign immunity, at least on the subject of land use, when it signed the 1983 settlement agreement with the town and the taxpayers.

The agreement paved the way for federal recognition of the tribe in 1987, and it was also ratified in separate acts of the state legislature and the federal government.

The settlement agreement and subsequent state and federal legislation all contain explicit language noting that the land conveyed to the tribe is subject to state and local zoning laws. The Cook Lands are one of four land areas conveyed from the town to the tribe in the agreement.

In his ruling last year, Judge Connon found that sovereign immunity trumps the settlement agreement. Wampanoag attorneys have hailed the decision as an important victory for Indian sovereignty; plaintiffs in the case say Judge Connon erred as a matter of law.

Now the state supreme court will decide.

There is much case law on the subject of Indian sovereignty, but because settlement agreements between tribes and states vary widely in scope and content, so does the law.

"Case by case, the 'sturdiness' of the tribe's retained sovereignty is (and no doubt will continue to be) perpetually retested and balanced against the particular jurisdictional power asserted by the state - that is the nature of litigation," wrote a federal district court judge in a recent decision involving the Narragansetts and the state of Rhode Island. The Narragansetts and the Wampanoags are both represented by Mr. Luckerman.

In the Rhode Island case, the federal judge found that sovereign immunity did not bar the state from taxing the sale of tobacco on tribal lands.

In the Wampanoag case, the main thread is land use: The Wampanoags have their own government and have adopted the town zoning rules as their own, but the rules include no provision for judicial relief.

"The superior court should have placed greater weight on the subject matter of this action: land use," wrote Mr. Barnico and Mr. Ritchie.

Briefs in the case tell the long story, recounting the history of the settlement agreement and the events that followed it over the years.

In the amicus brief Mr. Wodlinger underscored the regional scope of the case, especially for the neighboring towns on the Vineyard.

He also noted the central role that land use protection has played on the Vineyard over the years, especially through the commission, created by an act of the state legislature in 1974.

"The legislature's creation of the MVC as a regional body underscores the interrelated nature of the towns on Martha's Vineyard and the potential Islandwide impacts of development in any one town," Mr. Wodlinger wrote.

At stake is the integrity of unique regional tools for environmental protection that cross town borders, such as districts of critical planning concern (DCPCs), Mr. Wodlinger wrote.

"If the tribe is free to do as it wishes on the Aquinnah shorefront in disregard of Aquinnah's coastal DCPC regulations, the Chilmark and West Tisbury coastal DCPCs will lose the benefit of unified regional regulation," Mr. Wodlinger wrote.

"The MVC is ... a third party beneficiary of the settlement agreement and has an interest in its efficacy and interpretation," he concluded.

Johanna W. Schneider, an attorney who works at Choate Hall & Stewart in Boston with Mr. Wodlinger, assisted in the brief.

All the attorneys made pointed reference to the unusual phrasing in Judge Connon's decision, which by now has been widely quoted. The judge noted that the town had received a "right without remedy" in the settlement agreement, and called his own decision "patently unfair." "[T]he right without remedy theory of tribal immunity stands on very soft ground," Mr. Barnico and Mr. Ritchie concluded.