Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-222

MARCH TERM, 2003

John Robert Hamilton v. Town of Holland Selectboard, Town of Holland and Town of Holland Tree Warden	}	APPEALED FROM: Orleans Superior Court DOCKET NO. 200-8-01 Oscv Trial Judge: Dennis R. Pearson

In the above-entitled cause, the Clerk will enter:

Plaintiff appeals from a summary judgment order in favor of defendants on plaintiff' s complaint for declaratory and injunctive relief. Plaintiff sought to prevent defendants from felling a number of trees along plaintiff' s road to facilitate a road widening project. We affirm in part, and reverse and remand in part.

The record establishes the following undisputed facts. Plaintiff owns property on Lackey Road, a class III town highway in the Town of Holland. On August 6, 2001, the Town of Holland Selectboard held a hearing on its proposal to remove approximately thirty trees along a half mile section of Lackey Road. The selectboard, along with the Town' s tree warden, decided to remove the trees to facilitate the selectboard' s plan to widen a section of Lackey Road. The section at issue is not wide enough to allow a truck or a snowplow and a school bus to pass each other safely. The Town engaged the assistance of the State District/Regional Highway Commission in selecting and marking the trees that must be removed for the road project.

The road widening project will require removal of tree stumps as well as ledge. The project will utilize jackhammers, bucket loaders, and other equipment, and some blasting may be required. Drainage ditches will have to be dug. The Town did not conduct a survey of Lackey Road in connection with the road widening project. The record contains no maps or other specifications regarding the location of the work, the location of the trees to be removed, the current width of the traveled portion of Lackey Road, or other like details.

At the August 6, 2001 hearing before the Town of Holland Selectboard, plaintiff stated objections to the tree cutting proposal. The selectboard did not permit another person, Barbara Kenyon, to provide testimony or comments on the proposal, however. Before the hearing concluded, the selectboard voted to go ahead with the project notwithstanding plaintiff' s objections.

Two days later, plaintiff filed a complaint for declaratory and injunctive relief in Orleans Superior Court seeking to prevent the Town from cutting down the trees. Plaintiff alleged that some of the thirty trees marked for removal are located on plaintiff' s Lackey Road property. He asked the court to (1) enjoin the defendants from cutting or otherwise damaging the trees, (2) declare ineffective the selectboard' s order to fell the trees, and (3) declare that the Town' s tree warden must hold a public hearing before removing any trees. Approximately one month later, defendants moved for summary judgment. Plaintiff opposed the motion and cross moved for summary judgment the following February.

The parties' dispute centered primarily on a disagreement about what, if any, procedures the Town must employ before widening Lackey Road and cutting down trees in furtherance of the road widening project. The Town argued that it has

authority under 19 V.S.A. § 304(a)(1) to maintain Lackey Road, widening the road is part of the Town' s maintenance responsibility, and the Town' s tree warden determined that the trees must be removed to eliminate a public safety hazard, namely the narrow width of Lackey Road. Under 24 V.S.A. § 2509, the Town argued, the tree warden may cause the trees at issue here to be felled without first holding a public hearing because they are a hazard to the public. See 24 V.S.A. § 2509 (tree warden may cut down a public shade tree without holding a public hearing if the tree " is infested with or infected by a recognized tree pest, or when it constitutes a hazard to public safety").

Plaintiff contested the Town' s authority to widen Lackey Road and cut down the thirty trees at issue under the authority of the Town' s tree warden alone. Plaintiff insisted that the Town must instead follow the procedures for altering a public highway set forth in Title 19, including performing a survey of the road. See 19 V.S.A. § § 701-714 (setting forth procedures for altering a public highway). Plaintiff also alleged that the action the selectboard took on August 6, 2001 was void because the Town violated Vermont' s Open Meeting Law by preventing Barbara Kenyon from speaking at the hearing.

