

NEWS UPDATE

State SJC reverses lower court decision; finds Wampanoag tribe has no immunity

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By Nelson Sigelman

In a major setback for the Wampanoag Tribe of Gay Head (Aquinnah) the state Supreme Judicial Court (SJC) today ruled that the tribe is subject to local enforcement of zoning regulations with respect to the construction of a small shed on the so called Cook Lands.

The 11-page ruling reverses an earlier judgment by a Superior Court judge in 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.

The dispute was grounded in 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. 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.

The seven-member SJC decision has far-reaching implications for both sides. The only remaining step on appeal is the U.S. Supreme Court.

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). ..."

The case was argued in front of the SJC on September 8, 2004 in the 13th-floor, wood-paneled courtroom of the New Suffolk County Courthouse in Boston. On a rainy 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.

No sovereign immunity

The 11-page decision, issued with one dissenting opinion on Dec. 9, stated: "We granted an application for direct appellate review to determine whether the defendants, Wampanoag Aquinnah Shellfish Hatchery Corporation (Hatchery) and Wampanoag Tribal Council of Gay Head, Inc. (Tribe), may properly invoke a claim of sovereign immunity to evade a zoning enforcement action and,

ultimately, compliance with local permitting requirements. The case concerns the construction of a shed and a pier platform on real property known as the Cook Lands, a coastal area bordered by Menemsha Pond, located in the town of Aquinnah (formerly Gay Head), Martha's Vineyard. After hearing cross motions for summary judgment, a Superior Court judge dismissed the complaint and entered judgment in favor of the defendants, declaring that the Tribe retains sovereign immunity from civil suit to enforce the local permitting requirements. We conclude that, with respect to its land use on the Cook Lands, the only land in dispute in this case, the Tribe waived its sovereign immunity, thus subjecting the Tribe and the Hatchery to the zoning enforcement action. The order and judgment shall be vacated. The case is remanded for entry of a judgment declaring that the Tribe, with respect to its land use activities on the Cook Lands, waived sovereign immunity and that the defendants are not immune from the zoning enforcement action; and further proceedings consistent with this opinion."

[Click here for copy of full decision](#)

In their finding of facts, the justices disputed the tribe's claim that it followed its own land use ordinances in construction of the shack. The justices wrote: "The Tribe asserted in the trial court that it "did in fact apply for a permit from the Tribe's [l]and [u]se [c]ommission to construct the pier platform," but the record belies this statement. The record shows an application to the Tribe's land use commission to construct only a shed, and a land use permit issued by the Tribe's land use commission limited to the construction of a shed. Nonetheless, and without express authority, the Tribe commenced construction of a pier platform in Menemsha Pond."

In his dissenting opinion, Justice Roderick L. Ireland wrote: "I stand with the Wampanoag Tribal Council. I would affirm the trial judge's order and judgment because I conclude, as did the judge, that the settlement agreement does not constitute a legally sufficient waiver of the Tribe's sovereign immunity. I fully appreciate the language in the settlement agreement, including the language that refers to future recognition of the Tribe, as well as the court's analysis of the phrase "in the same manner, and subject to the same laws, as any other Massachusetts corporation." Nonetheless, I dissent."

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.”

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