

LEGAL AND REGULATORY NOTES, JULY 2012

Second Circuit and Franklin County Superior Courts Strike Down Town Prayer

“And there’s a slow, slow train comin’ up around the bend ...”

-Bob Dylan

Earlier this year at VLCT’s annual “Town Meeting Tune-Up” workshop, I spoke about prayer at town meeting. I highlighted the legal uncertainty surrounding this practice at both the federal and state level as a way of buttressing my recommendation to refrain from it until such time that we obtain clarification as to whether it is permissible under both the U.S. and Vermont Constitutions. I analogized prayer at town meeting to two trains running down different tracks, one riding the federal constitutional rail and the other the state. The take-away from that presentation was that in order to hold prayer at town meeting, it’s necessary for both trains to arrive safely in the station. If one doesn’t make it, then neither does the other.

The federal prayer train (*Galloway v. Town of Greece*, Docket No. 10-3635-cv) arrived in the station at the Second Circuit Court of Appeals on May 17, 2012, and the state train (*Hackett v. Town of Franklin*, Docket No. S.77-11 Fc) arrived at Franklin County Superior Court shortly thereafter on May 29. Ordinarily, with a topic of this magnitude, I would write about the intricacies of both cases, but I’ll give the federal case short order here since the state train seems to be running off the tracks, throwing the practice of town meeting prayer into doubt.

The Town of Greece, New York, first began inviting local clergy to start its Town Board meetings with a prayer in 1999. The town had no formal policy prescribing the process for inviting prayer-givers, it had no guidelines regulating its content, nor had it ever asked to review the wording of prayers prior to their delivery. The town’s legislative prayer practice involved randomly contacting religious organizations listed in the Greece Chamber of Commerce’s Community Guide until a clergy member was found who was willing to deliver an invocation. Until 2008, this list contained only Christian organizations which were a reflection of the religious organizations located within the town. A substantial majority of the prayers provided were explicitly Christian. (In fact, from 1999 to 2007 every prayer-giver was Christian.) Two attendees complained of the town’s prayer practice to the Town Board and eventually brought suit. On appeal from the District Court of Appeals for the Western District of New York, which upheld the prayer practice, the U.S. Court of Appeals for the Second Circuit (Second Circuit) reversed. The Second Circuit found the town’s prayer practice ran afoul of the Establishment Clause because “an objective, reasonable person would believe that the town’s prayer practice had the effect of affiliating the town with Christianity.” The Establishment Clause of the First Amendment to the U.S. Constitution reads, “Congress shall make no law respecting an establishment of religion...” This clause applies to the acts of local officials under the Fourteenth Amendment. To determine whether the Town of Greece violated the Establishment Clause, the Second Circuit looked at the town’s practice including its prayer-giver selection process, the content of the prayers, and the actions and inactions of its town officials to ascertain whether the

town conveyed the view that it favored or disfavored certain religious beliefs as perceived by an ordinary, reasonable observer. In ruling against Greece, the Second Circuit seemed just as concerned with what it was saying as with what it was not saying, which was that legislative prayers do not in and of themselves violate the Establishment Clause. Rather, a sectarian legislative prayer that is “inclusive of multiple beliefs and makes clear, in public word and gesture, that the prayers offered are presented by a randomly chosen group of volunteers, who do not express an official town religion, and do not purport to speak on behalf of all the town’s residents or to compel their assent to a particular belief – is fully compatible with the First Amendment.” Aspiring to and accomplishing this balancing act, the Second Circuit acknowledged it is no easy task and these “difficulties may well prompt municipalities to pause and think carefully before adopting legislative prayer, but they are not grounds on which to preclude its practice.” Essentially, the Second Circuit said municipalities within its jurisdiction (New York, Connecticut, and Vermont) can hold legislative prayers, just not the way the Town of Greece, New York, did. The federal prayer train therefore is still rolling down the tracks, albeit a little slower. A couple more barriers lie ahead, but so long as it treads carefully, it can still get to its destination. Though this case may be appealed, it is unlikely to be heard by the U.S. Supreme Court. Another train of the same configuration (see *Joyner v. Forsyth County*, No. 10-1232 (4th Cir. Ju. 29, 2011). left the station in North Carolina, was denied cert. (i.e., the U.S. Supreme Court refused to hear it), and never reached its destination in Washington, D.C.

