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Town-Tribe Pact Moves Quietly

Memorandum of Understanding Circulating, But Still Unsigned Outlines Inter-Government Land Use Review Process

By IAN FEIN

A draft agreement that proposes an untested joint intergovernmental venture between the town of Aquinnah and the Wampanoag Tribe of Gay Head (Aquinnah) is now quietly circulating among town and tribal officials.

Obtained by the Gazette this week, the memorandum of understanding outlines a collaborative land use review process that would recognize the tribe as a separate government and resolve some of the issues raised in the still-pending lawsuit over tribal sovereignty.

The authors of the proposed agreement are unknown, though it is understood to be the result of ongoing talks behind the scenes between town and tribal leaders. It has not yet been signed by either the town or the tribe, nor has it been discussed in any public meetings.

The proposed agreement will likely be of great interest in Aquinnah, where town-tribal relations, particularly relating to land use issues, has long been a hot-button topic.

In a landmark decision that attracted widespread attention, the Massachusetts Supreme Judicial Court one year ago this month ruled that the Wampanoag tribe must abide by state and town zoning rules, reversing a lower court decision that found the tribe could not be sued because of sovereign immunity. The state's highest court found that the Wampanoags waived their right to sovereign immunity over land use issues when they signed the historic 1983 Indian land claims settlement agreement, which led to federal recognition for the tribe in 1987. The Wampanoags are the only federally recognized tribe in commonwealth.

The tribe this summer decided not to appeal the case to the United States Supreme Court. It has been remanded back to the superior court for a remedy.

The memorandum of understanding obtained this week does not mention the pending lawsuit. But if the agreement is adopted, it could bear directly on the outcome of the case, which began in 2001 when the tribe built a small shed near its shellfish hatchery on the Cook Lands without obtaining a building permit. If the superior court requires that the tribe obtain a building

permit for the shed, as is now expected, the ensuing regulatory review would likely fall under the joint process set out in the agreement.

The 11-page memorandum of understanding is broadly drawn with open-ended terminology and appears to leave some questions unanswered. But the purpose of the proposed agreement is clear: to create a collaborative review and mediation process for land use issues, and to improve communication and cooperation between the town and the tribe, which each have separate governments.

Under the memorandum of understanding, the town board with jurisdiction over a project on tribal lands would hold a joint public hearing with the tribal land use commission. The joint hearings would be subject to the Massachusetts Open Meeting Law.

Both the town and tribal boards would render decisions on the project application. If the two governments disagree, a lengthy mediation process would follow.

The mediation process, as spelled out in the proposed agreement, would include a special joint advisory board to oversee the collaborative review. The so-called Aquinnah planning advisory board would have five members - two appointed by the tribe, two by the town, and one appointed jointly. According to the agreement, the advisory board would also be subject to the state open meeting law.

The advisory board would facilitate the resolution of disputes stemming from any land use or permitting issues, monitor the progress of the cooperative planning process, and make recommendations for improvement to each government.

If after a joint hearing the tribal land use commission approves a project on tribal lands, but the town does not, the application would then go to the advisory board. If the board cannot reach a mutually acceptable resolution, then the tribal council and the board of selectmen can call a special joint meeting to discuss the issues. If a consensus still cannot be reached, the case would then go to a mediator selected by the advisory board.

If mediation fails to settle the dispute, then the permitting board would issue its final decision, and any aggrieved party would retain the right to appeal the decision in court.

The tribe, under the proposed agreement, however, would waive the defense of sovereign immunity in any judicial review of a land use issue.

The memorandum of understanding would also protect the rights of town boards to refer appropriate projects to the Martha's Vineyard Commission for review as developments of regional impact (DRIs).

The proposed agreement does not describe any collaborative review process with the commission, nor does it discuss land use review involving tribal lands outside the town of Aquinnah.

The final page of the memorandum of understanding indicates that the agreement is to be voted upon and signed by both the selectmen and the tribal council. There is no language in the draft agreement that specifies the need for a town meeting or ballot vote.

It is unclear how the proposed agreement will play out in the public arena in the weeks ahead as it surfaces for discussion. The draft agreement comes at a time of change in both town and tribal leadership.

Some town residents and taxpayers may see the proposed agreement as a dilution of the hard-won state supreme court decision. At a divisive and controversial meeting two years ago this month, town selectmen decided not to appeal the lower court decision, leaving a group of taxpayers and abutters to carry the ball in court - and also foot the bill.

Tribal members, some of whom also opposed the 1983 settlement agreement, may be reluctant to unequivocally relinquish their sovereignty on land use issues.

But the proposed agreement may also be seen as a good faith effort to create a new atmosphere of cooperation that acknowledges the mutual interests of the community - both Indian and non-Indian - in the small town at the western edge of the Island.

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