

STATE OF VERMONT
CALEDONIA COUNTY, SS.

FILED

1996 OCT 11
CLERK OF COURT
ST. JOHNSBURY

CALEDONIAN-RECORD PUBLISHING
COMPANY, INC.,
Plaintiff

CALEDONIA SUPERIOR COURT
DOCKET NO. S172-7-96 CaCv

v.

TOWN OF ST. JOHNSBURY and
BRYON QUATRINI, JOHN SIMONS,
ELWIN CROSS, GRETCHEN HAMMER,
GABRIEL HANDY, in their capacities as
Selectpersons,
Defendants

DECISION: DECLARATORY JUDGMENT ACTION ON OPEN MEETING LAW

This matter came before the court for a hearing on October 11, 1996. Based on the pleadings, the evidence presented, and the arguments of counsel, the court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Plaintiff publishes a daily newspaper of general circulation, The Caledonian-Record, that serves St. Johnsbury and the surrounding area. It places special emphasis on coverage of local affairs, publishing 22-33 local stories on a daily basis.
2. Defendants are the Town of St. Johnsbury and the individual members of the Selectboard of the Town of St. Johnsbury.
3. In 1993, St. Johnsbury Trucking Co., a major employer, closed down its

business in St. Johnsbury. The issue of economic development for the area became a subject of major community concern, and a subject closely followed by the newspaper.

4. At that time, David Clark, who had been the St. Johnsbury Town Manager for approximately 32 years, contacted two Selectboard members, Bryon Quatrini and John Hall, to help him form a team to address the issue of economic development in the area. He also contacted Elbert Moulton and Patricia Moulton Powden of the consulting firm of Moulton Consultants, to discuss with them the possibility of a contract to do economic development work for St. Johnsbury of the kind they had recently begun to do in Springfield, Vermont. He considered that as the Town Manager, he had significant responsibility for economic development in the community. He worked with the Moultons to develop the outlines of a contract, which took considerable time. He then presented the proposal to the Selectboard for its consideration and approval. It is not clear whether the Board ever went into executive session in 1993 to discuss the terms of the proposed contract. Eventually, a three-year contract was approved. The cost to the Town was \$7,000 per month (\$84,000 per year) for three years for a total of approximately \$250,000. This was a public investment designed to attract businesses and new jobs to the area to counteract the effect of the loss of St. Johnsbury Trucking Co., and to promote future economic vitality. The community had not undertaken this kind of expense or initiative before, and there was concern about the value of this effort to the community in relation to the substantial cost.

5. The Moultons worked under the contract to promote economic development in the area. The term of the contract was September 1993 to September 1996. It was a

matter of significant public interest whether the Town's investment in the Moulton contract would result in new businesses in Town to provide economic opportunities for residents and economic strength in the community. Patricia Moulton Powden provided services for St. Johnsbury five days per week under the contract, and Elbert Moulton provided less time. Neither of them lived in St. Johnsbury, and Patricia Moulton Powden did not conduct her work from a St. Johnsbury office on a regular basis.

6. In early 1996, a major effort was under way to develop a new Town Plan for St. Johnsbury. The project was called "Join St. Johnsbury" and involved many citizens in the community on committees and subcommittees to address various aspects of the 1996 Town Plan. The Industrial Development Committee addressed the issue of industrial development within the town, and produced a first draft of its section of the proposed report in early March. It suggested an approach to economic development that placed primary responsibility for economic development with the Town Manager, and called for a severely limited continuation of the Moulton contract "to wean the town from this arrangement." It suggested that the Town Manager take over direct responsibility for the functions originally provided under the Moulton contract, and that a part time industrial developer be hired to work with the Town Manager. The issue of whether the contract should be continued or revised or phased out, with the role being shifted to the Town Manager, was a subject of great public interest.

