

**OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT
COMMISSION**

P.O. Box 140, Barnstable, Massachusetts 02630-0140
Tel: 508-775-1766

William W. Latimer, Appellant

Vs.

Decision for Appeal No. 2011-7

**Old King's Highway Regional Historic
District Committee for the Town of Dennis**

On Tuesday, September 6, 2011 at 1:30 P.M., the Commission held a hearing at the West Barnstable Fire Station Meeting Room, 2160 Meeting House Way (Route 149), West Barnstable, Massachusetts, on Appeal # 2011-7 filed by William W. Latimer seeking reversal of the Dennis Historic District Committee's granting permission under the ROUTE 6A Scenic Road Act (Chapter 61 of the Acts of 1992) to Anne Ranstrom to remove a tree located at 946-952 Main Street, Dennis, Massachusetts.

Present were Chairman Peter T. Lomenzo, Jr., Dennis; Lawrence Houghton, Brewster; William Collins, Sandwich; George Jessop, Barnstable; James R. Wilson, Commission Administrative Counsel; William W. Latimer, Appellant; Christopher A. Veara, Appellant's Attorney; Ellis N. Allen, Appellant's Arborist; Anne Ranstrom, Applicant; James Ranstrom, Applicant's Attorney; and John Holbrook Applicant's Arborist.

Absent were Paul Leach, Orleans and Richard Gegenwarth, Yarmouth.

The Dennis Town Committee's decision was filed with the Town Clerk on July 15, 2011. The appeal was entered with the Commission on July 22, 2011, within the 10-day appeal period.

Copies of the Appeal Petition, Town's Decision, Application, Plans and Minutes from the Town Committee's hearing were distributed to the Commissioners for review.

The Appellant's Presentation:

Attorney Christopher A. Veara of Dennis addressed the Commission on behalf of the Appellant's appeal. He stated that the tree was located on his Client's property and that at an earlier hearing before the Dennis Town Committee in May that the parties had been advised to see if they could work out a reasonable agreement with their neighbors before the matter came back to the Dennis Town Committee. He stated that his Client and the Applicant agreed to hold a meeting in September to attempt to find an amicable settlement to the tree removal dispute.

He claimed that without his Client's knowledge or agreement the Applicant filed another application with the Dennis Town Committee for permission to remove the tree and that on July 13, 2011, a public hearing was held and permission granted by the Dennis Town

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Committee. He asserted that this was done without his Client's knowledge or opportunity to be present to oppose the application.

He stated that the tape recording of the public hearing indicated that the decision by the Dennis Town Committee was based on a concern for the alleged poor health of the tree and that the purpose of his Client's appeal was to obtain an opportunity to present his opposing evidence on the issue. He asked his Client, Dr. Latimer to address the Commission.

Dr. Latimer acknowledged that he did receive the formal legal notice of the July 13, 2011 Public Hearing, but indicated that neither his neighbors nor he or his attorney were able to attend. He stated that no opposition appeared at the hearing and the Dennis Town Committee did not hear his evidence about the health of the tree. He indicated that it was reported at the hearing that the Dennis Town Tree Warden had given an advisory opinion that the tree was healthy.

He showed the Commissioners a photograph of the tree and asked his Arborist, Ellis N. Allen, to present his evidence about the health and condition of the tree. A copy of his May 18, 2011 Report was attached to the Appeal Petition and available for review by the Commissioners.

Mr. Allen reviewed the matters contained in his May 18, 2011 Report and added that in 1991 and 1992 he had participated in a Route 6A Tree Survey in which the subject tree (No. 4744) had been rated a 7 on a 1 to 10 scale of it's condition. He reported that he made two increment borings of 7.25 inches and 6.25 inches on either side of the tree's identified open decay cavity. He stated that the borings revealed sufficient healthy wood remaining in the trunk to support a calculated structural loss factor of 10%. He expressed the opinion that by using the structural loss calculation formula, the tree would not have to be removed until the trunk showed a 33% structural loss. He concluded by suggesting that the tree was not in a hazardous condition and that with a thinning of the crown to lessen the load on the damaged trunk, the tree could live for many years.

