Vineyard Gazette Online

http://www.mvgazette.com/news/2005/02/04/wampanoags_new_trial_denied.php?&format=print

State High Court Denies Wampanoags New Trial; Federal Petition Readied

By JULIA WELLS

The Massachusetts Supreme Judicial Court has denied a petition by the Wampanoag Tribe of Gay Head (Aquinnah) to hold a new hearing on the much-watched sovereignty case, closing the door on the last option for the Wampanoags at the state level.

In a one-sentence ruling issued late in the day on Wednesday, the state supreme court denied the motion by the tribe to rehear the case.

The tribe will now pursue an appeal to the United States Supreme Court.

"We are disappointed of course that the court has decided not to rehear our arguments and I think it's really just one more step in what is going to continue to be a very long process," said Douglas J. Luckerman, a Lexington attorney who represents the tribe in the case.

"We have 90 days from yesterday in which to file an appeal to the Unites States Supreme Court, and that is what we intend to do," he added.

The attorney for a group of Gay Head taxpayers who are plaintiffs in the case said the decision came as no surprise.

"You never want to be overconfident, but I expected the supreme judicial court would deny the petition because it really raised no issues that they hadn't previously considered," said James Quarles 3rd, a partner at Hale and Dorr in Washington who represents the Aquinnah/Gay Head Community Association.

Mr. Quarles said it is rare for the supreme court to grant petitions for rehearings.

"Petitions for reconsideration happen when the court has overlooked an important fact or an important piece of precedent. It is extraordinarily rare that the court will rethink its analysis of the case," he said, adding:

"It's always been my view that the shorter the petition for reconsideration, the greater the likelihood that it will be granted - and this petition was 13 single-spaced pages."

In early December the state's highest court ruled that the Wampanoags must abide by state and local zoning rules, reversing a superior court ruling that found the tribe could not be sued because of sovereign immunity. The underpinning for the state supreme court decision was a 1983 Indian land claims settlement agreement that was signed by the town, the tribe and the town taxpayers association. Among other things the tribe expressly agreed to abide by state and local zoning laws.

The supreme court ruled that the Wampanoags had in fact waived sovereign immunity, at least on the subject of land use, when they signed the settlement agreement. The agreement later led to federal recognition for the tribe, which is today the only federally recognized tribe in the commonwealth.

The dispute began when the tribe built a small shed and a platform in March of 2001 without obtaining a building permit from the town. The shed was built on the Cook Lands, which front Menemsha Pond and were transferred to the tribe under the terms of the 1983 settlement agreement.

The case has attracted the attention of legal experts across the country.

Aquinnah town counsel Ronald H. Rappaport said the decision by the state supreme court this week marks an important turning point.

"This is a significant development and closes the door on the state court involvement. The next issue is whether the tribe appeals to the United States Supreme Court and whether the court would take that case," Mr. Rappaport said.

The town was the original plaintiff in the case, but did not participate in the appeal to the supreme court after a decision by the town selectmen last year that was the source of much controversy in Aquinnah, where the sovereignty case has put a strain on tribe-town relations.

The appeal was left to the taxpayer group and the Benton Family Trust, a group of abutters to the Cook lands. Later Massachusetts Attorney General Thomas Reilly intervened in the case on behalf of the commonwealth. Friend of the court briefs were filed by the Martha's Vineyard Commission and the towns of West Tisbury and Chilmark

Coincidentally, the Aquinnah selectmen met this week in executive session with Mr. Rappaport. The town attorney confirmed yesterday that the subject of the discussion was the sovereignty case, but said no more.

"It was to discuss this case, but beyond that I won't comment," he said.

Mr. Quarles, whose involvement goes back to the original settlement agreement, has said publicly that he doubts the U.S. Supreme Court will take the sovereignty case, and this week he did not waver from that position.

"I don't think the supreme judicial court made any new law or overlooked any old law and therefore I think it's not likely the Supreme Court will think there's an issue here that needs to be revisited," he said. He concluded:

"I was pleased that the supreme judicial court denied the petitions for reconsideration and hope that people will recognize that this was a decision that was made on the law, and wasn't something that people were free to decide in any way they wanted to decide, or could decide as a political matter. The law was clear, the agreement was clear and they made the right decision."

Mr. Luckerman had a different view.

"The only thing the court has decided is number one, whether the tribe voluntarily waived its right to sovereign immunity, so we've still got a whole other phase of this to go, which is what does this concurrent jurisdiction mean. I suspect it will unfortunately be many years to go, even after we get back from a Supreme Court decision," he said. Mr. Luckerman declined to speculate on whether the United States Supreme Court will take the case.

"I think it's impossible to know - there are so many factors that go into the Supreme Court accepting a case, and in this case, just off the top of my head, we have a difference in how the federal circuits determine a waiver of sovereign immunity and how the state determines it. The standard that the state supreme judicial court has used is entirely different than the standard that

the first circuit has used."
