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### **Wampanoags Ask High Court to Reconsider Sovereignty Case**

By JAMES KINSELLA  
*Gazette Senior Writer*

The Wampanoag Tribe of Gay Head (Aquinnah) has asked the Massachusetts Supreme Judicial Court (SJC) to reconsider a case freighted with long-term implications for the tribe's sovereignty and land use powers.

The tribe's attorney, Douglas J. Luckerman of Lexington, filed the motion last Thursday with the SJC, the highest court in Massachusetts.

On Dec. 9, the SJC ruled against the tribe in the case.

The court, basing its decision on a historic 1983 Indian land claims settlement with the tribe, ruled 5-1 that the Aquinnah Wampanoags must abide by state and town zoning rules. The ruling reversed a superior court decision that found the Wampanoags cannot be sued because of sovereign immunity.

The lawsuit stems from the tribe's decision to build a shed and platform in March 2001 on the Cook Lands, which front Menemsha Pond and were obtained through the 1983 agreement. The tribe built the shed and platform without obtaining a building permit from the town.

In the SJC decision, Justice John M. Greaney wrote: "[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."

In his motion to have the case heard again, Mr. Luckerman said the court erred in a number of ways.

"The court misapprehended the applicable federal standards for waiver of an Indian tribe's sovereign immunity," he stated. "The standards applied here contradict those set forth by the Supreme Court, violate the supremacy clause, and disregard the sovereign rights of the tribe."

The court faces no deadline in deciding whether to grant a rehearing of the case. Regardless of any SJC decision, the tribe has 90 days from the date of the state court's decision to appeal the matter to the U.S. Supreme Court, which can opt to hear or not hear the appeal.

James Quarles 3rd, a partner at Hale and Dorr in Washington, D.C., who faced off against Luckerman in the SJC case, doubted that the state's highest court will agree to reconsider.

"I don't think there's anything new in there from what he argued in the first place," said Mr. Quarles, who represented the Aquinnah/Gay Head Community Association in the case.

Mr. Quarles also questioned whether the U.S. Supreme Court would agree to take the case.

"I don't this decision breaks any new ground," he said. In particular, he said, the case finds a precedent in the C and L Enterprises, a 2001 Supreme Court decision. The C and L case, he said, found that a tribe that previously had agreed to an arbitration process could not later claim sovereignty to avoid arbitration.

Mr. Luckerman, however, argues in his petition for a rehearing that the tribe did not waive its sovereignty through the 1983 land claims settlement.

"The Supreme Court requires that to find a waiver it must be stated on the face of the document," he wrote. "The settlement addressed only the application of state jurisdiction to tribal lands and contained no 'clear and unmistakable' declaration that the tribe consented to suit in state court."

The court, Mr. Luckerman wrote, applied a legal standard that he called unfair, unjust, unlawful and plainly in error. In his petition, the tribe's attorney made a series of arguments against the SJC ruling, asserting that the courts must view treaties in a different light.

"Normal rules of construction do not apply when Indian treaty rights, or even non-treaty matters involving Indians, are at issue," Mr. Luckerman wrote.

He also drew a distinction between the tribe and its tribal land council, arguing they were two separate entities.

"The unrecognized tribe had little money and wanted to protect its new lands from tribal debts not related to the lands," the tribe's attorney wrote. "[The tribe] was all too aware that since 1850, foreclosures had taken millions of acres from other tribes all across the United States."

Mr. Luckerman pointed out that the settlement agreement specified that the lands, rather than the tribe, would be subject to state and local laws. "As other courts have noted, there is a difference between subjecting tribal lands to state law and the authority to enforce such a law against a tribal government," he stated.

"Questions of sovereign rights and immunity far outweigh considerations of contract," he also wrote.

The sheer weight of history comes down on the tribe's side, according to Mr. Luckerman's argument. The tribe predates the state as sovereign on the lands in question, and over the past 400 years, successive European and American governments have respected the tribe's independence, the attorney argued.

Federal recognition in 1987 affirmed the tribe's rights to self-governance, he also stated.

"When tribal leadership felt ready to assume greater responsibility, it adopted the substantive zoning laws that it had agreed would apply on the settlement lands," he wrote. "Differences between the tribe and the town concerning zoning rules cannot justify unlawfully stripping the tribe's sovereign rights."

The tribe has established a government-to-government relationship with the United States that merits full protection under federal law. "Indian tribes have the right to immunity because they

are sovereigns, and immunity is necessary to preserve their autonomous tribal existence," he wrote.

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