

## Wampanoags to seek permits, ending lawsuit

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By Nelson Sigelman

The end to a three-year legal battle over the limits of Wampanoag tribal sovereignty that reached the state's highest court played out quietly Tuesday where it began a little more than three years ago, in the second floor courtroom of Dukes county Superior Court.

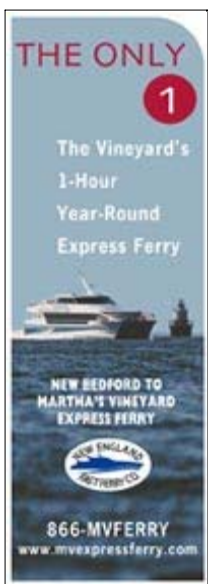
On Tuesday, Douglas Luckerman, a lawyer representing the Wampanoag Tribe of Gay Head (Aquinnah), appeared before Superior Court Judge Diane Kottmyer and said the tribe would apply by April 21 for town building permits for a small wooden shed and pier built on tribal lands on the shore of Menemsha Pond without town permits in the winter of 2001.

The tribe's agreement to seek permits capped the legal victory for the town, in large measure due to the determination of the Aquinnah/Gay Head Community Association Inc., even when the town faltered, to defend the terms of the 1983 settlement agreement that led to federal recognition for the tribe.



The lawsuit that pit Jerry Wiener, Aquinnah building inspector and zoning officer, against the Wampanoag Aquinnah Shellfish Hatchery Corporation and the Wampanoag Tribal Council of Gay Head (Aquinnah) was never solely about two modest structures but went to the heart of that agreement, which specifically provides that the settlement lands are subject to local, state, and federal laws and regulations, including zoning laws.

The tribe had argued successfully at the Superior Court level and later unsuccessfully before the Supreme Judicial Court that the town, state, and courts had no jurisdiction over the actions of the tribe by virtue of its sovereign immunity.



In a judgment handed down on Dec. 9, 2004 the Supreme Judicial Court ruled that the tribe "was not immune from zoning enforcement under the doctrine of sovereign immunity in this case" and sent the case back to Superior Court.

In doing so the court vacated a ruling by Superior Court Justice Richard F. Cannon, 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.

Tuesday's hearing before Judge Kottmyer was originally set for the purpose of seeking a judgment in the case. As a result of the tribe's decision, outlined in a letter dated March 23 to Ron Rappaport, Aquinnah town counsel, Mr. Rappaport agreed to defer a motion filed March 8 asking the court to order the tribe to apply for the necessary permits



Mr. Luckerman wrote that, "in the interest of an improved government to government relationship with the town without any prejudice to the tribe's rights, the tribal council has decided to submit the permit applications for the shed and the pier at issue...."

The one-page letter ended, "The tribe is interested in moving forward to establish a solid working relationship with the town that will lead to increased cooperation between these two governments that will reduce the need in the future to resort to litigation to resolve disputes. Those resources are better used to support services provided by the town and the tribe to their citizens and members."

### **Quiet conference**

Three years ago attorneys for the Wampanoag Tribe and the town of Aquinnah squared off over the limits of tribal sovereignty in a freshly painted courtroom watched by tribal and town officials and a large number of tribal members and Island residents.

On Tuesday Mr. Rappaport, Mr. Luckerman, Robert Howell, representing the community association, and Michael Nuesse, representing the Benton family trust, property abutters, appeared quietly in front of Judge Kottmyer. No tribe or town officials attended court.

The conference took approximately five minutes, long enough for Mr. Rappaport and Mr. Luckerman to describe the tribe's decision and their agreement. Mr. Rappaport told the judge that further assistance from the court may not be necessary and asked that the court maintain supervision. The judge asked the sides to appear back in court for an update on May 1.

Asked to comment on Tuesday's proceedings, Mr. Rappaport, who represented the town in the original Superior Court trial and then was forced to stand by when the town chose not to appeal, said, "This does not close the book, but is another chapter in this case."

Last fall, Mr. Rappaport helped craft a draft memorandum of understanding (MOU) designed to set up a process to resolve conflicts between the tribe and town over land use issues. The document, which outlined a joint review and consultation process, generated little support, but it spawned an ongoing series of meetings between tribe and town officials designed to promote more communication and cooperation.

On Tuesday Mr. Luckerman told The Times that following two successful meetings with the town the tribe thought there was enough good will being generated that it decided to take a leap of faith and put its resources into building long-term relationships with the town.

### **Looking ahead**

Commenting on the tribe's decision, Donald Widdiss, tribal council chairman, said the tribe acted based on the spirit of cooperation the tribe and the town now enjoy.

Asked if it is his view that the tribe is required legally to seek a building permit, Mr. Widdiss said, "just at this moment on the Cook Lands as required by the judgment by the Superior Court."

Mr. Widdiss explained that it is the court's view and not his view that the tribe must seek permits but that the tribe would honor the court's request. "We basically put ourselves in the position of saying that we will honor the court's request at this time," he said, "and work something out with the town in terms of how we are going to go forward."

Mr. Widdiss said he looks forward to a good working relationship with the town. "I think we are getting closer to having a solution that will put the town and the tribe both on an equal footing in terms of respecting each other's authority," said Mr. Widdiss. "That was the goal in the beginning. It was not to usurp any authority. I think we are getting there."

Yesterday, Jim Newman, chairman of the Aquinnah board of selectmen, said he was glad the case

was concluded.

"I think both the tribe and town are satisfied with the outcome," said Mr. Newman. "Through all of this we have been able to better our relationship and hopefully it will be more productive as we continue."

Following Judge Connon'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 statement e-mailed to The Times, Larry Hohlt, association president, said "We are very pleased that this long litigation indeed is reaching its conclusion, and that fundamental agreements and principles set forth in the 1983 Settlement Agreement and the implementing Federal and Commonwealth laws have been so strongly upheld. We also are very pleased by and strongly support the efforts of many Aquinnah representatives and residents and the Tribe to foster a spirit of cooperation and to implement measures that hopefully will eliminate any need for future litigation. This legal action now ending has been very expensive, not only because of the actual very large monetary costs involved but also in terms of the extensive and intensive time and attention it has required. These are resources that in the future hopefully instead can be dedicated to working to enhance the quality of life for all Aquinnah residents and the Island generally."

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