

The Martha's Vineyard Times

Tribe approves permit deal with town

Aquinnah, Wampanoag pact awaits town approval

By Nelson Sigelman - January 11, 2007

An agreement that would create a joint land use permitting process between the Wampanoag Tribe and the town of Aquinnah appears to be back on track. The agreement is designed to help avoid future court battles.

Saturday, members of the Wampanoag tribal council voted overwhelmingly in favor of a 12-page "Intergovernmental agreement on cooperative land use and planning between the Wampanoag Tribe of Gay Head (Aquinnah) and the town of Aquinnah."

The memorandum of agreement (MOA) is an outgrowth of a long legal battle over the limits of tribal sovereignty and the extent to which the tribe must comply with town permitting. A lawsuit over a small shed constructed without a town permit on Menemsha Pond reached the state Supreme Judicial Court (SJC), which ruled against the tribe.

[\[A copy of the MOU is available here\]](#)

The intergovernmental agreement now goes back to the town. Selectmen will ask town voters to approve the agreement at a special town meeting on Feb. 15.

It will be the second time the agreement has been presented to voters. Almost five months ago, at a special town meeting on Aug. 21, selectmen presented the MOA, which had been ironed out over months of meetings that involved lawyers for both sides, to town voters.

At the time, town officials thought that the agreement had the support of tribal members. To their surprise, it did not.

At the special meeting town voters who are also tribal members said they were not satisfied that the agreement as written was ready to be acted on before the tribe had had an opportunity to fully discuss it. Several members expressed outright opposition.

The opposition of tribal members was enough to sway some non-tribal voters, many of whom had thought all of the issues had been resolved. As a result, voters decided to table the article.

That left the tribe's partially completed self-permitted community center as the next possible legal flashpoint. Standing on a Superior Court ruling, the tribe did not seek review or approval from town boards or the Martha's Vineyard Commission.

With no agreement in place last November, the selectmen voted 2 to 1 to direct town attorney Ron Rappaport to send a letter to the tribe asking it to comply with town building regulations. In the following weeks, however, in the interests of harmony and based on indications that there was some progress on the MOA, Mr. Rappaport was asked not to draft the letter.

This week, tribal chairman Donald Widdiss said that tabling the measure rather than pushing for a vote at the August special town meeting provided needed time. He said the last several months provided an

opportunity to allay the concerns of tribal members and better understand the ramifications of the agreement.

"The tribal council is comfortable enough with the document to support it," Mr. Widdiss said speaking by telephone Monday from his office in the tribal administration building. He said that, while there are likely people on both sides who would not be in favor of an agreement no matter what the terms, he thinks the MOA provides a mechanism for both sides to work together and is looking forward to approval.

"I think the tribe and the town are both on the same page," said Mr. Widdiss. "Let's try a process that includes mediation and dispute resolution so that we don't spend the rest of our lives in court."

By agreement, once the MOA is approved the tribe intends to apply for permits for the community center within 30 days. In May 2004, a team of Air Force reservists erected the shell of the 6,500-square-foot structure as part of a civil engineering training exercise. Mr. Widdiss said the center is approximately 80 percent completed.

He said that a lack of money compounded by escalating building costs has hindered completion. He estimated the tribe needs approximately \$250,000 to finish the project.

Doug Luckerman, the Wampanoag tribe's attorney, said the tribal council voted to approve the MOA Saturday. He described it as an exciting moment in the tribal-town relationship and an opportunity for both sides to work together.

"I know that there are people on both sides that still are wary of the other side and that is to be expected after the long history here," said Mr. Luckerman, one of the architects of the MOA, "but I think that there is an opportunity, if people want to take it, to find a way to work together and resolve the fact that there are these two sovereign governments living within very close proximity to each other."

Ron Rappaport, who represented the town in the creation of the MOA, described tribal council approval as another step along the road. "Hopefully, town voters will approve it at the special town meeting of February 15 and the document can be executed," he said. "We will see whether it works, but I hope for the best."

Michael Hebert, chairman of the Aquinnah board of selectmen and one of the agreement's strongest backers, said he was very pleased by the council's overwhelming vote of approval. He said the tribe's process took a little longer than he expected, but it is done now and he expects town voters will approve it at the February special town meeting.

"It is about trying to work together instead of having to have the courts fight our battles for us," Mr. Hebert said.

Parallel process

The 1983 settlement agreement that led to federal recognition of the Gay Head Wampanoag tribe 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 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.

The legal conflict that led to the MOA began in the winter of 2001 when the tribe constructed a small shed and pier on tribal land (called the Cook Lands) beside Menemsha Pond without town permits.

The tribe argued successfully at the Superior Court level 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.

The intergovernmental agreement on cooperative land use and planning between the Wampanoag Tribe of Gay Head (Aquinnah) and the town of Aquinnah outlines a parallel permitting process overseen by a newly created seven-member Aquinnah planning advisory board, which would include tribe and town members.

According to the agreement, the tribe agrees to adopt and enforce the laws and regulations that are, at a minimum, substantially equivalent to the town zoning bylaws that were in place on the date of the 1983 Settlement Agreement, and any subsequent amendments.

The latest document is the product of numerous meetings and redrafts. The language has been carefully crafted around some of the more sensitive issues underpinning of the current tribal-town relationship.

For example, section 5-9 states that "The town continues to consider the waiver of sovereign immunity found to exist by the Supreme Judicial court of Massachusetts as sufficient for purposes of this agreement. The Tribe reserves the right to disagree with the Town's interpretation of the Massachusetts Supreme Judicial Court decision."

In the event of a dispute, the first try at finding a mutually agreeable solution falls to the advisory board. In the event the advisory board is unsuccessful, the Tribal Council and the board of selectmen would be notified and have the option to confer on the issues by calling a special joint meeting for that purpose.

If there is no consensus, the dispute goes to a mediator selected by the advisory board. The cost would be split evenly between the tribe and the town.

The agreement cannot be terminated for two years from its effective date without the approval of both the Tribal Council and Town Meeting, but may be terminated at any time thereafter by a vote of one or the other governmental bodies.

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