7. In the spring of 1996, two events were upcoming. One was the retirement of David Clark after 35 years as Town Manager. During the winter John Hall had been named to succeed him as the Town Manager. After John Hall was designated and

before David Clark's retirement, the two spent considerable time together so that John Hall could be prepared for the job, which he was scheduled to take over on June 15, 1996.

8. The second upcoming event was the termination of the contract with Moulton Consultants, which was due to expire on September 12, 1996. There was continuing public interest in the future of the Town's economic development initiatives and their cost, and in whether or not there would be a renewal of the Moulton contract and the terms of any renewal. The Caledonian-Record was particularly interested in covering this issue, and the Managing Editor discussed it with reporters during the spring of 1996.

9. The 1996 Town Meeting was held on March 4, 1996. The proposed budget included \$110,000 for economic development. Of this total, a portion was to cover the remaining obligation under the existing Moulton contract, another portion was to cover other expected costs, and another portion was to be available for use after the expiration date of the Moulton contract. At the Town Meeting, a resident moved to reduce the amount of funding for economic development. The specific focus of the Motion was to delete funding for the Moulton contract. The Motion was seconded, and in the discussion that followed, at least two other speakers supported the Motion. It was defeated when put to a vote. Although it was supported by a number of voters, the vote was not close enough to need a paper ballot.

10. In late March, the Caledonian-Record printed a two-part article over two days on the issue of whether or not renewal of the Moulton contract was advisable for the community, and if so on what terms, and on the alternative proposal suggested by

Join St. Johnsbury.

11. The Industrial Development Committee of Join St. Johnsbury modified its recommendation on this subject in April, changing the proposed Town employee position of industrial developer from part time to full time, and making a few other changes. The April version became the report of the Committee in the final Join St. Johnsbury Report. Another Committee identified as the Economic Development Committee did not specifically address the Moulton contract in its report.

12. On July 8, 1996, a Selectboard meeting was held. This was the second Selectboard meeting that John Hall attended in his capacity as Town Manager. Although he was new to this job, he had substantial prior involvement with public affairs in the community. He had been on the Selectboard from 1990 to 1993, had been on the School Board for 9 years and its Chair for 4 years, and was a member of the Vermont Legislature.

13. At the time of the July 8, 1996 meeting of the Selectboard, there had been no discussion at any Selectboard meeting about the future of the Moulton contract or economic development efforts in the Town. The Agenda for the meeting, dated July 3, 1996, identified "Economic Development Contract" as an agenda item.

14. In the weeks prior to July 8, 1996, the attorney for the Caledonian-Record had written to the Town attorney with concerns over whether the Selectboard was acting in compliance with the Open Meeting Law, 1 V.S.A. § 313. Specifically, the newspaper questioned whether the subject matter discussed during executive sessions of the Selectboard was properly identified in advance, whether the statutory basis for the use of

executive session was appropriately referenced, and whether the discussion that took place while in executive session was limited to the subject matter for which executive session was legitimately authorized. The Town attorney had written to the attorney for the newspaper stating that the issue had been reviewed with the Selectboard and that the Town intended to comply with the requirements of the law on an ongoing basis.

15. John Hall had prepared the agenda for the July 8, 1996 meeting. He was aware of different perspectives on the economic development contract within the community. He expected that the Board would initially work on "the structure or structures" for deciding how to proceed with the issue, and reserve discussing details until a later time. He expected that it would take more than one meeting to address the issue. He expected the initial "macro" issues to be addressed first, such as whether to consider a continuation of the contract, or whether to abandon that approach altogether. He expected that some Board members might wish to become active on the issue.