The reason why the federal train runs on a separate track – and, by extension, the problem with applying the same reasoning from the Second Circuit’s holding to Vermont – is that its decision was grounded in the U.S. Constitution, not Vermont’s. While similar, the outcome of these cases turns on the differences in the two Constitutions. Whereas the Establishment Clause of the U.S. Constitution states that “Congress shall make no law respecting an establishment of religion...”, the Vermont Constitutional corollary, Article 3 or the Compelled Attendance Clause, provides that, “no person ... can be compelled to attend *any* religious worship ... contrary to the dictates of conscience, nor can any person be justly deprived or abridged of any civil right as a citizen, on account of religious sentiments, or peculiar[r] mode of religious worship.” Vt. Const. Ch. I, Art. 3. (Emphasis added.) Herein lies the rub: Vermont’s Constitution “speaks not to establishment of religion” (*Chittenden Town School Dist. v. Department of Educ.*, 169 Vt. 310, 311 (1999)) but rather to a person being “compelled to attend *any* religious worship....” (Emphasis added.)

We now jump the track to the Vermont case where the state prayer train came to a screeching unscheduled stop (at least in Franklin County and at least for now). In summary, the Town of Franklin opened its annual town meeting by having a local Christian minister deliver a sectarian prayer after the gaveling of the meeting with frequent and express references to the Christian faith. Ms. Hackett, a resident of Franklin who has attended every town meeting since at least 2000, objected to this prayer practice a number of times. Despite her objections, the prayer practice continued through 2011. In contrast to the federal case, the facts mattered much less to the Franklin County Superior Court in finding that the Town compelled attendance at a religious worship by having prayer at town meeting. The Franklin Superior Court’s focus wasn’t on how or how not the Town of Franklin tried to avoid endorsing a particular religion. Instead it focused on the fact that the prayer was “religious” in the least and that Ms. Hackett (the plaintiff) was “compelled” to listen to it.

Starting from the basis as other courts have done that prayer is an inherently religious act, the Court sought to determine whether the prayer or sectarian invocation constituted religious

worship. The Town argued that it was not because the prayer was offered at its annual town meeting and not in a church. The Court disagreed, stating that such an argument would carry more water in other states that prohibit compelled attendance at any “place of worship,” but Vermont’s constitution was written more broadly to prohibit compelled attendance at “any religious worship.” The Court then turned to the Town’s argument that the prayer offered wasn’t “religious worship” but rather an invocation of guidance based on widely held beliefs steeped in a unique historical tradition. The Court rejected this argument as well, holding that “even if prayer at Vermont town meetings had a long-standing tradition, the Court is skeptical that this would necessarily render the prayer non-religious. The argument that a religious prayer becomes non-religious through use over time would, strangely, imply that earlier prayers at town meetings *did* violate the Vermont Constitution, since there would be no extended history to sanitize the prayer.” The Court then addressed the Town’s position that Ms. Hackett was not “compelled” to attend the prayer in order to participate in town meeting within the plain meaning of that word. The Court refused to rely on what it considered the Town’s narrow meaning, countering that the word “compel” can also take the form of influence or causing by overwhelming pressure. The Town’s position was that Ms. Hackett was never forced to recite the prayer or to in any way demonstrate an outward manifestation of her assent to this practice. In the eyes of the Court, there is no distinction between actively participating in town prayer or attending a town meeting at which a sectarian prayer is delivered. “What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.” Holding a prayer at town meeting, the Court reasoned, put Ms. Hackett in the position of having to choose between attending a religious worship and exercising her right to vote. That she could arrive after the prayer negates the fact that Ms. Hackett has the right to attend the entire town meeting, and “Article 3 prohibits a person from being ‘deprived or abridged of any civil right as a citizen, on account of religious sentiments, or peculiar mode of religious worship.’”

Though a Franklin County Superior Court opinion is binding precedent on Franklin County only and does not necessarily compel any other state superior court to reach the same conclusion, opinions of sister courts (those with the same adjudicatory authority but different jurisdictions) are given persuasive weight (no court likes to be the first one to get a decision wrong) and that’s not a ticket (to completely exhaust the whole train analogy) that I’d be willing to punch.

The holdings of these two cases can best be summed up this way: the federal court said you can still conduct town prayer but it’s going to be a journey fraught with peril. The Franklin Superior Court said you can’t do it at all in Franklin County.

So where does this leave us? With respect to prayer at town meeting, the trains have stopped, at least temporarily. The next stop? The U.S. and Vermont Supreme Courts – maybe. But in Vermont, for the time being, you can’t get there from here.

Garrett Baxter, Staff Attorney II
VLCT Municipal Assistance Center