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Massachusetts High Court Rules Wampanoags Waived Sovereignty

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In a much-awaited decision that has far-reaching implications for the Vineyard and the commonwealth, the Massachusetts Supreme Judicial Court ruled 5-1 yesterday that the Wampanoag Tribe of Gay Head (Aquinnah) must abide by state and town zoning rules.

The ruling reverses a superior court decision that found the Wampanoags cannot be sued because of sovereign immunity - and it preserves the integrity of a historic 1983 Indian land claims settlement agreement that was the crux of the case.

The state's highest court found that the Wampanoags did in fact waive sovereign immunity when they signed the settlement agreement, which later led to federal recognition for the tribe.

"[T]he facts clearly establish a waiver of sovereign immunity stated, in no uncertain terms, in a duly executed agreement, and the facts show that the tribe bargained for, and knowingly agreed to, that waiver," wrote Justice John M. Greaney. "There is absolutely nothing to suggest that the tribe was 'hoodwinked' or that its negotiators were 'unsophisticated' or did not know what they were doing."

The 12-page ruling was issued yesterday afternoon, and the news spread rapidly around the region, where the case has attracted much attention.

"This is a case of importance not just to the Vineyard but the state. It decides the question of whether an agreement which required the tribal council to abide by the zoning laws of the town and state had to be followed," said Aquinnah town counsel Ronald H. Rappaport, who represented the town in an earlier stage of the case.

Donald Widdiss, chairman-elect of the Wampanoag tribal council, said he expects the tribe to appeal the case to the United States Supreme Court. Mr. Widdiss takes office Jan. 8.

"I'm not surprised," Mr. Widdiss said of the decision. "We were hoping for more consideration on the part of the Supreme Judicial Court. After attending the hearings, I thought it was clear. They're not addressing the federal court issue."

Douglas Luckerman, the Lexington attorney who represented the tribe in the case, said he views the decision as narrow in scope, and he questioned the legal underpinnings.

Their decision is based more on a desire to be fair than on following the requirements of federal law, Mr. Luckerman said.

"They were looking to correct the unfairness identified by Judge Connon," he said, referring to the Hon. Richard F. Connon, who had ruled for the tribe in the case at the superior court level.

The court dispute dates back to March of 2001, when the tribe built a small shed and a pier at its shellfish hatchery without obtaining a building permit. The hatchery sits on the tribally owned Cook Lands fronting Menemsha Pond. The town took the tribe to court over the infraction, and in June of 2003 Judge Connon found that the Wampanoags cannot be sued because of sovereign immunity.

In a pivotal moment last year, the town decided not to pursue an appeal of the decision, leaving it to the Aquinnah/Gay Head Community Association (formerly the Gay Head Taxpayers Association) and the Benton Family Trust, an abutters group, to seek judicial guidance from the state's highest court.

Later Massachusetts Attorney General Thomas Reilly intervened in the case.

"We stepped in this case for a reason. There is more going on here than just a shed in Aquinnah. We believe it is important that the tribe live up to its agreement and comply with state law in current and future tribal projects," Mr. Reilly said in a statement issued yesterday about the ruling.

James Quarles 3rd, a partner at Hale and Dorr in Washington, D.C., who represented the community association, said he and his clients were pleased by the decision.

"We thought this was what the agreements meant," Mr. Quarles said yesterday afternoon. For his clients, he said, "It means that the regime that we always expected would be in place is in place - that zoning activities would be regulated in town."

Mr. Quarles questioned whether the U.S. Supreme Court would take the Wampanoag case, as that court already had ruled on a similar case, one cited by the state supreme court in its own decision.

In the superior court decision Judge Connon acknowledged the conflict between the settlement agreement, in which the Wampanoags expressly agreed to abide by state and local zoning laws, and the doctrine of sovereign immunity. But the lower court judge effectively sidestepped any

resolution to the conflict, noting that the settlement agreement had conferred a "right but no remedy" on the town.

Justice Greaney cleared the conflict.

"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," he wrote.

He continued: "Because we have concluded that the tribe waived its sovereign immunity as to land use on the Cook Lands, we need not discuss in detail the additional argument . . . [but] the tribe knowingly bargained for, and fully understood, its obligations under the settlement agreement to submit to local zoning enforcement, and judicial action, where necessary."

The lone dissenting opinion came from Justice Roderick L. Ireland, the minority judge on the bench. Justice Ireland said the 1983 agreement did not constitute a sufficient waiver of sovereign immunity.

"I remain unpersuaded for two related reasons," he wrote. "First, at the time the settlement agreement was signed, the tribe had not received tribal recognition. Therefore, it had no sovereign immunity to waive.

"Second, given the sophistication of the parties who clearly anticipated that recognition might occur in the future, it would have been very easy for the parties to have addressed the impact of such recognition in a more straightforward fashion. It would have been very simple for them to have said, 'The tribe waives its sovereign immunity.'

"The absence of such a clear, unequivocal, explicit, 'direct' and 'unavoidable' statement of waiver is, in my opinion, controlling, given the importance of the rights at stake."

Justice Greaney, however, concluded that the Wampanoag tribe expressly stated its waiver of sovereign immunity to town zoning enforcement in the settlement agreement, even if the tribe was subsequently recognized by the federal government. The federal recognition also was made subject to the settlement agreement.

"Although the tribe may not desire the precise result now occurring, the tribe's agreement had a 'real world objective' and 'practical consequence,' " he wrote.

Friend of the court briefs were also filed in the case by the Martha's Vineyard Commission and the towns of West Tisbury and Chilmark.

"I do not see any practical impact from this because we have always had good relations with the

tribe," said MVC executive director Mark London yesterday.

"But I am reassured that this point of law has been clarified and that the town zoning regulations and also those of the commission have been upheld," he added.

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