16. When the Economic Development Contract agenda item was reached, a Selectboard member moved to go into executive session. The Motion was seconded. The discussion that followed was on other unrelated issues, and when that discussion was concluded, the Chair asked for discussion on the Motion to go into executive session. There was none. There was no identification of the specific reasons for going into executive session. The Board voted to go into executive session. A ten-minute break was taken while the media "broke down" their equipment. During that break, Andrew Turner, the reporter covering the meeting for the Caledonian-Record, stated to the Chair his objection to the Board going into executive session, and asked that his objection be

noted in the Minutes. John Hall asked him how he would like his objection worded. He responded, and asked how long the executive session was expected to be, and whether or not a vote would be taken. The Chair told him that it would be fairly lengthy, approximately an hour and a half, and that no vote would be taken. In accordance with his custom, Mr. Turner returned to his office rather than wait because of the expected length of the session and the fact that there would be no vote. The standard practice of the Board was that under those circumstances, he would leave, and the Town Manager would telephone him after the executive session was terminated, to inform him of what occurred.

17. During the executive session, the members of the Selectboard discussed strategies for addressing the issue of renewal of the Moulton contract, including whether or not to continue with any contract. They discussed different possible configurations including the concept of the Town having more control than it had had during the initial three-year contract period. They discussed the length of a new contract, a proposal that the Town hire its own staff to perform some of the services provided under the current contract, and the overall goal of having a full time person working on economic development from a St. Johnsbury location. Different perspectives of different Board members were expressed. Generally the attitude toward the work of the Moulton Consultants was positive. There was discussion and agreement on several points: that the Town wanted a full time economic development person working out of a St. Johnsbury location, and possibly a person who lived in St. Johnsbury; that the Board's preference was to hire such a person as an employee of the Town; that the Board was

satisfied with much of the work done by the Moultons and wished to continue a relationship with them of some kind but probably on a restructured basis with the Town taking over some functions directly and others provided under contract; that if the Town was not able to hire a person with appropriate qualifications on its own, the Board wanted to maintain the possibility of having the Moultons provide a person on a contractual basis; and that the Board wanted John Hall as Town Manager to negotiate a new package with the Moultons along the lines of the consensus reached. The Board members agreed to delegate the responsibility of negotiating a new contract to John Hall, and the session was concluded. The executive session lasted approximately ten minutes. The Board members returned to open session, and unanimously approved a motion to "Support the Town Manager in renewing the Economic Development contract with Moulton Associates, and ask the Manager, upon completion of the negotiations, to report back to the Board."

18. After the meeting, John Hall telephoned Andrew Turner and told him that the Board had assigned Hall the responsibility of negotiating a new contract. During the conversation, he informed Turner that the Board wanted a person working five full days a week on economic development who was located in St. Johnsbury, with a preference for someone who lived locally. He also informed Turner that the Board was satisfied with the Moultons' work, and wanted to work out an arrangement that would continue a contract with them, but that the Board also wanted the Town Manager to play an active role.

19. Following the meeting, John Hall had considerable contact "back and forth"

with the Moultons to work on a new contract. He informed them of the Board's position that the Town would like to continue working with the Moultons, but that it wanted to have a person working on the matter who maintained a full time presence in St. Johnsbury. In September, John Hall placed an ad in the Caledonian-Record for a person to do full time economic development work in St. Johnsbury as an employee of the Town, and he interviewed and negotiated with candidates for the job. By September 13, 1996, the final terms of a new contract with the Moultons were identified and agreed upon with the Moultons, based on a plan to have the full time economic development person be a Town employee, but John Hall did not yet know whether he had secured a satisfactory person to do economic development as a Town employee, and therefore the Moulton contract was not finalized. John Hall wanted the flexibility to review the terms depending on the outcome of the effort to hire a Town employee for the role. The evidence indicates that the Moultons were fully aware of the alternative positions of the Town, and that they were willing to work with the Town under either alternative. On September 19, 1996, John Hall was still negotiating with two different candidates. On that day he prepared and distributed the agenda for the Selectboard meeting scheduled for September 23, 1996. The agenda did not identify any personnel items. It did not include any items relating to economic development or the renewal of the Moulton contract. It did not include any item concerning creating a new Town employee position. By this time the term of the original Moulton contract had expired.

