SJC hears appeal of Indian claim of immunity from suits over land use

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By Nelson Sigelman

Boston – A zoning dispute that began modestly more than three years ago with the construction of a small wooden shed by the Wampanoag Tribe of Gay Head on tribal lands in Aquinnah without a town building permit was argued before the state Supreme Judicial Court (SJC) in Boston yesterday.

Reflecting the reputation of the state's highest court as active, thoughtful, and well-prepared, the justices repeatedly questioned attorneys for both sides on matters of law and the specific language of the 1983 settlement agreement between the town, the state, the Wampanoag tribe, and the non-resident taxpayers of what was then Gay Head. Recognizing the far-reaching implications of the dispute before them, the justices explored the meaning of the agreement, considering whether it might be construed as a waiver of tribal sovereignty by the Indian tribe.

Many of the justices' questions were reserved for the Wampanoag tribe's lawyer, Douglas Luckerman. Time and again, the justices returned to the meaning of the settlement agreement.

That agreement, which is at the heart of the lawsuit, eventually led to federal recognition of the Wampanoag Tribe of Gay Head, Massachusetts's only federally recognized tribe.

Signed by the tribe, the Gay Head Taxpayers Association (since renamed the Aquinnah/Gay Head Community Association Inc.), the town, and the state and embodied in legislation approved by Congress known as the Indian Claims Settlement Act of 1987, the agreement specifically provides that the settlement lands… "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 (MVC). …"

At issue in the appeal to the SJC is an earlier decision by a Massachusetts Superior Court judge who found that, regardless of the terms of the agreement, the tribe enjoys sovereign immunity from suit.

The stakes are high. The only remaining step on appeal is the U.S. Supreme Court. The SJC is expected to issue a decision within three months.

Before the SJC

In the 13th-floor, wood-paneled courtroom of the New Suffolk County Courthouse in Boston Wednesday morning, Douglas Luckerman of Lexington, lawyer for the Wampanoag Tribe of Gay Head (Aquinnah), squared off with Thomas Barnico, state assistant attorney general, James Quarles, representing the Aquinnah/Gay Head Community Association, party to the original settlement agreement, and Michael Nuesse, representing the Thomas P. Benton Trust, abutters to the shed property in question.

Not represented was the town of Aquinnah, which originally brought the suit but decided last December not to appeal. The selectmen, two of whom are directly related to the tribe, instead decided

to negotiate a memorandum of understanding to govern future disputes.

The justices changed their morning schedule, according to one knowledgeable source, to allow extra time for all sides to make arguments in the case.

Under the official schedule, each side had 15 minutes to state its case, which left Mr. Quarles, Mr. Barnico, and Mr. Nuesse with precious little time. Lawyers appearing before the SJC must be quick on their feet and capable of departing from written outlines in order to respond to questions and points made from the bench, often in quick succession.

In remarks preceding the hearing, Chief Justice Margaret H. Marshall, a Vineyard summer resident, said there had been a claim that a resolution of the case may affect the value of her land in West Tisbury. She said she did not think that was grounds to disqualify her from hearing the case but asked each lawyer if he had an objection to her participation. None did.

Absent from the bench was Justice Judith A. Cowin. No reason was given for her recusal from the case.

Standing at a podium before the six justices seated behind the bench, Mr. Quarles in the six minutes allotted him detailed his argument, telling the justices that it was not necessary to "plumb the depth of Indian law." He said the case turns on the question of whether the tribe waived its sovereign immunity at the time it signed the settlement agreement.

Mr. Nuesse told the court that the tribe agreed to sue and be sued. The justices had no questions.

Mr. Barnico, an experienced and confident litigator before the court, faced several questions. Focusing on the issue of whether the tribe waived or Congress abrogated sovereignty, Justice Martha B. Sosman said, "We do not have to be concerned whether the waiver, if we agree that it is a waiver, whether it ultimately ripens, if you will, into a full-blown Congressional abrogation by this ratification."

"That is exactly our point," said Mr. Barnico.

"If we agree on the waiver issue, we do not have to concern ourselves with this," said Justice Sosman.

Referencing the Superior Court decision that held that, while it had a right to enforce its laws upon the Indians, the town had no remedy because of the Indians' immunity from suit, Chief Justice Marshall said that was not a new concept that had been just "plucked out of the sky." Picking that point up, Justice Robert J. Cordy said there are remedies, but they are just more difficult.

Mr. Luckerman was barely out of the starting gate when he faced his first questions. In response to his point that there must be a clear and unequivocal assent to be sued, Justice Francis X. Spina pointed out that the tribal corporation agreed to hold the lands subject to local and state laws. "Doesn't that suggest that they are exposing themselves to suit?" he asked.

Mr. Luckerman drew a distinction between the corporation and the tribe.

Justice Sosman quickly followed up, pointing out that the language of the settlement agreement made allowances for the future evolution of the tribal corporation.

"It seems to me," said Justice Cowin, "surely it impairs the civil or criminal jurisdiction, for the party that was previously holding the land was clearly subject to the jurisdiction of the courts and the Commonwealth, to say we now have sovereign immunity, it surely impairs the jurisdiction does it not?"

