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Wampanoag Tribe Will Apply for Aquinnah Building Permits

By IAN FEIN

Closing a chapter in the landmark sovereignty case, the Wampanoag Tribe of Gay Head (Aquinnah) this week agreed to submit town permit applications for the shed and pier it built on Menemsha Pond in 2001.

The announcement comes at a time of renewed cooperation and communication between the town and tribe, and marks a significant moment in the long-running case that has garnered widespread attention and reached the Massachusetts Supreme Judicial Court.

At a status conference in Dukes County Superior Court on Tuesday, Lexington attorney Douglas Luckerman, who represents the tribe, told the Hon. Diane M. Kottmyer that without prejudice to its future rights the tribe would apply for the necessary town permits by April 21. The agreement, set out in a letter last week, followed a motion filed by town counsel Ronald H. Rappaport that would have given the tribe 30 days to apply for the permits.

Also present in court Tuesday were attorneys Robert Howell, who represented the Aquinnah/Gay Head Community Association, and Michael Nuesse, who represented the Benton Family Trust, an abutters group. The two taxpayers' groups carried the case to the state's highest court after the Aquinnah selectmen decided not to appeal a lower court decision.

The supreme court ruled in December 2004 that, with respect to the Cook Lands, the tribe waived sovereign immunity when it signed the historic 1983 Indian land claims settlement agreement - and so must abide by town and state zoning rules.

The supreme court decision remanded the case back to superior court for a remedy, which led to the status conference this week.

After giving a brief synopsis of the case, Mr. Rappaport on Tuesday asked Judge Kottmyer to retain jurisdiction over the matter. Another superior court hearing is set for May 1, and the judge will monitor the status of the application proceedings should any of the permits be denied.

The shed and pier permit applications likely will trigger hearings with both the Aquinnah conservation commission and planning board.

"Further assistance from the court may not be necessary," Mr. Rappaport told Judge Kottmyer. "But it might be."

Mr. Rappaport also drew attention another building - the Wampanoag Community Center - which the tribe built without town permits. The tribal land use commission approved the center in April 2004, while the sovereignty case made its way through the courts.

It is unclear whether the tribe plans to submit town permit applications for the community center building. Tribal council chairman Donald Widdiss said this week that the community center is not on the Cook Lands, and thus was not a subject of the court proceedings.

Board of selectmen chairman James Newman raised the issue on Wednesday during the third summit meeting between town and tribe officials, who are trying to frame an agreement to prevent litigation over future land use disputes. Mr. Newman at the outset suggested that the two governments must resolve the issue of the community center before trying to create a cooperative regulatory process for the future.

"I think we're beyond the Cook Lands, we know where that lies," Mr. Newman said. "Now I think we need to get the community center out of the way, because it's too late for us to talk about process when it's completed already. I think we need to do whatever we need to do about that - put it to bed - and then we can discuss the process we will invoke when there is a new project proposed in the future.

"I'm saying up front - at this point - that [the community center] is going to impede where we go until we get it settled, by whatever process it takes," Mr. Newman added. "I'm saying it will be a sticking point."

Mr. Widdiss said the governments should avoid talking about specific projects at this point - and should instead focus on the future. He reiterated that the tribe agreed to submit applications for the shed and pier as a measure of good faith to support the ongoing discussions.

"We are in a position to broaden the scope - and, more importantly, broaden the understanding - of how the town and tribe can learn to deal with each other," Mr. Widdiss said. "The issue of development - and character - is the key to this. And if you get caught up in specific instances, then we're never going to get to having a consistent way of dealing."

While the first two summit meetings were marked by a cordial and optimistic tone, the atmosphere turned slightly more confrontational this week as the governments started putting pen to paper. The meeting also came one day after the status conference in court, and two weeks after the Massachusetts Department of Revenue released a report that recommended the town and tribe adopt a formal structure for payments in lieu of taxes. The state report was not discussed this week.

After a half-hour of discussion, town and tribal officials turned their attention to the draft memorandum of understanding that spurred the summit meetings in the first place.

The draft agreement, which met with criticism when made public in late December, laid out a cooperative regulatory process for future projects on tribal lands. It was authored over the last two years by Mr. Widdiss and town selectman Michael Hebert, with assistance from their attorneys.

Town and tribal officials on Wednesday said they agreed with the concepts behind the draft agreement, and made their way through the first three pages of the 11-page document without much disagreement. All embraced the idea of a joint Aquinnah planning advisory board, which would include appointed members from the town and tribe and would serve as a facilitator between the governments.

But the issue of permitting authority quickly resurfaced. Tribal land use commission co-chairman Durwood (Woody) Vanderhoop said he did not believe the tribe should have to apply for town permits.

"I believe strongly in the tribe's ability to permit activity on its land," Mr. Vanderhoop said. "We're very over-regulated here on tribal lands. We have to jump through federal hurdles for many projects that people in town, private citizens, don't have to deal with."

Tribal member and town planning board Berta Welch raised the issue of the 1983 settlement agreement, wherein the tribe agreed that its land will be subject to town health and zoning

regulations as they existed at the time. "I agree with you, Woody. But there's a settlement agreement that speaks to what we're trying to do tonight," Mrs. Welch said.

Mr. Newman also referred to the historic agreement. "It sounds to me as if we're throwing out the settlement. And I don't know if we have that license," he said.

Tribal member Roxanne Ackerman questioned the town's motives. "This all seems very imposing. I don't understand why the town feels they need to do it," she said. "I just feel that you're way out of bounds. Why don't you back off?"

Town conservation commission member Sarah Thulin responded that the lack of dialogue between the two governments led to the current dispute.

"Through communication, through discussion, through telling each other what's going on, there is a 99.9 per cent chance that we will agree," Mrs. Thulin said. "If we don't set up some sort of discussions, then it falls back to not knowing what's going on. I just think that if we can find a way of working through this in a joint way it will be much better than if we go our separate ways."

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