20. Over the weekend between September 19th and September 23rd, John Hall settled on terms with Joel Schwartz as a person to be hired as a Town employee to do

full time economic development work from Town offices. This meant that no further changes would need to be made to the terms of the proposed new Moulton contract, which had been negotiated based on the assumption that the Town would hire such an employee. On Monday, September 23rd, John Hall prepared a memo to the Board outlining the terms on which he proposed to hire Joel Schwartz, based on his negotiations with him. The memo was included in the packets distributed to the Board members for the meeting. It was not made public.

21. At the Selectboard meeting on September 23rd, no changes were made to the agenda to indicate that the Board would be taking up a personnel issue. A Motion was made at some point to go into executive session to discuss a personnel issue. The Chair asked for discussion and there was none. There was no identification of the personnel matter that was to be discussed, and therefore no identification of it as one that related to the issue of economic development work in the Town. There had been a labor negotiation meeting scheduled on unrelated matters earlier in the week, and although the meeting had been cancelled, it could have provided the subject matter to be addressed in executive session. The Board went into executive session and discussed the proposal to hire Joel Schwartz. John Hall was not seeking Board approval since it was his view that he already had the authority to hire a Town employee for the purpose, but nonetheless he wanted to make sure the Board was informed and aware of the development. There was discussion about the cost of the employee, since the amount of money negotiated for the Moulton contract and the Economic Development Director exceeded the sum previously approved for economic development purposes. Ultimately,

Joel Schwartz was hired on the same terms as those contained in the memo John Hall distributed to the Board members prior to the meeting. There was no vote in executive session, and no vote when the Board returned to open session. There was no mention in open session of the specific subject matter of the executive session, or of the hiring of an employee by the Town for economic development work, or of any matter related to the economic development contract. Prior to this time, there had not been any discussion in open meetings of the Selectboard about the creation of a new position of Economic Development Director within Town government. On the same day, September 23rd, John Hall called Joel Schwartz and made a formal offer of employment.

22. The next day, John Hall informed Andrew Turner of the offer he had made to Joel Schwartz, and gave him a copy of the memo he had distributed to the Board before the meeting. He told Andrew Turner that he was awaiting a return phone call of acceptance from Joel Schwartz. He also told him that he had given the memo to the Board prior to the meeting, and that it was given to the Board members for their review and to keep them informed on an ongoing basis but not for formal approval.

23. Subsequently, Joel Schwartz accepted the offer and was hired by the Town as Economic Development Director. John Hall prepared a memo for the Selectboard members outlining the final terms of the contract with Moulton Associates, which were the terms that had been agreed on as of September 13, 1996. The contract was executed on October 10, 1996 without any further discussion or consideration at a Selectboard meeting. It calls for Patricia Moulton Powden to provide services 52 days a year, and for Al Moulton to provide services 12 days a year. The monthly cost is \$2,500,

and the term is one year. There was no report back to the Board on the status of negotiations with Moulton Consultants as called for by the Motion approved by the Board at its July 8, 1996 meeting.

CONCLUSIONS OF LAW

Based on the foregoing facts, the court concludes as follows:

1. Plaintiff seeks a declaratory judgment that Defendants violated the Open Meeting Law on both July 8, 1996 and September 23, 1996 in that on both occasions they failed to make particularized findings of the necessity for meeting in executive session, and in that the discussions that took place in executive session were not justified under the terms of the law. Plaintiff further seeks an order enjoining Defendants from such action in the future. Both forms of relief are authorized under 1 V.S.A. § 314(b) as enforcement provisions of the Vermont Open Meeting Law, 1 V.S.A. §§ 310-314.¹

2. The overall purpose of the law and the public policy on which it is based is stated clearly in 1 V.S.A. § 311(a):

In enacting this subchapter, the legislature finds and declares that public commissions, boards and councils and other public agencies in this state exist to aid in the conduct of the people's business and are accountable to them pursuant to Chapter I, Article VI of the Vermont constitution.