Applicant's Presentation:

Attorney James Ranstrom addressed the Commission stating that neither he nor his wife, the Applicant, were able to attend the July 13, 2011 Public Hearing, but indicated that the application had been presented by Arborist, John Holbrook of Yarmouth Port. As background, he stated that the Application was related to four years of litigation involving a twenty-foot Right of Way across the Appellant's property in which the subject tree was located. He indicated that the Right of Way had been created in 1949 for all uses and that he and his wife owned one of four cottages benefited by the Right of Way. He indicated that after the successful conclusion of the litigation, the cottage owners hired an Arborist John Holbrook, to review and report on the health and condition of all the trees located within the Right of Way. Mr. Holbrook reported that the subject tree was in decline and should be taken down. He asked Mr. Holbrook to present his report about the health and condition of the tree.

Mr. Holbrook presented copies of his April 15, 2011 Report and indicated that he had added an observation that the open decay cavity was now producing fungal spores. He stated that he had used a different test to calculate structural loss to the tree trunk. He indicated that he had used a resister graph that operates like a seismograph, to test the extent of the decay and that the result indicated that the tree did not have any long term viability, but was at risk.

He showed a color photograph of a large branch that had been shad during the recent storm and pointed out the dark black decay area on its base. He claimed that this indicated that the decay had spread from the trunk into the crown.

He expressed the opinion that there were many negative factors that would eventually result in the death of the tree and suggested that while tree did not appear to be imminent danger of collapse the risk was present and that the tree should be taken down.

Mr. Ranstrom concluded the presentation by pointing out the safety and liability risk of the weakened tree and that there had been previous hearings before the Dennis Town Committee in which Dr. Latimer had participated and expressed his opposition to the removal of the tree.

The Town Committee's Presentation:

Peter Lomenzo addressed the Commission in support of the Dennis Town Committee decision to grant written permission to remove the tree. He confirmed Mr. Ranstrom's statement that the matter had been before the Dennis Town Committee at prior hearings at which Dr. Latimer and others had presented their opposition to the tree removal.

He reported that an application had been filed in April and the first public hearing was held on May 25. At that hearing there was concern expressed for the fact that the application had been filed under the name of Dr. Latimer. The application was filed in that manner because Dr. Latimer was the record owner of the subject locus. Dr. Latimer objected to the process and this created confusion at the initial hearings.

Mr. Lomenzo reported that there had been significant back and forth about the condition of the tree and the fact that the tree was located in the middle of the twenty-foot Right of Way. Dr. Latimer participated in the discussions and presented information in opposition to what Mr. Holbrook had stated to the Dennis Town Committee about the condition of the tree. As a result of the conflict, the May 25th Public Hearing was continued until June 8th to allow for the gathering of more information about the condition of the tree and to attempt to remove any confusion that may have arisen during the proceedings.

At the June 8th Public Hearing the conflict and confusion continued and it was proposed that the matter be put off until September to allow the Applicant and the neighbors to try and work out their differences.

Following the June 8th Public Hearing the Applicant was advised to withdraw the initial application that had been entered in the name of Dr. Latimer and start the process over with a new application in the name of the Applicant, as the owner of the Right of Way. The original application was withdrawn and a new application was filed.

A new Public Hearing was scheduled for July 13, 2011. At the Public Hearing on the new application, members of the Dennis Town Committee expressed strong concern about the safety and liability issues of allowing the weakened tree to remain in place. On a split vote, a majority voted three to two (3-2) to authorize the removal of the tree.

Mr. Lomenzo confirmed that he had spoken with the Dennis Tree Warden and that at the July 13, 2011 Public Hearing he announced that the Tree Warden had expressed the opinion that the tree was fine. He qualified the comment by pointing out that the Tree Warden had advised him that he was not an arborist.

Mr. Lomenzo concluded his presentation by expressing the opinion that the Dennis Town Committee did not exceed its authority; exercise poor judgment; was not arbitrary, capricious, or erroneous in its action.

