

# The Martha's Vineyard Times

## Town-tribe issues resurface

By Nelson Sigelman

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A letter from the Aquinnah zoning officer to the chairman of the Wampanoag Tribe of Gay Head (Aquinnah) reprised an earlier zoning dispute that ended in a legal battle that was ultimately settled by the Massachusetts Supreme Judicial Court (SJC). In his July letter, the Aquinnah building inspector and zoning officer wrote that the tribe had failed to obtain permits for three development projects and was in violation of town bylaws and state building codes.

The July 25 letter from Jerry Wiener, town zoning officer, said that if the Tribe did not submit complete, original applications, not copies, for all three permits immediately, the town would be forced to take legal action.

Mr. Wiener wrote that he had made several requests for the necessary paperwork, but received no response. He wrote that the buildings - a shed on the Cook property, the Tribe's Community Center, and the MET tower, a meteorological test tower erected to gauge the potential for wind turbines - must all be permitted and inspected, in accordance with state laws and Aquinnah zoning bylaws in force in 1983.

The date references the year all parties in a complicated land case, brought by representatives of the then as yet unrecognized tribe, reached agreement.

The 1983 settlement agreement that led to federal recognition of the Wampanoags, 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.

Seven years ago, in the winter of 2001, the Wampanoag Tribe erected a small shed on the Cook property without a town building permit. The resulting legal battle reached the SJC.

In December 2004, the state's highest court ruled that the tribe, then the only federally recognized Native American tribe in Massachusetts, was not immune from zoning enforcement under its claim of sovereign immunity.

In the aftermath of the long legal battle that divided residents of the Island's smallest town and exacerbated tribe-town relations, officials and lawyers on both sides agreed to a memorandum of understanding (MOU), officially known as the "Intergovernmental agreement on cooperative land use and planning between the Wampanoag Indian tribe

and the town of Aquinnah."

The agreement, signed June 9, 2007, is intended to avoid future land use disputes. The tribe also agreed to seek the necessary town permits.

## Communication gap

On Tuesday, tribe officials reached by The Times had little to say regarding the letter from Mr. Wiener or the tribe's plans in response.

In an email to The Times, Cheryl Andrews-Maltais, chairman of the Tribe, said she was busy preparing for a meeting and did not have time to speak but that there was little to comment on. "Apparently this is simply another case of miscommunication and misinformation," she wrote. "There is no issue or story on the tribe's part."

Tobias Vanderhoop, the tribe's executive administrator, said that the tribe's planning department, headed by Durwood "Woody" Vanderhoop, had been in contact with the town offices. "To my knowledge, the issue is being handled appropriately," he said.

Asked if that meant the tribe is seeking building permits, Mr. Vanderhoop repeated his previous statement and said, "Whatever actions are appropriate to be taken, I'm sure are in the process of being taken." Mr. Vanderhoop said he had no comment on Mr. Wiener's letter.

Reached early yesterday by phone, tribe planner Durwood Vanderhoop referred to comments attributed to Mr. Wiener and published in the Vineyard Gazette, regarding permit applications the town had received but were illegible. "That was never made clear to the tribe that there was some confusion regarding those things," he said, adding that there had been a lack of communication between the town and the tribe regarding all of the permits. Asked what happens next, Mr. Vanderhoop said, "I will be in touch with Jerry Wiener as appropriate."

In a follow-up email to The Times, Mr. Vanderhoop said permit applications for the shed and the meteorological tower were submitted to the town on April 20 and April 21, 2006, prior to signing the MOU, and the tribe has copies of the applications. "I am not sure what correspondence was described as illegible in previous news reports," he said. "This information was not made known to the tribe in any official correspondence prior to the letter from the building inspector, dated July 25th, 2008."

Mr. Vanderhoop added, "The community center permit has not been submitted, though the tribe has been acting in good faith to satisfy all requirements of the permitting process, as detailed in the town/tribe MOU, including seeking planning board, ConCom [conservation commission] and MVC approvals, as requested by the town."

Mr. Vanderhoop said that further discussion of any issues should take place in accordance with the MOU, "in good faith and face to face."

