State of New Hampshire
Supreme Court

NO. 2006-0020

2006 TERM

SEPTEMBER SESSION

ATV Watch

v.

New Hampshire Department of Resources & Economic Development

RULE 7 APPEAL OF FINAL DECISION OF
MERRIMACK COUNTY SUPERIOR COURT

REPLY BRIEF OF PLAINTIFF, ATV WATCH

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I. Timely Disclosure of Appraisal Would Not Have Disadvantaged the State in Negotiations, Would Have Saved the State Money, and Would Have Benefitted the Public Interest

The State argues that "[b]y releasing the appraisals and related documents that ATV Watch requested during negotiations, DRED would have severely hurt its bargaining position." *DRED Brief* at 12. It claims that by releasing the appraisals and related documents "the seller would know exactly how much DRED thought the property was worth and could have charged the public more thereby destroying the negotiating process for DRED." *Id.* The State expresses its fear that "a competitor could have outbid DRED after learning the value of the property based on DRED's appraisal.

This argument is unsupported by the record, however, because DRED gave the appraisal to the seller immediately after it was received by the State. It is undisputed that the State received the appraisal on March 8, 2005, and that just three weeks later, the State gave it to the seller for his approval. LETTER FROM BILL CARPENTER TO THOMAS & SCOTT DILLON (Mar. 31, 2005), *appx.* at 17 ("Enclosed is an original Appraisal Report . . . If you find the Report acceptable, please sign and return to my office . . . .").

Because both the seller and the potential buyer shared the same appraisal, it is impossible to maintain that disclosing it to ATV Watch would somehow harm the negotiations. The seller could have used the appraisal for exactly what the State feared the public might do – shop for a better bid.

Nonetheless, the appraisal was withheld from the public until December 19, 2005, almost nine months after the State gave it to the seller and more than a month after the G&C approved the purchase.

II. State's Assumption the Disclosure Harms the Public Interest is Not Supported

Moreover, the State's claim that release of the appraisal would have disadvantaged the State is merely an unsupported assertion. Rather, timely disclosure may have resulted in the State being able to negotiate a better deal. Had there been timely disclosure, ATV Watch or others would have been able to ask pointed questions about the appraisal itself, for example:

- Why was one of the sales comparables which composed part of what DRED acquired not used in the comparable analysis? *See* APPRAISAL REPORT (Nov. 22, 2004) at 45, ***appx.*** at 163 ("An attempt was made to include the original Hancock transfer, but the substantially greater TCV[1] – and possibly other factors that have not yet been isolated or articulated by the current ownership – resulted in a comparison that was not meaningful. Therefore, the 8,485-acre Hancock sale to Dillon was not included in the comparison grid that follows.").

- Was there an independent evaluation of the of the timber capital value on the property (which amount was supposed to be offset against the final price because the seller retained timber rights), or was this information solely based on information provided by the seller and broker? *See* APPRAISAL REPORT at 35, ***appx.*** at 153 ("Scott Dillon has indicated that approximately $500,000 of TCV remains on the property, or approximately $70/acre, as of the date of value."); APPRAISAL REPORT at 9, ***appx.*** at 129 ("According to Mr. John Gallus, the broker, and Mr. Charles Baylies, Dillon's local forester, the TCV on the St. Laurent property was less than that on the Hancock property.").

- Was there an independent evaluation of the remaining gravel value on the property (which amount might have been offset against the final price because the seller also retained gravel rights), or was this also based solely on information provided by the seller? *See* APPRAISAL REPORT at 34, ***appx.*** at 153 ("according to Mr. Baylies [Dillon's local forester] and Mr. Dillon, the value of the remaining gravel is considered to be minimal.").

- Was the fact that prior to sale the seller subdivided off all state road frontage, which the State acknowledged had a "higher-value, commercial potential," taken into account in the appraisal of the property? LETTER FROM BILL CARPENTER TO SCOTT DICKMAN (appraiser) (Oct. 11, 2004), ***appx. to reply*** at 12.

[1]Timber Capital Value."

- The 7,185 acre DRED acquisition was carved out of two tracts of land, one of which was acquired by the seller *after* the State's appraisal. Was the involvement of a middle-man – who then retained the timber, gravel and frontage – in the best-interest of the public? *See* APPRAISAL REPORT, title page, *appx.* at 116; and at 9, *appx.* at 129 ("The second purchase was recorded on December 16, 2004, and comprises a transfer from St. Laurent Heirs, Inc., to Dillon Investments.").

