# Holland Tree Removal Case Summary

**FAILURE TO HOLD A TREE WARDEN HEARING VIOLATES LANDOWNER'S DUE PROCESS RIGHTS**

The failure of your tree warden to hold a hearing prior to cutting down a public shade tree within the limits of public ways and places could cost your municipality tens of thousands of dollars. Fortunately, for the Town of Holland it only cost $1.00 (not including legal fees of course).

Back in 2001, the Town of Holland selectboard sought to widen a half-mile stretch of town highway called Lackey Road so that it could accommodate large vehicles. The selectboard's original plan called for the removal of trees, blasting ledges, digging drainage ditches, and installing culverts. This plan was eventually scaled back to tree cutting, improving existing ditching, dumping gravel and widening a traveled portion of the highway.

Before the work began, an adjoining landowner brought suit in Orleans Superior Court seeking declaratory and injunctive relief to prevent the Town from cutting down the trees. The landowner also claimed that the Town's actions constituted altering a public highway, which would necessitate performing a survey. "When selectmen accept, lay out, or *alter* a highway, as provided in this chapter, they shall cause a survey to be made. . ." 19 V.S.A. § 704. (Emphasis added.) The Town filed for summary judgment, arguing that its tree warden was not required to hold a public hearing prior to felling the trees because they contributed to the narrowness of the road, and thus created a public safety hazard. The Town also characterized its work to widen the road not as an alteration, but as "maintenance" within the bounds of 19 V.S.A. §§ 904, 950, and 952. As such, it argued, the work did not require a survey.

At trial, the Superior Court granted the Town's motion for summary judgment, which the landowner then appealed to the Vermont Supreme Court. On appeal, the Court agreed with the landowner that the tree warden had no authority to remove the trees without first holding a public hearing and reversed and remanded the case back to the lower court. The landowner, represented by new counsel, subsequently supplemented his complaint, claiming that the tree warden's failure to hold a public hearing deprived him of his constitutional right to due process. On remand, the Superior Court agreed and awarded the landowner $1.00 in nominal damages and $15,000 in attorney's fees. It also held that, although the road work was more than just routine maintenance, it did not rise to the level of "a major alteration to the road as that term is defined in [19 V.S.A.] § 701" and, therefore, did not require a survey.

The Town appealed the Superior Court's grant of attorney's fees and the landowner appealed its conclusion that the road project was not an alteration requiring a survey. The Supreme Court determined that the Town's changes to the road did not in the aggregate equate to an "alteration" as contemplated by 19 V.S.A. § 701(2) ["a major physical change in the highway such as a change in width from a single lane to two lanes"] because it did not extend beyond the road's existing three-rod right-of-way. The Court did, however, affirm the Superior Court's ruling that the Town's refusal to hold a tree warden hearing violated the landowner's due process rights, but refused to grant him damages beyond those nominal damages in the $1.00 award, as he had failed to justify his replacement costs. Finally, the Court overturned the Superior Court's grant of attorney's fees in the amount of $15,000 because the landowner's due process rights had been vindicated by his previous attorney, for whom such fees had not been requested.

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**VLCT News**, February 2008

## STATUTORY PROCESS MUST BE FOLLOWED IF ALTERING HIGHWAYS, REMOVING PUBLIC SHADE TREES

The Vermont Supreme Court, in Hamilton v. Town of Holland (No. 2002-222), recently clarified the procedures that a selectboard must follow when removing trees to facilitate the alteration or widening of a public way, even if the trees are being cut for public safety reasons. The decision also clarifies when a tree warden may cut down public shade trees without a public hearing under the "hazard to public safety" exception contained in 24 V.S.A. § 2509. Finally, the Court clarifies the standing requirements necessary to assert violations of the Open Meeting Law. This case should be of particular interest to municipalities because, according to the Town's brief, this is only the second time the Vermont Supreme Court has addressed the issue of tree wardens' authority under 24 V.S.A. §§ 2502-2511.

