

EDITORIAL

Will they do their duty?

December 16, 2004

Islanders welcome the Massachusetts Supreme Judicial Court's (SJC) holding that the Wampanoag tribe of Gay Head (Aquinnah) is not immune to suit by the town of Aquinnah, or other individuals or agencies, to enforce town, regional, and state development rules.

The 5-1 ruling issued last week vacates a 2003 ruling by Superior Court Judge Richard F. Connon who found that the town had no legal means to enforce town zoning regulations on the Cook Lands because the tribe had not explicitly waived its sovereign immunity from suit when it signed the 1983 settlement agreement that is at the heart of the case. And, by the way, at the heart of the decision by Congress to recognize the Wampanoag tribe.

The SJC held that "...with respect to sovereign immunity, 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 decision delighted Ron Rappaport, the Edgartown attorney and Aquinnah town counsel who was unable to persuade the Aquinnah selectmen to do their duty and join in the appeal from Judge Connon's decision.

"When the building inspector brought the suit in Superior Court seeking to enforce the zoning bylaws of the town, it was his judgment as well as my own that the settlement agreement required the tribe to comply with zoning and obtain building permits for the shed," Mr. Rappaport told Times news editor Nelson Sigelman. "I believed, and expressed publicly to the town meeting, that the decision of the Superior Court was wrong as a matter of law, and I obviously agree with the decision of the Supreme Judicial Court."

Douglas Luckerman, attorney for the tribe, criticized the SJC decision harshly: "This decision smacks of a result that was predetermined by the court and they did everything in their powers to reach that result."

Mr. Luckerman now argues that the tribe has "concurrent jurisdiction" with the state over tribe land. He says, despite the SJC decision, the tribe need not apply to the town for development permission, nor be bound by town decisions. He allows that the only matter decided by the SJC — a holding he rejects — is that the town may sue to enforce town development rules.

"Whether or not they have to go get a permit was not part of the decision," Mr. Luckerman says. "That phase of the argument we will now have to go through."

Almost certainly, the tribe will appeal to the U.S. Supreme Court.

But, for the near term, the question for Islanders generally and for Wampanoag residents in particular has to do with the town selectmen and other municipal officials. The question is, will the selectmen, two of whom have close ties to the tribe, do their duty as elected town officials and enforce town rules? Will they require permits? Will they and the town planning board refer to the MVC Wampanoag projects that trigger Martha's Vineyard Commission review? Will they take whatever steps may be

required, including court action, to be sure that the tribe, as it promised in the settlement agreement, as the highest state court has held, respects town and regional development rules? And will they do so because they have sworn as selectmen to do so, or only when forced to by a court order yet to come?

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