In granting summary judgment to defendants, the court determined that no genuine factual dispute existed about the safety hazard presented by the narrow width of Lackey Road, or the need to cut down thirty trees along the road to widen it and make it safer for travel. The court opined that the trees at issue need not present a safety concern themselves under 24 V.S.A. § 2509 if removing them facilitated a project the Town was undertaking to enhance public safety. Thus, the court concluded, the Town was authorized to cut down the trees based on the tree warden' s authority under Title 24. The court also concluded that the Town was not proposing to widen Lackey Road as contemplated by 19 V.S.A. § 703. The court found that the legal right of way for Lackey Road is three rods wide under statute, and that all the trees at issue are located in the public right of way. The court explained that " all of the contemplated work will take place well within [the right of way] boundaries," and that the planned work is not a " major physical change" or " alteration" under 19 V.S.A. § § 701(2) and 704. Thus, the procedures embodied in Title 19 did not apply to the Town' s proposed road work. Finally, the court found that plaintiff lacked standing to contest the lawfulness of the selectboard' s decision to preclude Barbara Kenyon from speaking at the selectboard hearing.

Following the trial court' s order, plaintiff moved for a stay pending appeal which the trial court denied. Plaintiff appealed to this Court and renewed his request for a stay. We denied the request. In response to questions at oral argument about the status of the trees, the Town acknowledged that it had cut some or all of the trees at issue here. It is unclear whether the Town has completed the scheduled road work, however. The parties agree that the controversy is not moot despite the Town' s action. We agree, and therefore we address the merits of the plaintiff' s appeal.

We review this matter using the same standard the trial court used: if there are no genuine issues of material fact for trial and a party is entitled to judgment as a matter of law, summary judgment is proper. V.R.C.P. 56(c); Mellin v. Flood Brook Union Sch. Dist., 173 Vt. 202, 211 (2001). On summary judgment, the court must draw all reasonable inferences and resolve all doubts in the nonmoving party' s favor, and must regard as true all of the opposing party' s properly supported allegations. Mellin, 173 Vt. at 211. In this case, we conclude that the record does not support the court' s summary judgment in favor of defendant' s claim that Title 19 does not apply to the Town' s road widening project. We also conclude that the court properly entered summary judgment to defendants on plaintiff' s claim under the Open Meeting Law.

We first examine plaintiff' s claim that Title 19 applies to the Town' s project on Lackey Road. Under 19 V.S.A. § 304(a)(1) the town selectboard is empowered to " see that town highways . . . are properly laid out, . . . altered, [and] widened, . . .when the safety of the public requires, in accordance with the provisions of [Title 19] . . . ." 19 V.S.A. § 304(a)(1). In laying out or altering a town highway, the town must follow the procedures in chapter 7 of Title 19. Chapter 7 of Title 19 defines " altered" as " a major physical change in the highway such as a change in width from a single lane to two lanes." Id. § 701(2). If a town highway' s width " as laid out is less than the law or the public convenience requires, the selectmen may widen the highway accordingly." Id. § 703. Section 703 requires compensation to landowners whose lands are taken or damaged in conjunction with a road widening project. Id. When altering a town highway, the selectboard must " cause a survey to be made" and the survey must " describe the highway and the right-of-way by courses, distances and width, and shall describe the monuments and boundaries." Id. § 704. Unless otherwise properly recorded, the width of the right of way for each town highway is three rods. Id. § 702.

The court grounded its decision on the inapplicability of Title 19 on the following facts: (1) the legal width of Lackey Road is three rods as presumed by § 702 of Title 19; (2) the trees to be cut are all located within the right of way for Lackey Road; and (3) all of the work the Town contemplates will take place within the public right of way for Lackey Road. The latter two facts have no support in the record, however. The affidavits the Town submitted in support of its summary judgment motion state that the selectboard determined that Lackey Road needed to be wider in one section to allow for safe travel and that thirty trees must be taken down to accomplish that goal. The Town presented no other details about the proposed road project. For example, the record does not identify whether the trees to be removed (or which have been removed already) are in the right of way or not. Similarly unknown are the current width of Lackey Road, the proposed post-completion width, and the location of the public right of way in the section of road at issue. The right of way and the location of the trees to be cut were sufficiently in issue on this record, and therefore summary judgment in defendant' s favor was error.

