

# Vineyard Gazette Online

[http://www.mvgazette.com/news/2006/09/05/tribe\\_town\\_backgrounder.php?&format=print](http://www.mvgazette.com/news/2006/09/05/tribe_town_backgrounder.php?&format=print)

## Town, Wampanoag Tribe of Gay Head Trace Their Disputes Across Decades

By IAN FEIN

Roughly three decades ago a country lawyer from Maine unearthed a forgotten 18th-century federal law and sparked a series of large Indian land claims that led to federal recognition for a number of tribes throughout the Northeast, including the Wampanoag Tribe of Gay Head (Aquinnah).

The repercussions are still playing out in Aquinnah today, where the town and tribe continue to struggle with how their two governments will respectfully coexist within the confines of one small community.

When town meeting voters two weeks ago tabled a proposed land use agreement negotiated by town and tribal leaders earlier this year, selectmen reacted with surprise and said they were unaware of the level of dissent within the tribe. But if past is prologue, a look back over the last 30 years of Aquinnah history suggests approval for such a pivotal document was unlikely to be secured on the first try.

The record of such negotiations among the tribe, town and taxpayers is in fact one of fits and starts, marked by deeply-felt emotion, a lack of trust, and occasional charges of discrimination. Opinions were aired in state and federal hearings on Beacon and Capitol Hills, and, after a particularly heated town meeting in December 1976, one tribal member found a severed deer head in her mailbox.

At issue today is to what extent the tribe must comply with local zoning laws for development projects on its roughly 500 acres of land. The two governments have now spent five years trying to sort through that aspect of their relationship, and it remains unclear whether they will reach an agreement.

Some tribal members share a strong sentiment that they have both the authority and ability to properly govern themselves. They note that their tribe cared for its land for thousands of years before European settlers even set foot on the Vineyard, and they take offense at suggestions that they now would allow inappropriate development on the Island.

Town officials, meanwhile, believe they have an obligation to enforce the town zoning bylaws and state building codes consistently across town.

Though the dispute is largely philosophical, it is now being driven by the existence of a 6,500-square-foot community center that the tribe built without town permits, and also by a December 2004 Massachusetts Supreme Judicial Court decision that limited tribal sovereignty over land use activities.

The state's highest court in that ruling required the tribe to secure town permits for a small shed and pier it built in 2001 on Menemsha Pond, but left the authority over other areas of

tribal lands largely unaddressed. In an attempt to avoid future litigation over similar projects, town and tribal leaders this year proposed a parallel permitting process that tried to respect the rights of both governments and laid out a lengthy path of mediation to resolve potential disputes. But that document is now on hold.

The proposed land use venture was designed to clarify ambiguities in the historic 1983 settlement agreement, negotiated between tribal members and a town taxpayer group as a resolution to the 1974 land claim suit.

One of a number of similar claims he filed for tribal entities from Connecticut to Maine, attorney Thomas Tureen of Calais, Me., in November 1974 initiated a federal lawsuit on behalf of the recently incorporated Wampanoag Tribal Council of Gay Head. The lawsuit sought to regain control of common land, which Mr. Tureen alleged was wrongfully put under town control. Based on the Non-Intercourse Act of 1790, which stated, in effect, that no transfer of land from an Indian tribe or nation shall be valid unless approved by the federal government, Mr. Tureen argued that the state of Massachusetts in 1870 violated federal law when it incorporated the town of Gay Head without prior approval.

The land claim suits filed by Mr. Tureen embroiled those communities in legal fights and attracted nationwide attention.

The small size of the town of Aquinnah - then still called Gay Head - made the case particularly complicated, because a significant percentage of town residents and officials are also tribal members. Gay Head voters quickly supported a settlement that would return land to the tribe, prompting other residents to form the Gay Head Taxpayers Association to represent non-tribal interests. Concerned about potential claims on private property, and the resulting impact on the Gay Head real estate market, the Gay Head Taxpayers Association formally entered the land claim suit as a party, and later carried the 2001 sovereignty case to its resolution at the Massachusetts Supreme Judicial Court.

Negotiations with the taxpayers association exposed sharp divisions within the tribe, led by a group of so-called dissidents who felt the settlement agreement was akin to signing away their Native American rights. Some members broke from the tribal council and filed a lawsuit that sought control of the entire town of Gay Head, but the U.S. Supreme Court refused to hear their case. Disagreement within the tribe carried through to today, and is reflected in current debate about the new land use agreement.

In November 1983, almost exactly nine years after the original land claim suit was filed, the tribal council, taxpayers association and town meeting voters all signed on to a single document - the Indian land claims settlement agreement - in what was called by some the most important moment in town history. Four years later, after the U.S. Department of Interior granted the tribe recognition in 1987, the state and federal governments codified the agreement in accompanying legislation.

The agreement transferred ownership of roughly 450 acres to the Aquinnah Wampanoags, officially settling the 1974 suit and extinguishing any claims by the tribe to other land in the commonwealth.

But lost in the 13 years of negotiations was an explicit and clear understanding of who was to

govern development projects on the tribal lands.

The tribe throughout the 1990s obtained numerous town and state permits as it formed an infrastructure for its newly created government - constructing an office building, affordable housing development and shellfish hatchery. The tribe in 1999 then adopted its own land use ordinances - based largely on the town's 1983 zoning bylaws - and in 2001 built a small shed and pier without applying for town permits.

In what would become the first court test of the settlement agreement, the town filed a Dukes County Superior Court case to enforce its zoning laws.

The tribe in the case argued that the sovereignty accompanying its federal recognition made much of the 1983 agreement unenforceable. A superior court judge agreed, but the supreme judicial court overturned his decision.

The 5-1 decision by the state's highest court was narrow in that it carefully limited its ruling to land use activities on the Cook Lands. But the text of the decision hints at a broader understanding.

Justice John M. Greaney wrote that, because of the specificity of the Cook Lands decision, he did not need to discuss in detail the larger argument that the tribe waived its sovereign immunity by signing the settlement agreement, which mentions state and local zoning laws on more than one occasion. But that did not preclude Justice Greaney from passing judgment on such a position.

"This argument," he wrote, "has persuasive force and further supports our conclusion that, 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 decision - like the settlement agreement - leaves unanswered one major question that still must be resolved either by the courts or in another agreement between the town and the tribe.

Where, exactly, is it necessary?