

Wampanoags will not appeal to high court

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By Nelson Sigelman

The Wampanoag Tribe of Gay Head (Aquinnah) announced yesterday it would not file an appeal with the US Supreme Court of a ruling by the state Supreme Judicial Court (SJC) 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.

In prepared remarks, Donald Widdiss, Wampanoag tribal chairman, said the tribe will instead ask the Aquinnah selectmen to resume negotiations, suspended when the original lawsuit was filed, in order to provide "mutually acceptable solutions to land use issues while respecting the need to set the tone for future cooperation between the tribe and town in matters of mutual benefit."

The tribe's decision not to appeal the SJC ruling and work out an agreement with the town does not mean an end to a legal battle that the town abandoned at the Superior Court level, leaving it to a citizens group made up of Aquinnah taxpayers and the office of the State Attorney General to carry the case forward.

In a 5-1 ruling issued on Dec. 9, 2004, the SJC vacated a ruling by 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 following that decision was an appeal to the U.S. Supreme Court. Following the granting of an extension, the tribe had until July 2 to file a petition for a writ of certiorari with the court.

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 construction by the tribe of a small wooden shed and pier on tribal lands on the shore of Menemsha Pond without town permits in the winter of 2001 triggered the lawsuit by Jerry Wiener, Aquinnah building inspector and zoning officer, against the Wampanoag Aquinnah Shellfish Hatchery Corporation and the Wampanoag Tribal Council of Gay Head (Aquinnah). The case was heard in Dukes County Superior Court on Feb. 12, 2003.

At the heart of Judge Connon's decision was the finding that there is no language in the

settlement agreement explicitly setting aside the tribe's sovereign immunity from suit, which it acquired as part of federal recognition as an Indian tribe.

After reviewing the language of the settlement agreement and the issue of Native American sovereignty, Judge 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."

In a press release issued yesterday afternoon, Mr. Widdiss, elected tribal chairman last November, said, "Although the tribe responded initially to legal action brought by the town and other groups, we now feel it is important that any process of resolution recognizes that the town of Aquinnah, and the island of Martha's Vineyard, will benefit from positive, cooperative action. There have been many recent instances where town residents and officials have expressed a desire to work cooperatively with the tribe. This is an encouraging development. We are willing to initiate this process in the hope that any future relationship between the tribe and Aquinnah residents can be approached in a positive and productive environment, with respect and dignity prevailing.

"This decision recognizes that matters of law still remain unresolved. The need for negotiation and cooperation on the part of the tribe and town of Aquinnah regarding land use issues on tribal lands, and associated quality of life issues, is inherently better served by a process that fosters mutual understanding and respect."

With the SJC ruling that the tribe is not immune to suit, and the tribe's decision not to appeal, the lawsuit now goes back to Judge Connon who must decide what enforcement action is appropriate for not conforming to the zoning laws. One question is what action Aquinnah officials will now take to enforce town authority to impose zoning review over ongoing tribal building projects, including a 5,000-square-foot community center.

Larry Hohlt, president of the Aquinnah/Gay Head Community Association, Inc, which was left by the Aquinnah selectmen to defend the settlement agreement, welcomed the news that the tribe would not appeal.

Mr. Hohlt said his group would work to help foster the spirit of goodwill, cooperation, and mutual respect referred to by the tribe, while adhering to the principles that were the subject of protracted negotiations?over many years and resulted in the Settlement Agreement.

In prepared remarks, Mr. Hohlt said, "We are very pleased that by not seeking review by the United States Supreme Court the Tribe has accepted the determination by the highest court in Massachusetts that the Tribe is not immune to suit. As we understand it, the suit brought by the Town against the Tribe, to which our organization is a party having intervened in support of the Town, will now be remanded to the Superior Court where hopefully it will be brought to a quick determination on its merits. The key governing documents are the 1983 Settlement Agreement and the subsequent implementing Federal and Commonwealth laws, and these documents are crystal clear in terms of the principles agreed to by the Tribe, namely that all land use matters in Aquinnah must comply with the Town's land use regulations and permitting and other procedures as implemented by the Town. The Superior Court clearly recognized this

in its prior decision regarding the immunity to suit issue.

"We applaud and encourage all efforts to foster mutual understanding and respect among the Tribe, the Town officials, and all of the Town residents. This is clearly beneficial to all, especially in such a small town like Aquinnah. But it was a recognition of the need for unified overall planning that this smallness creates that underlies the basic principles that were agreed to in the 1983 Settlement Agreement and codified in Federal and Commonwealth law, including that one set of land use rules and regulations and one set of permitting processes, namely those of the Town, would be administered by the Town and would apply to both the Town residents generally and to the Tribe.

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