In addition, the record suggests that the project will involve substantial amounts of work and a significant physical change in the area abutting the existing roadway. The chair of the Town' s selectboard testified by affidavit that the project on Lackey Road will require the use of bucket loaders, will involve the removal of ledges, trees, and stumps, will require ditch digging, and may need some blasting. Notwithstanding those undisputed facts, the trial court held that the proposed work is not a " major physical change" or " alteration" under 19 V.S.A. § 701 and 704. It is possible that some highway widening projects involving the machines and construction described in the Town' s affidavits are alterations as contemplated by § 701(2) and others are not. Whether a project involves " major physical change" of a highway depends on the particular facts of the project. As we noted, the specific facts of this project were not provided to the trial court and are not part of the record. It was therefore error for the court to grant summary judgment to defendants on the basis that the project was not an alteration as contemplated by Title 19, particularly given the Town' s description of what will be required to widen Lackey Road.

Because the issue may come up again on remand, we also address plaintiff' s claim that the statutes governing shade trees do not apply. The Legislature has placed all " [s]hade and ornamental trees within the limits of public ways and places" under the control of the tree warden. 24 V.S.A. § 2502. Under 24 V.S.A. § 2508, a public shade tree may not be cut down except by the tree warden or his or her designatee. A public shade tree within residential parts of a municipality may not be cut down without a public hearing unless the tree is infested by pests or is a hazard to public safety. Id. § 2509. Plaintiff argues that there is nothing in the record to establish that the trees at issue are " public shade trees." He also contends that § 2509 does not grant the tree warden authority to cut public shade trees under the public hazard exception if the trees themselves do not present the public safety hazard. We agree with both contentions.

As we noted previously, there is no evidence in the record to establish the location of the trees the Town wishes to cut other than the fact that they are located somewhere along Lackey Road. We therefore do not know if the trees are in the public way and within the authority of the Town' s tree warden. In addition, it is undisputed that the narrowness of Lackey Road is the public safety hazard the selectboard wishes to ameliorate. To do so, the Town needs to remove the trees. There is no allegation that in the absence of the Town' s road widening project, the trees at issue presented a hazard to public safety. Thus, the trees themselves are not a public safety hazard as contemplated by § 2509, and the Town' s tree warden had no authority to remove them without a public hearing. The trial court' s contrary decision was erroneous and must be reversed.

Plaintiff' s final claim of error relates to Vermont' s Open Meeting Law. See 1 V.S.A. § 312. He claims the selectboard' s refusal to allow Barbara Kenyon to testify or comment during the hearing on August 6, 2001 violated 1 V.S.A. § 312(h) and rendered void its decision to fell the trees on Lackey Road. The trial court rejected plaintiff' s claim on the grounds that he was not " aggrieved" under the statute and lacked standing to pursue the claim. We agree. Section 314(b) of Title 1 allows a person " aggrieved by a violation of the provisions" of the Open Meeting Law to seek declaratory or injunctive relief for the violation in superior court. 1 V.S.A. § 314(b). To be " aggrieved," and therefore satisfy the standing requirement under § 314, the party seeking relief must show that the legal violation caused him injury. Trombley v. Bellows Falls Union High Sch. Dist. No. 27, 160 Vt. 101, 106 (1993). In this case, the parties agree that the Town violated § 312(h) by preventing Barbara Kenyon from stating her concerns about the tree cutting proposal. Nevertheless, the injury plaintiff alleges is the Town' s decision to cut trees on Lackey Road without following the proper procedural framework under Title 19. Plaintiff fails to demonstrate any injury resulting from the Town' s refusal to allow Barbara Kenyon from speaking at the August 6, 2001 hearing, and we discern no injury from the record before

us. The trial court therefore properly entered summary judgment to defendants on plaintiff' s claim under Vermont' s Open Meeting Law.

The trial court' s decision on plaintiff' s claim under Vermont' s Open Meeting Law is affirmed. In all other respects the order is reversed, and the cause remanded for further proceedings.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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Denise R. Johnson, Associate Justice

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Frederic W. Allen, Chief Justice (Ret.)

Specially Assigned