- How were the boundaries of the 7,185-acre DRED acquisition determined from within the total 12,685 that the Dillons came to own, without a single piece of correspondence between the seller and DRED detailing the boundaries? And exactly how did the boundaries change between the time the property was appraised and the time the transaction was completed, and did the price the State paid reflect these changes? *Compare* APPRAISAL REPORT, "Topographic Site Map," at 33, *appx.* at 151 and *appx. to reply* at 19 *with* RECREATIONAL TRAIL SITE, BERLIN, NEW HAMPSHIRE, (Oct. 2005), *appx. to reply* at 18.

Timely disclosure of documents may have compelled answers to these and other questions and may have ultimately saved rather than cost the State money. Thus the State's assumption that disclosure harms the public interest is not supported.

III. State Cannot Claim Privacy Interest in Information it Willingly Released

The State argues that it could not release documents because of its concern for the privacy interests of the sellers. *DRED Brief* at 7, 15, 20.

The State cannot maintain such an argument because it willingly released the same information, which it now claims is private, in another appraisal. Although otherwise unimportant to this case, there were two appraisals – one for the land which the State was acquiring, and another for a right-of-way through adjacent land which the seller was retaining. The appraisal for the right-of-way, which the State released to ATV Watch, is virtually identical to the appraisal for the land.

Moreover, it is understood that the seller was a business entity, *See e.g.,* INTER-DEPARTMENT MEMORANDUM FROM DRED TO ANNE EDWARDS (Dec. 1, 2004), *appx. to reply* at 17, which has lower privacy interests than private citizens. *Lamy v. Pub. Utils. Comm'n*, 152 N.H. 106 (2005). Thus, even if the State could claim the seller's privacy interest, the Right-to-Know law nonetheless mandates disclosure.

IV. Rules of the Executive Council Do Not Preempt Disclosure Requirements

The State argues that procedural rules of the Governor and Executive Council (G&C) determine whether DRED's documents are subject to the disclosure requirements of the Constitution and Right-to-Know law. *DRED Brief* at 20-21. There are three flaws in its argument.

First, the State has cited no statute, rule, or regulation of the G&C to support this claim, and no such rule is known.

Second, it is elementary that the Right-to-Know law applies to administrative agencies, RSA 91-A:1-a, I(c), which DRED undeniably is, and that the law also applies to the G&C. RSA 91-A:1-a, I(b); RIGHT-TO-KNOW LAW MEMORANDUM OF THE ATTORNEY GENERAL (2003) at 1, *see* <http://www.doj.nh.gov/publications/right_to_know.html>.

Third, the State alleges that "members of the public have at least 48 hours, usually more, to review the [G&C] agenda and the items to be considered." *DRED Brief* at 22. This just isn't so. Recently ATV Watch has encountered items which, after it sought them in a Right-to-Know request, were placed on the G&C agenda as a late item – the morning of the meeting – thereby precluding any ability for public analysis of items prior to consideration by the G&C.

Thus, even if the G&C had procedural rules, and even if those rules applied here, they would probably be in violation of the Right-to-Know law. In any event, the State's argument is unsupportable.

V. Order Should Have Issued Preventing Further Violations

The State alleges that ATV Watch did not meet the elements to procure an injunction. *DRED Brief* at 20-21.

First, the Right-to-Know law does not require the traditional elements of an injunction. Rather the statute, under the section entitled "Remedies," provides that "the court may issue an *order* to enjoin future violations of this chapter." RSA 91-A:8, III (emphasis added). ATV Watch proved below that DRED had violated the Right-to-Know law, and that the violation prejudiced its rights. That is sufficient for an order for a remedy.

Second, if ATV Watch had to show an immediate threat of irreparable injury, it did. ATV Watch suffered immediate and irreparable harm in that it was not able to timely exercise its constitutional right to petition its representatives, and had DRED timely provided the documents ATV Watch requested, it could have. ATV Watch showed a public interest in that it was merely asking questions of its representatives to ensure that public resources were wisely spent.

Accordingly, the court should have issued order to prevent DRED from further violating the law.

VI. Court Should Have Awarded Attorneys Fees

"[U]nder RSA 91-A:8, attorney's fees *shall* be awarded if the trial court finds that: (1) the lawsuit was necessary to make the information available; and (2) the body, agency, or person knew or should have known that the conduct engaged in was a violation of RSA chapter 91-A." *WMUR Channel Nine v. New Hampshire Dept. of Fish and Game*, __ N.H. __ (decided Aug. 3, 2006) (quotations and brackets omitted, emphasis added). If the two elements are met, the statute *requires* an award.

