

## **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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