## No contact

Yesterday, town administrator Jeff Burgoyne said he had not heard anything from town or tribe officials and had not received any official correspondence.

Mr. Wiener did not return several calls from The Times asking for an update.

Jim Newman, chairman of the town selectman, was off-Island when reached by The Times Tuesday evening. He said that he received a call from Cheryl Andrews-Maltais, chairman of the Tribe, prior to leaving the Vineyard last week. She asked that they speak when he returned to the Island.

Mr. Newman said he wanted to discuss the matter with Ms. Maltais and attempt to resolve the dispute before making any decision about legal options. Mr. Newman said he is of the opinion that the selectmen must uphold the decision of the court.

Camille Rose, selectman and chairman of the planning board, said Tuesday she had heard nothing from the tribe. Ms. Rose, who was in the forefront of the battle to defend the terms of the settlement agreement, said the situation is a great disappointment. "I had hoped we that were on the road to having a good mutual and trusting relationship," she said. "This is something that I really didn't expect."

Ms. Rose said the tribe has always been granted special permits without a problem. "I realize it is a matter of principle, but it is with us a well, as we have to proceed with our obligations. I suspect the next step will be litigation."

The memorandum on land use is a document to guide conflict resolution, according to Ms. Rose. "I was hoping we would never need it," she said. "This isn't an issue that we could ever use the MOU for, because we can't defy the SJC."

Ms. Rose said it is unfortunate that the tribe has made no effort to communicate with the town, despite hopes on both sides for a new era of cooperation. "The tragedy is that there are a lot of things we could do together," she said.

Spencer Booker, selectman and a member of the tribe, could not be reached when called late yesterday afternoon for comment.

Ron Rappaport, Aquinnah town counsel, said he is aware of Mr. Wiener's letter but had received no official requests from town officials. "The legal status of what is required is clear," he said, "both from the decision of the Massachusetts Supreme Judicial Court and the memorandum of understanding. But I have not been officially asked by the selectmen to take a role in this at this time."

## Some history

In March, 2006, 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 where it began, in the second floor courtroom of Dukes county Superior Court.

Douglas Luckerman, a lawyer representing the Wampanoag Tribe of Gay Head, 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 that was 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 SJC 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 SJC 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. 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 MOU agreed to by both parties outlines a parallel permitting process overseen by a seven-member Aquinnah planning advisory board made up of tribe and town members.

Although disputes may be referred to a mediator, any decision or recommendation of the mediator would not be binding. Court would still be an option, in which case the tribe agrees to waive the defense of sovereign immunity.

According to the introduction, the Intergovernmental Agreement "represents good faith commitments which are being made by each of the parties in a spirit of cooperation, and is based on the belief that these commitments will be of mutual benefit to the parties."

According to the MOU, the Tribe agrees to adopt and enforce the laws and regulations that are, at a minimum, substantially equivalent to the town zoning bylaws that existed on the date of the 1983 Settlement Agreement, and any subsequent amendments.

The Tribe agrees to provide the town with reasonable access to its property so that the Town can monitor land use activities that fall under the agreement.

The Tribe agrees to provide the town with notice of land use permitting activities on tribal lands and the town will inform the tribe of activity on land abutting its property.

Land use activity that constitutes a development of regional impact will be referred to the Martha's Vineyard Commission.

Both sides will "use their best efforts" to coordinate land use permitting so that meetings and hearings take place at the same time and at the same place, in which cases the open meeting law would apply.

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.

Should the matter go to court, "The Tribe agrees to waive the defense of sovereign immunity to any action seeking judicial review or enforcement of matters covered by this agreement and both parties recognize, and agree, that said limited waiver is not intended for, and may not be used for, any other purpose in any other action or proceeding."

The agreement calls for a joint review of the cooperative planning process after two years. The agreement may be amended only by parallel resolutions of the Tribal Council and the Town Meeting. The agreement cannot be terminated for five years from its effective date without the approval of both the Tribal Council and Town Meeting, but may be terminated at any time after by a vote of one or the other governmental bodies.

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