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Wampanoag Sovereignty Arguments Are Heard at State Supreme Court

By JULIA WELLS

Attorneys on both sides of the sovereign immunity dispute in the town of Aquinnah took their arguments to the Massachusetts Supreme Judicial Court this week, in a landmark case whose outcome is expected to have far-reaching implications for every town on the Vineyard.

In the end the case will test the strength of the historic 1983 Indian land claims settlement agreement in this tiny town that is home to the Wampanoag Tribe of Gay Head (Aquinnah).

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

"This case turns on the question of waiver. Did we enter into an agreement that made it inappropriate to assert sovereign immunity later? We believe the answer is yes," declared James Quarles 3rd, a partner at Hale & Dorr in Washington, D.C., who represents the Aquinnah/Gay Head Community Association, formerly the Gay Head Taxpayers Association. The taxpayers were a party to the original settlement agreement.

"Fundamentally this case is about disagreement over what the settlement agreement says," said Douglas Luckerman, a Lexington attorney who represents the tribe.

It was the only point on which the two attorneys agreed.

Mr. Quarles and Mr. Luckerman argued in front of the state's highest court Wednesday morning in the 13th-floor courtroom of the Suffolk County Courthouse in Boston.

Six justices sat for the arguments, which lasted for about 30 minutes and were punctuated by keen questions on the arcane questions of law that surround the case.

Thomas Barnico, an assistant state attorney general, made an appearance on behalf of the commonwealth, and Michael Nuesse argued on behalf of the Benton Family Trust.

The state attorney general intervened in the case earlier this year.

The case is an appeal of a superior court decision last year that found that the tribe could not be

sued because of sovereign immunity.

The case came about because of a simple zoning dispute which 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 shed and pier are located on the tribally owned Cook Lands fronting Menemsha Pond, one of four land areas conveyed from the town to the tribe under the terms of the 1983 agreement.

The town later went to court to compel the tribe to comply with local zoning rules.



In June of 2003 The Hon. Richard Connon ruled that the federal doctrine of sovereign immunity trumps the settlement agreement.

On Wednesday morning Mr. Quarles detailed the history behind the case, including the settlement agreement which paved the way for federal recognition of the tribe in 1987. The agreement was also later incorporated into separate acts of the state and federal government.

The agreement contains specific language noting that the land conveyed to the tribe is subject to state and local zoning laws.

At issue is whether the tribe waived sovereign immunity, at least on the subject of land use, when it signed the settlement agreement.

Chief Justice Margaret M. Marshall probed the question.

"There might be a waiver as to one particular conduct and not on other conduct," she said, adding: "The [superior court] judge found that the tribe agreed to abide by zoning regulations but did not agree to submit to the courts. . . . It was the 'right but no remedy'," she said, quoting the phrase from Judge Connon's decision that has been repeated many times over since the ruling. Justice Marshall also noted that the right with no remedy was not so out of the ordinary.

Mr. Quarles said the waiver was clear, pointing for emphasis to a U.S. Supreme Court arbitration case in which Justice Ruth Bader Ginsberg found that "there are no magic words necessary" to waive sovereign immunity.

"We submit the waiver is even clearer in this case," Mr. Quarles said. "The commonwealth cared and the taxpayers cared that there was not going to be a radical change in the way the land was governed. That was an unequivocal waiver."

Mr. Luckerman said there was no waiver.

"I do think that this case turns on points of law, federal law. It is not such a complex and difficult excursion that the court must take in recognizing first and foremost that there has to be in the document a clear and unequivocal statement that the tribe can be sued," he said.

"But if we are to plumb the depths of federal law, then why was this case remanded back to the state court?" returned Justice Francis X. Spina.

"It's the question we are all asking," Mr. Luckerman said. "There needs to be consent to be sued," he also said.

"This is a contract and an agreement and its terms must be enforced by this court," Mr. Nesse said.

Mr. Barnico said the tribe was bound by the settlement agreement to follow state and local law.

Attorneys confined their arguments to the topic of waiver and did not touch on another theme: whether the settlement agreement and subsequent state and federal legislation also constituted abrogation of immunity.

Justice Martha B. Sosman, who posed a number of agile questions during the arguments, probed the point.

"Abrogation and waiver are not identical," she said.

Justice Sosman also zeroed in on the sequence of events, noting that the tribe was not recognized when the settlement agreement was signed. "It seems to me that surely this impairs the party holding the land, to say that now we have sovereign immunity. It impairs the jurisdiction, does it not?" she said.

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

Absent from the arguments was the town of Aquinnah, which decided not to pursue an appeal of the case.

A decision by the court is expected by the end of the year.

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