
WilmerHale Wins Case in the Massachusetts Supreme Judicial Court for the Aquinnah/Gay Head Community Association, Inc.

2004-12-28

The Massachusetts Supreme Judicial Court ruled in favor of our client, the Aquinnah/Gay Head Community Association, Inc. (the "Association"), in a long running dispute with the Wampanoag Tribal Council of Gay Head. The dispute was over a small shed built on tribal lands without a permit from the town of Aquinnah (formerly Gay Head). The subtext was the possible development of Indian gaming venues in Massachusetts as an alternative to establishments in nearby states.

The dispute dates back to a federal district court action brought in the 1970s by the Wampanoag Tribe against the Martha's Vineyard town of Gay Head. The Tribe (then a non-profit organization, unrecognized as an Indian tribe) sued the town for return of certain aboriginal lands transferred in violation of the Indian Nonintercourse Act, 25 U.S.C. § 177, which prohibits the transfer of Indian land without congressional approval. The suit clouded title to land in Gay Head making it difficult, if not impossible, for residents to finance or transfer their land holdings.

Over the course of several years, both the Association (represented by Hale and Dorr) and the Commonwealth of Massachusetts intervened in the suit as defendants and participated in settlement negotiations with the original parties. Under the terms of the 1983 Settlement Agreement, the town, several private citizens, and the Commonwealth agreed to transfer and fund the transfer of over two hundred acres of land to a corporation controlled by the tribal council. In return, the tribal council agreed to hold the land in the "same manner, and subject to the same laws, as any other Massachusetts corporation." This legal status for holding the land would continue "regardless of any future recognition of a federal Indian tribe in Gay Head." By its terms, the Settlement Agreement applied to any lands transferred as a result of the Agreement and to any lands acquired afterwards by the Tribe anywhere in the Commonwealth. The Settlement Agreement was contingent upon subsequent ratification by the Commonwealth and the United States.

Eventually, the Tribe received federal recognition, and the Settlement Agreement was ratified. Over the course of the following decade, the Tribe sought building permits like any other property owner in the Town. In 2001, however, the Tribe constructed a shed on the Cook Lands – part of the lands transferred as part of the Settlement Agreement – without seeking a building permit from the town.

The town's building inspector issued a Cease and Desist Order that the Tribe ignored. The building inspector then filed suit in the Superior Court for Dukes County. The Tribe removed to federal district court, but the case was remanded to Superior Court for lack of a federal question sufficient to invoke the district court's jurisdiction.

At this point, we became involved. The Association, our client, is a group of landowners – many of them only summer residents of the island. Concerned that the town would not be able to afford a potential appeal, or would simply not have the political will to appeal, the Association sought the Firm's services to intervene in the case.

Upon remand, the Superior Court granted the Association's motion to intervene and received briefing and argument on the issue of waiver of sovereign immunity. Despite finding that the Tribe "clear[ly]" intended to be bound by the town's zoning requirements, the Superior Court granted summary judgment in favor of the Tribe. The town subsequently decided that it would not appeal the ruling, leaving the Association and an abutter to appeal the decision.

We sought and were granted direct appellate review by the Supreme Judicial Court of Massachusetts. The Commonwealth intervened at the appellate level. In its briefing and at oral argument, the Association argued that the "in the same manner" language of the Settlement Agreement constituted a limited waiver of tribal sovereign immunity with respect to land ownership. The Association also relied on a Supreme Court holding from a case argued and won by Jim St. Clair in the early 1980s.

The Supreme Judicial Court adopted the Association's arguments. Though language in the opinion would limit its applicability to the Cook Lands alone, the "in the same manner" language that the Court found convincing applies to all lands transferred to or subsequently acquired by the Tribe in Massachusetts. The Tribe has indicated that it will seek *certiorari*.

The case team consisted of [James L. Quarles III](#) and Joseph R. Baldwin, both of the Washington office, with assistance from [Daniel W. Halston](#) and [Daniel H. Gold](#) in the Boston office.