Chapter I, Article VI of the Vermont Constitution is entitled "Officers servants of the people" and declares:

¹ There is no claim in this case for invalidation of any action taken by the Board at any meeting, whether in open or executive session. Compare Valley Realty & Development, Inc. v. Town of Hartford, 7 Vt. L.W. 207 (1996).

That all power being originally inherent in and co[n]sequently derived from the people, therefore, all officers of government, whether legislative or executive, are their trustees and servants; and at all times, in a legal way, accountable to them.

These provisions, and the details of the Open Meeting Law, explicitly set forth the principle that publicly elected officials are accountable directly to the people, and are expected to conduct public business in an open and public manner at all times except within narrowly defined exceptions that serve some other public interest. This principle reflects the fundamental concept of democratic government as one in which elected representatives are not chosen to exercise responsibility privately on behalf of the public, but are "trustees and servants" of the people, serving at their pleasure and with constant accountability to them. This is one of the most fundamental principles of our form of government. Under this concept of government, it is important that the people, the citizenry, have full opportunity to express their opinions to their elected "servants" on matters of public interest, and that they have full opportunity to observe the actions and decisions taken by their elected "trustees" in order to ensure accountability.²

Accordingly, "All meetings of a public body are declared to be open to the public at all times, except as provided in section 313 of this title." 1 V.S.A. § 312(a). "At an open meeting the public shall be given a reasonable opportunity to express its opinion on matters considered by the public body during the meeting as long as order is maintained." 1 V.S.A. § 312(h). See Trombley v. Bellows Falls Union High School Dist. No. 27, 160 Vt. 101, 104 (1993) (discussion of purposes of open meeting law).

² See historical analysis in J. R. Pole, The Gift of Government, 1983. Chapters I, V and VI.

3. Both procedural safeguards and legal standards are delineated to address exceptions to the open meeting requirement. The procedural safeguards described in 1 V.S.A. § 313(a) require that:

- (a) a motion must be made to go into executive session,
- (b) the motion must "indicate the nature of the business" of the executive session,
- (c) a vote must be taken in the open meeting with the result recorded in the minutes,
- (d) the vote must pass by affirmative vote of a majority of the members present (in the case of a municipality or political subdivision),
- (e) no other matter may be considered in the executive session, and
- (f) no formal or binding action shall be taken in executive session.³

4. The statute establishes legal standards concerning the permissible subject matter for discussion in executive sessions: "A public body *may not hold* an executive session except to consider one or more of the following:" with seven specific exceptions identified. 1 V.S.A. § 313(a) (emphasis added). The exceptions pertinent to this case are:

§ 313(a)(1): Contracts, labor relations agreements with employees, arbitration, mediation, grievances, civil actions, or prosecutions by the state, where premature general public knowledge would clearly place the state, municipality, other public body, or person involved at a substantial disadvantage; and

§ 313(a)(3): The appointment or employment or evaluation of a public officer or employee.

Exceptions to the open meeting law must be strictly construed. Trombley, 160 Vt. at

³There is a limited exception for securing real estate options.

5. On July 8, 1996, the motion to go into executive session did not identify the nature of the business to be discussed in executive session, nor did it identify an appropriate statutory category for use of executive sessions. There was no discussion on the motion, and therefore no such indication during discussion. John Hall, who had prepared the agenda, had anticipated that there would be a general discussion of "the structure or structures" for approaching the important subject of the future of the Town's approach to economic development, with "macro" issues addressed first, such as identification of general alternative approaches. There was no discussion of the extent to which this could or could not be done in open meeting without touching on subject matter that called for executive session. There was simply no attempt to comply with the spirit and policy embodied in the terms and requirements of the Open Meeting Law, which requires accountability to the public on public issues. The evidence about the content of the discussion shows that the subject matter did not fit within a category for which executive session is authorized. Only "macro" issues were discussed. While there was discussion of renewal of the Moulton contract, there is no indication that the contract discussion included consideration of negotiating positions or other specifics such that "premature general public knowledge would clearly place the state, municipality other public body, or person involved at a substantial disadvantage." 1 V.S.A. § 313(a)(1). On the contrary, the substance of the discussion was reported to the Caledonian Record reporter directly after the session, and thus became public immediately. While it is theoretically possible that something might have come up in the

