Kevan v. Town of Randolph Selectboard, No. 137-7-05 Oecv (Teachout, J., July 31, 2006)

STATE OF VERMONT
ORANGE COUNTY, SS.

William J. Kevan, Letitia H. Rydjeski, Leigh R. Wright, et al.	)	**Orange Superior Court Docket No. 137-7-05 Oecv**
v.	)	
Town of Randolph Selectboard	)	

DECISION AND ORDER
regarding
THE MERITS OF THE APPEAL

Eleven citizens appealed a decision by the Town of Randolph Selectboard to cut down a venerable 100-year-old flowering crab apple tree.[1] The Selectboard made that decision on July 5, 2005, after discussing the matter in executive session. In this review under V.R.C.P. 75, the appellants have questioned whether the hearing conducted by the Selectboard met with the requirements of Vermont law.

The facts are derived from the record on appeal. The court has heard oral arguments and reviewed the parties' memoranda of law. For the reasons stated, the Selectboard decision to cut down the tree is reversed, and the matter is remanded to the Selectboard for a new hearing.

Facts

[1] Following the death of one of the petitioners, there are now ten appellants: William J. Kevan, Mimi Kevan, Stanley A. Rydjeski, Letitia H. Rydjeski, Leigh R. Wright, Sonia Buckholts, D.H. Antunes, Janice Felch, Russell Royce, and Doris Royce.

The flowering crab apple tree is growing on the lawn in front of the Randolph Municipal Building at 7 Summer Street, in Randolph, Vermont. No one disputes that it is an exceptional tree with importance in the community. Removal of the tree was proposed to accommodate a plan to expand the municipal building.

On May 31, 2005, newly-designated Tree Warden Mardee Sánchez conducted a hearing with regard to the removal of the tree. Legal notice of that hearing had been published in The Herald of Randolph. Ms. Sánchez issued a written decision on June 16, 2005, concluding that the crab apple tree could be removed for expansion of the municipal building.

Various citizens appealed the Tree Warden's decision to the Randolph Selectboard. The Selectboard held a public hearing on the evening of Tuesday, July 5, 2005, following a Board meeting. The Selectboard convened the public hearing at 8:15 p.m.

First the Town attorney spoke about procedures. The minutes do not reflect the substance of his comments. Three members of the public then spoke about the crab apple tree. The Town maintains that all persons who wished to address the Selectboard were able to do so. Appellants disagree, suggesting that the debate was peremptorily cut off by the Selectboard Chair. The minutes are not clear on this point. The Selectboard then went "into executive session at 8:40 for a deliberative session." They moved out of executive session at 8:45 p.m. Upon motion, without any public discussion or elaboration, the Selectboard voted 5-0 to approve the Tree Warden's decision. The meeting was not tape recorded or transcribed. No written decision was issued.

On July 7, 2005, Letitia Rydjeski, Leigh Wright and William Kevan filed an appeal with the Environmental Court. However, that Court forwarded the appeal to the Superior Court, and on July 25, 2005, the above-named appellants and eight others filed a Notice of Appeal in the Superior Court.

Conclusions

In an appeal under V.R.C.P. 75, the Superior Court conducts a narrow review of the governmental action under challenge to determine whether governmental authority was properly exercised. It is not the function of the court to substitute its judgment for those authorized to act, but to review whether they have acted within the bounds of lawful authority. In this case, the review consists of an examination of the documents in the record submitted by the Town on August 15, 2005. See Entry Order of February 2, 2006. The appellants bear the burden of showing that the hearing on July 5, 2005, failed to satisfy the requirements of the law.

In the Notice of Appeal originally filed, appellants raised only the substantive question of whether the healthy tree should be cut down "for the mundane purposes of expanding the town offices." Thus the first question raised was whether the Selectboard's decision complied with the

law in the statute governing parks and shade trees, in chapter 67 of Title 24. Initially it appeared that the issue on appeal was whether the Selectboard had correctly interpreted the standards, purposes, and policy of that chapter of the law, including explicit and implicit requirements.

As the case developed, the appellants also raised procedural issues, perhaps triggered by the question of how the Superior Court could conduct a review on the basis of record documents given the circumstances that the Selectboard reached its decision in executive session. See, e.g., Leigh Wright's memorandum, filed October 28, 2005 (pointing out that the Board made its decision in executive session), and Appellants' Request for an Evidentiary Hearing, filed October 31, 2005 (pointing out that the Board had made its decision without any public discussion or explanation).

By the time of the oral argument on April 3, 2006, it was clear that appellants were questioning whether the Selectboard could appropriately address the fate of the crab apple tree in an executive session, consistent with the statutes governing public access to information under the Open Meeting Law. The Selectboard argued that it had the authority to hold a "deliberative session" in executive session. The court invited the parties to submit supplemental memoranda on the procedural issues raised by this appeal, and they have done so.

Under the statutes governing parks and shade trees, a decision to cut this healthy tree, presenting no hazard to public safety, could only be made following a public hearing. When the tree warden is an interested party, the decision must be made by the municipal legislative body. When an interested party makes a written request, the decision must be made by the legislative body of the municipality. 24 V.S.A. § 2509. Also see *Skinner v. Buchanan*, 101 Vt. 159, 163 (1928). In this case, appellants previously claimed that the tree warden was an interested party. The court ruled in a Decision on February 2, 2006 that the issue was not relevant to the appeal, since the Selectboard had held its own hearing upon request, as required by the statute, rendering the conflict issue moot. The issue now before the court is whether that hearing was conducted in compliance with the procedural requirements of the law.

