State SJC finds Wampanoags are not immune to lawsuits

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By Nelson Sigelman

In a major legal setback for the Wampanoag Tribe of Gay Head (Aquinnah), the state Supreme Judicial Court (SJC) ruled Dec. 9 that the tribe waived its sovereign immunity and is subject to suit by the town of Aquinnah to enforce zoning regulations and permitting requirements over the construction of a small shed on tribal land on Menemsha Pond.

The 5-1 ruling issued last Thursday morning on appeal vacates a ruling by a Superior Court Justice Richard F. Connon on June 11, 2003 that the town has no legal means to enforce town zoning regulations on the Cook Lands because the tribe had not explicitly waived its sovereign immunity when it signed the 1983 settlement agreement that is at the heart of the case.

The SJC decision stated: "…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 only remaining step for the Tribe on appeal is the U.S. Supreme Court.

Douglas Luckerman of Lexington, Wampanoag attorney, said the tribe would appeal the decision that he described as "absolutely shameful."

Beverly Wright, outgoing tribal chairperson, said the tribal council planned to discuss the tribe's next step at a meeting scheduled last night. "We are obviously disappointed," she said.

She referred any questions about the tribe's plans to comply with local zoning regulations with respect to the disputed shed or a new community center now under construction to Mr. Luckerman.

The dispute began modestly more than three years ago with the construction, without a town building permit, of a wooden shed and pier by the tribe for use by the Wampanoag shellfish hatchery on what is known as the Cook Lands.

The 1983 settlement agreement was signed by the tribe, the Gay Head Taxpayers Association (since renamed the Aquinnah/Gay Head Community Association Inc.), the town, and the state. It was embodied in legislation approved by Congress known as the Indian Claims Settlement Act of 1987. The agreement, which eventually led to federal recognition of the Wampanoag Tribe of Gay Head — Massachusetts's only federally, recognized tribe — 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 now goes back to Judge Connon who must decide what enforcement action is appropriate for not conforming to the zoning laws. What if any action Aquinnah officials will now take to enforce town authority to impose zoning review over ongoing tribal ongoing building projects, including a 5,000-square-foot community center, remains unclear. Decisions in the Island's smallest town are often influenced by the delicate nature of tribal-town relationships.

The case was argued in front of the SJC with one justice absent on September 8, 2004 in the 13th-floor, wood-paneled courtroom of the New Suffolk County Courthouse in Boston. Mr. Luckerman, representing the tribe, squared off against 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. Last December the three selectmen rejected the legal advice of their long-time town attorney Ron Rappaport and voted not to appeal Justice Connon's decision.

In a telephone conversation Monday, Carl Widdiss, chairman of the Aquinnah selectman, said the SJC decision came as no surprise. "The first decision was more of a surprise to me than this one," said Mr. Widdiss. "I figured

on the state level it was going to be defeated."

Asked if in light of the SJC finding, the selectmen were wrong not to pursue an appeal of a decision that had been ruled incorrect, Mr. Widdiss said, "Absolutely not. From my standpoint, anyway, what you have is a decision that does not surprise me and cost the town no money."

Mr. Widdiss, brother of Donald Widdiss, the newly elected chairman of the tribe, said he anticipates the tribe will appeal the SJC decision, which leaves the issue still unresolved.

Regarding the shed and any requirement for the tribe to comply with town zoning requirements, Mr. Widdiss said he plans to speak with town counsel regarding the next steps.

Reached Monday evening, Mike Hebert, Aquinnah selectman, said he has not read through the SJC decision and did not want to offer a comment. Mr. Hebert said any action regarding the shed or the tribe's new community center would fall to the appropriate board, not the selectmen.

Jim Newman, Aquinnah selectman, could not be reached for comment.

Small shed, big issue

The SJC decision was a welcome victory for the members of the Aquinnah/Gay Head Community Association, Inc, which was left by the selectmen to defend the settlement agreement. Larry Hohlt, association president, said his organization was very pleased with the Court's decision. He said the court's analysis of the Settlement Agreement "and the manner in which it was codified by the subsequent enabling Federal and Commonwealth laws is totally in sync with what we have always believed to be the import of that Agreement and those laws."

Mr. Hohlt, a retired attorney and seasonal Island resident, said the agreement "was the result of long, detailed negotiations and compromises whereby all of the parties received considerable benefits, took on responsibilities and accepted various restrictions. Hopefully, now both the town's selectmen and the Tribe will act in a manner reflecting their respective rights, obligations, and duties as so carefully spelled out in the 1983 Settlement Agreement and the related laws."

For knowledgeable observers, the important issue has always been the legal underpinnings of the Tribe's relationship with its neighbors and the future implications of any decision. With the case on its way to the SJC, the state attorney general decided to intervene, filling the official void left by the town.

In a prepared statement issued following the SJC decision, Attorney General Tom Reilly said, "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. Rappaport was also buoyed by the result. "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," said Mr. Rappaport. "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."

Mr. Quarles, the lead attorney in the case and a party to the original settlement agreement, said that while the case was very significant for all of the parties, "It does not plow any new ground." He said the case was relatively straightforward and he sees little likelihood the U.S. Supreme Court would decide to review the SJC decision.

Mr. Luckerman has an opposing view. "It was a mockery of a sham of a mockery of a sham," he said quoting comedian Woody Allen in the film Bananas. "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 said the justices incorrectly applied a standard that has no basis in federal law in finding that the tribe waived its sovereign immunity. "I do not know how they arrived at this decision," he said.

Mr. Luckerman said the tribe has been given concurrent jurisdiction over its lands with the state. Asked if in light of the SJC ruling the tribe must now get a building permit from the town, he said, "No, I do not think so."

He said the only point decided by the SJC was if the tribe could be sued. "Whether or not they have to go get a

permit was not part of the decision," said Mr. Luckerman. "That phase of the argument we will now have to go through."

Donald Widdiss, newly elected tribal chairperson, said the tribe is disappointed with the court findings. Mr. Widdiss, who has promised to work to heal rifts within the town, said the tribe would consider all its options.

Tribe not hoodwinked

In a ruling on June 1, 2003, Justice 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."

The 11-page SJC 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 court concluded: … 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 SJC sent the case back to Superior Court and instructed the judge to take action consistent with the SJC opinion.

[A copy of the SJC decision is available at www.mvtimes.com/News/12092004/decision.html]

Throughout the court proceedings, the Tribe had argued that it followed its own land use ordinances and those mirror or exceed town regulations. The justices disputed that claim. 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."

Mr. Luckerman, an experienced litigator in Native American affairs, had argued successfully in front of Judge Connon that the language of the settlement agreement did not sufficiently contain a clear and express waiver of the tribe's inherent sovereignty.

The Justices wrote that the Tribe, then a nonprofit corporation, knew what it was getting when it signed the settlement agreement and did so with the expectation that it would lead to federal recognition.

"Here, the 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. 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. From all that appears in the record, the parties, represented by able counsel, engaged in protracted and difficult negotiations which produced the settlement agreement bespeaking, in unambiguous terms, the parties' complete understanding."

The Justices said that the Tribe agreed to be treated "in the same manner" as any other Massachusetts corporation, and "the parties agreed to the permanence of this status and did so expressly in contemplation of possible Federal recognition of the Tribe."

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.”

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