discussion that would fit within the exception, it appears that that never happened throughout the discussion. Therefore, the Open Meeting Law was violated in three ways: (1) there was no identification of the nature of the business at the time of the vote, (2) there was no attempt to identify whether executive session was authorized for the discussion that was expected to take place, and (3) the discussion that actually took place was not one that was authorized.

6. The Defendants argue that the Plaintiff waived its claim for enforcement by not asking for an explanation of the basis for executive session at the time of the vote on the motion to go into executive session. This argument is misplaced. The burden is not on a member of the public to seek an explanation or risk the result that the entire citizenry of the municipality have waived the public accountability required of elected officials under the Open Meeting Law and the Vermont Constitution. The public is entitled to the accountability of open government and to all the protections of the Open Meeting Law whether or not anyone insists on them at a given moment. The law requires members of the public body to explain their reasons for entering into executive session, and does not suggest that this requirement may be dispensed with unless someone present at the meeting reminds them of their obligations in that regard. This would shift the entire burden of maintaining public accountability to the public, whereas the Constitution and Open Meeting Law provide that such burden is on the "trustees and servants." The enforcement remedies set forth in 1 V.S.A. § 314 may be invoked by their terms and cannot be defeated by a claim that a failure to seek compliance on the spot

constitutes a waiver.⁴

7. Defendants have moved to dismiss the claim as it relates to the September 23, 1996 meeting on the grounds that executive session for discussion of hiring of an employee is specifically authorized by 1 V.S.A § 313(a)(3) without the necessity of showing that such a discussion would prejudice or disadvantage any person or public body. The motion is denied. The broad interpretation Defendants seek would mean that any discussion concerning restructuring of Town administrative functions could be done in executive session because it could potentially have an effect on employment contracts entered into at some point to implement that structure. This interpretation violates the purpose and intent of the Open Meeting Law. The gist of the discussion at the September 23, 1996 meeting was to settle on what the overall structure for proceeding with economic development would be: either Plan A, a renewal of the Moulton contract, whereby substantial Town funds would be paid to consultants on a contractual basis to perform development work from locations outside St. Johnsbury, or Plan B, direct hiring of a Town employee, working from the Town offices in St. Johnsbury, to do the bulk of the daily economic development work with some assistance from outside consultants. This is a so-called "macro" issue, related to the structure and function of Town government and whether or not a new Town position would be created. This had been and was an appropriate subject for public discussion on policy

⁴There is no argument here, as there was in Trombley, that Plaintiff was not an "aggrieved" person and therefore had no standing to bring an open meeting claim. Trombley, 160 Vt. at 106. Plaintiff had raised the issue through its attorney in advance, was present at both meetings, and is a press organization that provides education to the public at large about governmental action taken at public meetings.

grounds. It is the kind of subject matter on which the public is entitled to express its views to its elected officials, and to observe the positions and arguments and actions of the various individual Board members as well as the collective decisions of the public body. The fact that the Board was considering hiring a Town employee was not a secret since the position had been advertized in the Caledonian Record. The idea of creating such a new position is too general to fall within the definition of "The appointment or employment or evaluation of a public official or employee" (1 V.S.A. § 313(a)(3)), which authorizes the use of executive session to discuss individual personalities and specific contractual provisions.

