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Draft pact would ease tribe-town relations

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By Nelson Sigelman

A draft memorandum of understanding between the Aquinnah selectmen and the Wampanoag Tribe of Gay Head (Aquinnah), intended to avoid lawsuits over zoning and land use issues and negotiated behind closed doors for more than two years, will be discussed publicly for the first time at a meeting Wednesday evening. The three selectmen and Ron Rappaport, town counsel and one of the architects of the agreement, will participate in the discussion.

The memorandum of understanding (MOU) has stirred debate among residents in the small up-Island town where land use issues between the tribe and town resulted in the lawsuits and ultimate legislative and Congressional action that led to federal recognition for the Wampanoag Tribe.

The MOU's genesis is rooted in the tribe's construction of a small shed on tribal land (called the Cook Lands) beside Menemsha Pond without a town building permit. The tribe's insistence that it did not need a town permit to build the shed led to a lawsuit in Superior Court and an appeal of that decision to the state Supreme Judicial Court.

The draft MOU emerged from a thicket of legal and political entanglements, following a 5-1 ruling by the Supreme Judicial Court issued on Dec. 9, 2004, in which the court vacated a ruling by Superior Court Justice Richard F. Connon, who held, 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.

The introductory language contained in the 11-page document states that it is based on the intergovernmental relationship between the tribe and the town and the recognition of "common interests" with respect to land use regulation.

Click here to view a copy of the MOU

Among other things, the agreement creates an Aquinnah planning advisory board, sets out a joint review and consultation process, provides for mediation in the event of disagreements, and maintains the right of either party to seek judicial review, in which case the tribe must waive the defense of sovereign immunity.

Mike Hebert, selectman and the town's sole representative during the lengthy negotiations, stressed this week that the memorandum is very much a draft document that will be brought before town boards and must ultimately be approved at a town meeting.

Mr. Hebert said negotiations on a MOU began shortly after the selectmen decided not to appeal the Superior Court decision that found for the tribe. Talks were on hold while the case was before the SJC but then resumed once the issue of sovereign immunity had been resolved in the town's favor.

"I did not think it would be in our best interests to agree to something that did not include such a waiver," said Mr. Hebert. He defended the secrecy that cloaked the negotiations with the tribe as necessary to reach an agreement

Mr. Hebert said that in his view the MOU protects everybody's rights of review and appeal and still preserves the tribe's sovereignty. He said he expects the MOU will change throughout the review process. "This is going to take a while," he said. "And if we are satisfied with the document we end up with, then it will go to a town meeting, and if it goes past town meeting, then I believe it will require legislative approval, so we have a long road to go."

According to Jim Newman, a selectman, the other selectmen were not involved in the negotiations and received a copy of the draft MOU on Wednesday, Dec. 21.

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The existence of the MOU was first described in a story published in the Vineyard Gazette on Friday, Dec. 30. The Gazette described the agreement and its possible implications but quoted no tribe or town officials.

The immediate public reaction from some town officials and residents reflected the political fault line that runs through the tribal-town relationship.

In a Letter to the Editor published in the Gazette, Carlos Montoya of Aquinnah called the MOU deeply flawed and suggested it was somehow linked to the still pending court case remanded to Superior Court.

However, Donald Widdiss, chairman of the Wampanoag tribe, speaking at a regularly scheduled selectmen's meeting last week, spoke approvingly of the MOU, which he said had the support of the tribal council.

The Times was unable to contact Mr. Widdiss for further comment, despite a telephone message left at tribal headquarters.

Camille Rose, selectman and chairman of the planning board, this week expressed skepticism about the need for the new agreement, which she described as cumbersome and unworkable in its current form.

Ms. Rose told The Times that at a recent joint meeting between members of the conservation commission and planning board to discuss the MOU, "it was unanimous that it was cumbersome at least and, except for one person, it was unanimously rejected as something that is even desirable, so there is a lot of work to be done on it."

Ms. Rose said she is still willing to listen, but in light of the SJC decision does not see the need for the MOU. "I guess the big question is why is this necessary," she said.

Mr. Newman expressed more flexibility, describing the MOU as a "work in progress, and another way of avoiding costly and lengthy litigation."

He said people reacted without waiting for an explanation. Mr. Newman said the "premature leak" of the MOU to the Gazette before the selectmen could discuss and digest the agreement "was prejudicial to the document and set a tone without anybody understanding what safeguards would be in place."

Legal view

Mr. Rappaport said the MOU has yet to be discussed at a selectmen's meeting or public hearing and in his view is very much a preliminary document. Mr. Rappaport said it is unfortunate that he did not have an opportunity to fully explain the intent of the MOU in public prior to people reacting to what they might have seen or read.

He said that contrary to what some people might think, it is not an attempt to skirt the court process, which survives the SJC ruling sending the case of the shed back to Superior Court.

"Should the town and the tribe, as two governments, try and establish a cooperative process to deal with land use issues that preserves fully the rights of town boards and neighbors to appeal to court but hopefully will lead to better communication," he said. "That is the whole objective."

"If voters don't want this, fine," he added, "but we may end up with litigation on other fronts."

As all sides consider the MOU, the views of the Aquinnah/Gay Head Community Association, Inc. are expected to carry significant weight. Following Judge Cannon's decision in favor of the tribe, the selectmen decided not to follow the advice of Mr. Rappaport and instead walked away from the courtroom battle. It was the taxpayers group, joined by the office of the state attorney general, that carried the case forward to the SJC and a legal victory.

In a prepared statement e-mailed to The Times, Larry Hohlt, association president, said of the MOU, "We are in the process of analyzing the draft Memorandum of Understanding. It is encouraging that those who have been involved in this process to date on behalf of both the town and the tribe recognize that something of this potential import will require time for questions to be posed and answered, modifications and refinements to be considered, and for reflection. In short, people in town will need the time and ample opportunity to be heard and responded to and to be involved in molding what has been characterized as being an 'initial' draft into a document and scheme that not only is consistent with the 1983 Settlement Agreement and applicable law but also that will work in practice."

History

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 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."



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