The relevant facts relied on by the Vermont Supreme Court are as follows. The Town's selectboard, with the concurrence of the Town's tree warden, decided at a public selectboard hearing to remove approximately 30 trees along a half-mile section of a Class 3 Town highway. The Town concluded that the removal of the trees was necessary to facilitate the alteration or widening of a narrow portion of a public way that was determined to constitute a safety hazard. The proposed work would require the use of bucket loaders; the removal of ledges; ditch digging; and possibly some blasting. The Plaintiff, who owns property abutting the public way, and on whose property four of the trees were located, spoke in opposition to the proposal at the hearing; another resident was not allowed to comment.

In response to the selectboard's decision to proceed with the proposed work, the Plaintiff filed a complaint in superior court alleging that:

1) The Town is required to follow the requirements of Title 19 when widening a public way;
2) The Tree Warden Statute does not authorize the selectboard to remove healthy, non-diseased trees to facilitate a road widening project; and
3) The Town violated the Open Meeting Law by prohibiting a member of the public from speaking at a public hearing. The Town subsequently filed a motion for summary judgment that was granted by the superior court. The Plaintiff then appealed to the Vermont Supreme Court.

### Altering a Highway

The Plaintiff argued that the selectboard's decision to proceed with the proposed tree removal and roadwork is ineffective because the Town did not comply with Title 19 procedural requirements for accepting, laying out, or altering a highway. 19 V.S.A. §§ 704 *et seq.* The Plaintiff contended that the selectboard was required to follow the requirements of Title 19 because the work constituted a widening of the public way, or in the alternative, an alteration of the public way, triggering the applicability of Title 19. In response, the Town argued that Title 19 did not apply because the work did not constitute an alteration, widening, or major physical change in the public way, but was being conducted as part of the Town's responsibility to maintain the town's highways in accordance with 19 V.S.A. § 304(1).

The Vermont Supreme Court ruled in favor of the Plaintiff and held that Title 19 did apply to the Town's project because the project was not merely road maintenance but constituted a "major physical change" of a highway that involved substantial amounts of work and a significant change in the area abutting the existing public way. The Supreme Court did state, however, that whether a road project involves a "major physical change" of a highway, triggering the applicability of Title 19, will depend on the particular facts of a project.

**Removing a Public Shade Tree**

Generally, a tree warden must hold a public hearing prior to felling a public shade tree located within a public way located in a residential area. However, no public hearing is required when the tree is "infested with or infected by a recognized tree pest, or when it constitutes a hazard to public safety." 24 V.S.A. § 2509.

The Plaintiff argued that the Town failed to present evidence to support its contention that the trees at issue were located on the public way, and not on private property, or that the trees were diseased and a hazard to public safety. The Town, however, argued that its actions were proper under the tree warden's authority. Agreeing with the Plaintiff, the Vermont Supreme Court reversed the superior court and held that the Town's tree warden had no authority to remove the trees without a public hearing because it was undisputed that the public safety hazard the Town sought to eliminate was the narrowness of the public way, and not the trees themselves, and that this was not the type of hazard to public safety contemplated by 24 V.S.A. § 2509.

Although the Court ruled in favor of the Plaintiff on both the Title 19 and Tree Warden issues, it did uphold the superior court's determination that the Plaintiff did not have standing to seek redress for the Town's Open Meeting Law violation because he was not prevented from speaking and failed to show how he was aggrieved by the fact that his neighbor was not allowed to speak at the public hearing. The message municipal officials should take from this case is that when you are deciding to conduct roadwork that exceeds mere maintenance and that could be construed as a widening or alteration of a public way, follow the procedures contained in Chapter 7 of Title 19. Moreover, tree wardens be warned - hold a public hearing prior to felling public shade trees unless the tree is diseased or the tree itself poses a hazard to public safety, such as when a tree limb is hanging precariously over a heavily traveled public way. If the threat isn't imminent, err on the side of caution and hold a public hearing prior to taking action. It will provide a forum in which the proposed plan can be discussed, alternatives can be considered, and hopefully litigation can be avoided.

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***VLCT News***, May 2003