8. When the motion was made on September 23, 1996 to go into executive session, it was made and passed without any identification of the fact that the "personnel issue" to be discussed related to filling a significant Town position that the Board had not yet created, nor even had an open policy discussion about creating. It was not made after a discussion of "macro" structural issues at a point when discussion had been become narrowed down to specific terms of a proposed contract with Joel Schwartz. Executive session could have been warranted at such a time, with appropriate disclosure of "the nature of the business," once the public knew that the Board's preference was to hire a Town employee for economic development work rather than rely entirely on contractual services from the Moultons. That is not what happened, however. Instead, at the time the motion was made, there was no identification of the subject matter to be discussed except "personnel matters," and the public was not informed that the personnel matters to be discussed related to economic development work, or the fact that they

related to creation of a new Town position. There was no opportunity for the public "to express its opinion on matters considered by the public body." 1 VSA § 312(b). There was no consideration of the extent to which there could be preliminary discussion in public session without affecting interests that deserve the protection of executive session under the statute. The discussion that took place addressed issues that were far broader than the specific terms of an employment contract with Joel Schwartz, although the discussion issues provided a framework for such a contract.

9. Defendants also seek to justify executive session on September 23, 1996 on the grounds that the Town needed to protect its negotiating position with respect to renewal of a contract with the Moultons, and that it would be prejudicial to the Town to reveal its position. Yet the terms of a new contract with the Moultons based on Plan B, which called for a Town employee, had been in place since September 13, 1996. The Moultons knew about the Town's intent to proceed with its own employee, and had already negotiated with the Town for a contract on terms satisfactory to both, so it is difficult to see whose interests would be prejudiced or disadvantaged by revelation of such a plan.

10. The court concludes that the terms of the Open Meeting Law were violated on September 23, 1996 in three ways: (1) failure to properly identify the nature of the business; (2) failure to determine in discussion whether the proposed subject matter for executive session was permissible under one of the exceptions to the open meeting requirement; and (3) failure to restrict discussion in executive session to subject matter authorized under one of the statutory exceptions.

11. Defendants' position is that executive session was justified at the July meeting

because of the necessity of protecting a negotiating position on the Moulton contract, and that it was justified at the September meeting because of the discussion of the employment contract with Joel Schwartz and its effect on the negotiating position with the Moultons. Defendants further argue that since there was a good faith basis in both instances, a requirement that Board members exercise a high level of scrutiny and discrimination on qualification for executive session would have a chilling effect on the willingness of citizens to serve on public bodies. This is a valid concern, but the requirements of the Open Meeting Law are straight-forward and not unduly burdensome. The statutes simply require the board (1) to indicate the subject matter to be discussed, (2) to identify the statutory basis for entering into executive session, and (3) to confine the discussion in executive session to appropriate topics identified in § 313(a). These requirements are not met by asserting the broad label of "personnel matters", and then relying on that label as a basis for conducting governmental affairs of significant public interest out of the public view. In the instant case, the Board failed to follow the procedural safeguards prior to entering into executive session, and the resulting discussion in those executive sessions strayed beyond the range of permitted subject matter. As a result the Town government approved major changes in the policy and structure of its approach to issues of significant public interest without any opportunity for the public to express its concerns, or to observe the actions of its elected officials. Common sense indicates that such a result is not consistent with the policies and procedures of the Open Meeting Law, or the principle of the accountability of public officials as "trustees and servants."