The type of hearing to be held is set forth in the Open Meeting Law, Title 1, chapter 5, subchapter 2. See 1 V.S.A. § 311(b). When enacting this law, the legislature declared 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." 1 V.S.A. § 311(a).[2] The purpose of the law is "to give public exposure to governmental decision-making." *Valley Realty v. Town of Hartford*, 165 Vt. 463, 467 (1996). Courts construe the public meeting law liberally "in support of the goal of open access to public meetings for members of the public. . . . Exemptions to these laws must be strictly construed." *Trombley v. Bellows Falls Union High School District No. 27*, 160 Vt. 101, 104 (1993).

[2] "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." Vermont Constitution, Ch. I, Art. 6.

"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). If a meeting is required to be open under this section, than actions taken outside of an open meeting are ineffective unless ratified by a later open public meeting. *Valley Realty*, 165 Vt. at 468.

In § 313, there are exceptions to the open meeting requirement. If an exception applies, a public body may consider the specified subject matter in executive session. However, none of the nine situations set forth in § 313(a) apply to this case.

There is a second circumstance in which a public body such as a selectboard is not required to act in open session. When it is conducting a hearing in the nature of a court hearing, the members may retire for deliberations in private session. This is because the law is not applicable to the judicial branch of government (which has separate means of assuring accountability), "nor shall it extend to the deliberations of any public body in connection with a quasi-judicial proceeding . . . ." § 312(e). A "quasi-judicial proceeding" is specifically defined by the statute.

Thus, a Selectboard can meet out of public view when it is either in executive session having discussion of one of the subjects which qualify for executive session under § 313, or if it holds a quasi-judicial hearing, it can retire for a deliberative session as allowed under § 312(e), but those are two different circumstances that do not occur at the same time. Since the public hearing on the crab tree did not qualify for executive session under an exception listed in § 313, the only basis on which the Selectboard could discuss the issue out of public view was if it was engaged in deliberations "in connection with a quasi-judicial proceeding" under § 312(e).

The Randolph Selectboard first argues that it did not have to provide a public hearing at all because the Tree Warden held one. As stated above, the "Parks and Shade Trees" statute calls for a "public hearing," to be held by the tree warden in the first instance but under some circumstances by the legislative body. 24 V.S.A. § 2509. The statute does not suggest that the Selectboard need only review the decision of the Tree Warden without hearing. This would not assure an impartial decision when the tree warden is an interested party. For the decision to be fair, the Selectboard would need to hold its own independent hearing of the same type that the tree warden is obliged to hold, which is a "public hearing." The statute does not provide for a lesser type of hearing when one is requested by a party in interest, as in this case.

The legislature was clear that it is a hearing of the "legislative body." The legislature assigned the task of deciding about tree-cutting to the elected representatives of the municipality, whose primary functions are legislative, not judicial in nature, and relate to matters of common community concern. Their meetings are required to be open under § 312(a). Thus, the Selectboard was obliged to hold a public hearing independent of that previously held by the Tree Warden, and it was required to be held in compliance with the Open Meeting Law.

The Selectboard argues that it was free to deliberate in private because the proceeding was of a quasi-judicial nature, and therefore it could retire for "deliberations" under § 312(e). 1 V.S.A. § 310(5) defines "quasi-judicial proceeding":

> (5) "Quasi-judicial proceeding" means a proceeding which is:
>
> (A) a contested case under the Vermont Administrative Procedure Act; or
>
> (B) a case in which the legal rights of one or more persons who are granted party status are adjudicated, which is conducted in such a way that all parties have opportunity to present evidence and to cross-examine witnesses presented by other parties, which results in a written decision, and the result of which is appealable by a party to a higher authority.

The hearing conducted by the Randolph Selectboard on July 5, 2005 did not fall within either of these categories. Both types of hearings are for parties whose individual rights are adjudicated, as opposed to matters of general community concern. Both require procedural formalities to assure accountability: presentation of evidence followed by a decision based on the evidence presented, the opportunity of persons with party status to present evidence and to cross-examine witnesses presented by other parties, a decision explained in writing, and the opportunity for review to a higher authority.

This case did not involve an adjudication of any individual rights. Rather, this was a "legislative-type proceeding" on a matter of public interest. See Opinion 18 from the Secretary of State (Opinions Vol. 8, #4, April 2006) (suggesting that legislative proceedings are not exempt from the open meeting law).

Furthermore, the procedures followed did not include the presentation of evidence followed by a written decision based on that evidence. On the contrary, the Selectboard allowed three citizens to speak on the proposal. There was no opportunity for cross-examination. It appears that the Board relied on the written decision of the Tree Warden rather than making its own decision on the issue. Finally, there was no written decision to explain the result. None of the procedural hallmarks of a quasi-judicial proceeding, designed to assure accountability of non-legislative decisionmakers, were present.

Legislative decisions made in executive session, without any public discussion or written decision, do not provide the public accountability required under the Vermont Constitution and the Open Meeting Law. In this case, the statute called for the Selectboard, sitting as a legislative body, to hold a public hearing in compliance with the Open Meeting Law. The Board was required to have its discussion and make its decision in public. Because there was no public discussion by the members of the Board as required by § 312, the hearing was not held in compliance with the law, and the Selectboard's decision is without effect.

The public vote that was taken after the Board resumed the public session was not sufficient to validate the decision, as it was part of the fundamentally flawed hearing. The Selectboard is required to hold a new hearing in a manner that is in compliance with the requirements of 24 V.S.A. § 2509 and 1 V.S.A. § 312(a).

ORDER

The Decision of the Randolph Selectboard, approving a proposal to cut the crab apple tree, is *reversed*. The matter is *remanded* to the Selectboard for a public hearing to be held that is in compliance with 24 V.S.A. § 2509 and 1 V.S.A. § 312(a).

Dated at Chelsea, Vermont, this ____ day of July, 2006.

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Hon. Mary Miles Teachout
Presiding Judge