"No, it does not," said Mr. Luckerman.

Justice Cordy asked if the tribe had its own mechanism to enforce zoning bylaws. Mr. Luckerman said the tribe's mechanisms are more stringent than the town's.

More questions followed. Having allowed Mr. Barnico to exceed his allotted time, the court was also generous with Mr. Luckerman. At 11:10 the red light on the podium used by lawyers standing before the high court came on, ending a case that many expect is still far from over.

History of dispute

The construction by the tribe of a shed and pier on tribal lands on the shore of Menemsha Pond without town permits in the winter of 2001 triggered the lawsuit by Jerry Wiener, Aquinnah building inspector and zoning officer, against the Wampanoag Aquinnah Shellfish Hatchery Corporation and the Wampanoag Tribal Council of Gay Head (Aquinnah). The case was heard in Dukes County Superior Court on Feb. 12, 2003

In a ruling on June 1, 2003, Justice Richard F. Connon found 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. In the view of this Court, said result is patently unfair."

Arguments outlined

According to legal experts, the written briefs — legal arguments submitted prior to hearing oral arguments — heavily influence the justices' decision making. The briefs, along with counter arguments known as reply briefs, submitted by lawyers in the Wampanoag dispute provided the legal underpinnings for the oral arguments made before the court yesterday.

Reaffirming the winning argument he made before Judge Connon in Superior Court, Mr. Luckerman argues in a 44-page brief filed on April 21 that his opponents "offer neither new arguments nor case law sufficient to show legal error."

Mr. Luckerman argued that absent a "clear waiver or congressional abrogation," something which cannot simply be inferred or implied," the tribe retains its inherent sovereign immunity. Mr. Luckerman wrote that federal recognition is just that, recognition of an existing state.

He wrote that the facts may be unfair but that has no bearing on the case law. "It is not the province of the courts to alter the sovereign immunity of a tribe," argued Mr. Luckerman. "That role is left to Congress and in the absence of a waiver or a grant of jurisdiction to the Commonwealth, a court must presume that congress decided to allow a tribe to retain its sovereign immunity."

He wrote, "The only question before this court is whether the tribe clearly waived its immunity from suit."

Mr. Luckerman argued that the tribe did not and there is no basis for the courts of Massachusetts to decide otherwise. "In other words, nothing in the settlement agreement or the settlement act," he wrote, "creates a right to sue the tribal government."

AG argues commonsense

Arguing for the office of state Attorney General Thomas Reilly in a 33-page brief filed Feb. 17, assistant attorneys general Thomas Barnico and Robert Ritchie countered the argument that the tribe is immune from enforcement of the terms of the settlement agreement. The state's lawyers wrote that tribes do not need to expressly use the words sovereign immunity for the court to find that the Wampanoags agreed to waive immunity.

The attorneys general argued there "are no magic words required for a waiver" and the courts must take a "practical, commonsense approach in attempting to separate words that can be fairly construed as comprising a waiver of tribal sovereign immunity from words that fall short."

They wrote that in this case, the settlement agreement expressly incorporates federal, state, and local law, and that it is clear that the settlement agreement meant for the tribe to be bound by those laws and subject to enforcement in the courts. "These references are more than sufficient to establish a waiver of tribal immunity from suit," they argued.

Referencing a prior decision of the U.S. Supreme Court, the attorneys general said that the Superior Court erred in applying "an exacting standard" not used by the nation's highest court and also erred in finding that "there is a right of enforcement without a remedy."

The state lawyers argued that the parties did not agree to a "meaningless agreement." Citing a case decided by the Supreme Court, the wrote "that the right without a remedy theory or tribal immunity stands on very soft ground."

Breaking a bargain

Taking a similar tack in his brief, Mr. Quarles focused on the issue of just what all sides agreed to when they signed the settlement agreement more than 20 years ago.

He wrote that the tribe, then a Massachusetts corporation and not yet federally recognized, agreed in return for hundreds of acres of valuable land to hold lands in the same manner and subject to the same laws as any other corporation then and in the future.

"The tribe, while desirous of holding on the benefits of its bargain," argued Mr. Quarles, "wishes to avoid what it apparently now sees as a burden."

Attacking the Superior Court's conclusion that there was no explicit waiver of immunity, he wrote that "an Indian tribe may waive sovereign immunity in any number of ways." For example, they may agree to submit disputes to the jurisdiction of a court. He argued that the Wampanoag Tribe agreed to be bound by the zoning bylaws and knew that those bylaws contained a method of enforcement.

Filing a brief appealing the Superior Court decision as a friend of the court on behalf of the MVC, West Tisbury, and Chilmark, MVC attorney Eric Wodlinger argued that, should the decision stand, it would prove detrimental to state interests because it would not allow for MVC protection or review.

Mr. Wodlinger wrote, "Chilmark and West Tisbury are particularly interested in this appeal because of recent attempts by the tribe to expand its presence and activities within reach of their borders."

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