First, DRED has not met its burden to show that this lawsuit was not necessary to compel the disclosure of documents sooner than it would otherwise have released them. As noted in the court's order below, many of the documents this matter concerns were not released until after commencement of this suit.

Second, the State disputes that DRED knew that its conduct violated the Right-to-Know law. Although DRED is an independent State agency, it has conducted its dealings with ATV Watch's Right-to-Know requests fully supported and directed by the Attorney General. In DRED's very first correspondence to ATV Watch, it stated, "[Y]our letter has been referred to the Attorney General's office for appropriate review. When we have heard from them we will be back in contact with you." LETTER FROM RICHARD MCLEOD TO ANDREW WALTERS (Dec. 1, 2004), *appx.* at 2. DRED's excuse for one instance of its tardiness is that it was conferring with the Attorney General. ORDER (Apr. 7, 2005), *appx.* at 57; *DRED Brief* at 4. Nearly every correspondence received by ATV Watch contained a "cc" line indicating that the Attorney General has been part of DRED's decision-making process. In addition, DRED directed ATV Watch to conduct its Right-to-Know negotiations directly with the office of the Attorney General,

and subsequent records demonstrate a long phone relationship between Andrew Walters, ATV Watch's principle, and Associate Attorney General Anne Edwards.

Thus presumably under the direction of the Attorney General for example, DRED released to ATV Watch a redacted copy of a letter from DRED to potential appraisers. ATV Watch later learned that the following phrases were redacted from the initial release: "enclosed is a sketch map of the target property," and ". . . as depicted on the attached map." *Compare* LETTER FROM BILL CARPENTER TO BEN MOORE (Oct. 11, 2004) (redacted version), ***appx. to reply*** at 13 ***with*** SAME LETTER (un-redacted version), ***appx. to reply*** at 15. There is no basis under the Right-to-Know law that the mere existence of a document should be kept secret. The only plausible reason for such a redaction is that DRED or the Attorney General did not want ATV Watch to know it had released the map to other parties, or that ATV Watch might use the map to advocate among elected representatives a course of action different from DRED's direction. In any event, this suggests that DRED and the Attorney General knew its action was in violation of the Right-to-Know law.

Accordingly, ATV Watch has met the two conditions necessary for an award of fees and costs, and the court below was in error in refusing to make such an award.

VII. Two Errors of Significance in DRED's Brief

There are two errors of significance in DRED's brief.

First, the State references "the Trial Court's order that the appraisals and related documents should not have been disclosed until negotiations were sufficiently completed because the benefit of nondisclosure is much greater than that of disclosure." *DRED Brief* at 14. Further, the State claims that "the Trial Court correctly ruled that DRED did not need to disclose these documents during negotiations and that order should be upheld." *DRED Brief* at 17. Neither of these references are cited. This is because neither of these conclusions appear in the trial court's order.

Second, in DRED's statement of the case, it claims that the trial court found that DRED's "'reliance on *Perras v. Clements* was reasonable and no knowing violation of the Right to Know Law occurred.'" *DRED Brief* at 2 (citation omitted). It should be noted that that finding was specifically in the context of awarding fees and costs. It should also be noted that the trial court more generally found "[t]he instant case is not a 'takings' case and the party seeking the information is not a property owner who would receive an unfair advantage in negotiating with the State by an order of disclosure. While the State relies on *Perras* to support nondisclosure, the Court does not find that the facts of this case fit the *Perras* analysis." ORDER (Apr. 7, 2005), ***appx.*** at 59.

CONCLUSION

Based on the foregoing, ATV Watch respectfully requests this Honorable Court to find that DRED was in violation of the timetable and substantive requirements of the Right to Know law, that DRED should have known it was not in compliance, and that this lawsuit was necessary to compel disclosure of documents sooner than they otherwise would have been. Further ATV Watch respectfully requests this Honorable Court to find that DRED was in violation of the public input provision of the ATV law, to issue an order forcing compliance with both statutes, and to award attorneys fees and costs.

Respectfully submitted,
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Dated: September 6, 2006

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for ATV Watch requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument because the issues raised in this case are complex and counsel believes the Court would benefit from an opportunity to have questions addressed.

I hereby certify that on September 6, 2006, copies of the foregoing will be forwarded to Anne M. Edwards, Esq., Associate Attorney General.

Dated: September 6, 2006

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APPENDIX