12. In analyzing whether these conclusions are sound, it is useful to review what full compliance with the Open Meeting Law would have entailed at each of the meetings, and whether such compliance would have been so difficult that the result is a chilling effect on the willingness of ordinary citizens to become public servants. At the meeting on July 8, 1996, the Board could have commenced a general discussion of alternative approaches to the issue of economic development, in open meeting, with an awareness that if the discussion turned toward specific parameters of a possible contract with the Moultons, executive session might become warranted. However, if the discussion stayed as general as it did, executive session never would have been needed. With respect to the September 23, 1996 meeting, the Board could have discussed in open session its overall plan to create a Town position if it could be appropriately staffed, while keeping open a possibility of entering into executive session to discuss the specific terms of a proposed contract with Joel Schwartz. It does not appear that such a procedure would have led to any prejudice or substantial disadvantage. As previously discussed, the public already had access to information that the Board was considering such a structure, and the Moultons already knew about the potential effect on a contract with them. Joel Schwartz's interests would be protected by discussion of the specific terms as they pertained to him in executive session, and the Town's negotiating position on the Joel Schwartz employment contract would not have been jeopardized. On the other hand, the public's interest in observing the decisions of the Board in relation to adopting an overall strategy, and the public's interest in having an opportunity to comment upon the issues, would have been protected, and the law is clear that its aim is

to protect these interests. While there are undoubtedly times in meetings of public bodies when it may be difficult or awkward for board members to identify why executive session is needed without stating the precise facts that justify executive session, and while there are undoubtedly times in executive sessions when discussion of issues proper for executive session becomes intertwined with discussion of other matters such that it is tempting to let the discussion flow beyond the limits of the reason for executive session, it is incumbent upon those holding public office to conduct the affairs of Town government according to the requirements of the Open Meeting Law. While it involves more public exposure than an ordinary citizen encounters in the conduct of his or her own affairs, and thus entails less flexibility in negotiating, it is an inherent responsibility of public office. On July 8, 1996 and September 23, 1996, the tasks of making responsible decisions concerning whether or not executive sessions would not have been unduly burdensome as long as procedural requirements were followed. See Trombley, 160 Vt. at 105 (not unworkable for public body to analyze need before deciding to enter executive session). In these meetings, the procedural requirements that aid the board in conducting its business in harmony with the Open Meeting Law were not followed, and the mandate of the law to conduct public business in public view was not observed.

13. For the reasons set forth above, the court declares that Defendants violated the Open Meeting Law on July 8, 1996 and on September 23, 1996.

14. Plaintiff requests injunctive relief in order to prevent a recurrence. Defendants argue that injunctive relief would be meaningless unless the exact circumstances of the past meetings are duplicated in the future; that the existence of an

injunction would make Board members nervous such that they would be fearful of taking action in the interest of the Town out of concern for being in violation of the injunction; and that the court should not become involved in directing the details of Town government. If it were predictable that the exact circumstances of the past meetings were to recur regularly, an injunction could be issued that would avoid the problems identified by the Defendants. Such relief would be warranted in this case because of the fact that the Defendants' violations occurred not once but on two occasions, both of them after the Town attorney had reviewed the Open Meeting Law with the Board, and because the violations involved not only improper implementation of the legal standards of the Open Meeting Law, but lack of compliance with procedural safeguards.

Nonetheless, the court agrees that: (1) the exact circumstances are not likely to be duplicated; (2) the existence of an injunction on these facts could have a disabling impact on the Board unless it was so broad as to be a general admonition to follow the law, which should be done anyway; and (3) a detailed injunction in relation to this subject matter could lead to the court becoming involved too closely in the details of the management of Town government. Injunctive relief might be warranted in the event of a Board member declaring in advance of a scheduled meeting that the Board intended to use executive session to discuss issues not permitted under the Open Meeting Law, but such is not the case here. There is no basis to conclude that the Board members had a specific intention in the past or intend in the future to disregard the requirements of the law. Therefore, the court declines to issue injunctive relief in this case. Within our framework of government based on accountability to the public, the declaratory

judgment contained herein provides consequences that should discourage future violations. There is an additional sanction available in 1 VSA § 314(a), including a penalty for a misdemeanor, for knowing and intentional violation if such were to occur following this decision.

Plaintiff's attorney shall prepare an Order consistent with this decision.

Dated at St. Johnsbury this 19th day of February, 1997.

Mary Miles Teachout
Mary Miles Teachout
Superior Judge