Public Comment:

Acting Chairman Houghton asked for public comment on the appeal and no one asked to speak.

Commissioner's Questions:

Mr. Collins of Sandwich asked for a clarification of the tree's size. He pointed out that the application indicated 14" size and that his observation indicated a much larger width to the trunk.

Mr. Holbrook stated that the diameter was measured by an arborist standard of measuring at breast height (DBH).

Mr. Collins asked if the tree was in place when the Right of Way was granted in 1949.

Atty. Ranstrom answered by saying that it would be hard to know if the tree existed sixty years earlier..

Mr. Collins and George Jessop of Barnstable asked about use of the Right of Way and if the Applicant intended to construct a driveway.

Mr Ranstrom indicated that a driveway was being considered, but that at the present it was only being used for pedestrian travel. He indicated that another driveway was being used to get to the cottages.

Acting Chairman Houghton asked the Appellant to clarify their notice and/or presents at the May and July Public Hearings.

Dr. Latimer indicated that he was present at the May public hearing and that he had been sent prior legal notice of the July 13, 2011 public hearing which he acknowledged receiving prior to the date of the hearing. He re-stated that he was working in Florida at the time of the July Public Hearing and that his attorney was not available to appear. He again claimed that he set his work schedule based on the Applicant's June e-mail appearing to express a willingness to defer the matter until after a proposed September neighborhood meeting. He acknowledged that the Dennis Town Committee did not appear to have acted capriciously or were in anyway unfair, but that they just did not have both sides.

George Jessop asked Mr. Lomenzo to clarify the standard used by the Dennis Town Committee in determining to authorize the removal of the tree.

Mr. Lomenzo stated that the decision was based on the scenic appearance of Route 6A, but acknowledged that the Town Committee was aware that they were being placed in a position of being blamed if the tree fell. He acknowledged that some of the members were influenced by the potential risk of making a mistake and not allowing the damaged tree to be removed.

Acting Chairman Houghton asked the Applicant to confirm the reasons for the request for permission to remove the tree.

Mr. Ranstrom reaffirmed that it was not necessarily because they wanted to construct a driveway, but because their arborist advised them that the damaged tree was at risk and that their insurance company had warned them of liability problems if the tree fell.

Mr. Houghton asked Dr. Latimer to clarify his reason for opposing the removal of the damaged tree.

Dr. Latimer stated that the tree was a part of the scenic landscape of Route 6A and that he opposed changing the Right of Way into a driveway. He stated that the odds of a person being hurt by a falling tree were far less than those of a person being hit by a motor vehicle. He claimed that there would be a far greater safety risk by opening up a secondary access driveway than of the tree falling. He expressed a willingness to work with the Applicant to maintain the pedestrian usage of the Right of Way and his belief in his arborist's opinion that the tree was healthy and not a risk.

Applicant's Rebuttal:

Mr. Ranstrom stated that the hearing is not about what is going to happen in the future with the Right of Way. He indicated that the construction of a driveway is a matter for future applications and hearings. He claimed that this proceeding was only about permission for the removal of a tree.

Mr. Holbrook stated that the question of risk is a difference of opinion between himself and Mr. Allen. He pointed out that a year previously, a woman had been killed by a falling tree that was located on Route 6A in Yarmouth Port within the jurisdiction of the Historic District.

He again stated that the tree was in decline. He pointed out that it had the fungal growth in the decay cavity and a pathogen in the structure.

Appellant's Rebuttal:

Attorney Veara stated that a member of the Dennis Town Committee had stated at the July 13, public Hearing that he was familiar with the tree in Yarmouth Port that had fallen and killed a woman and that the tree had been completely dead. He reported that the two members of the Dennis Town Committee that voted to keep the tree had stated that they, like the Dennis Tree Warden, had looked at the tree and felt that it looked fine.

He reaffirmed Mr. Allen's calculation that the damaged tree was only ten (10%) percent weakened by its condition and that thirty-three (33%) percent structural loss was the level at which immediate removal would be required.

Mr. Allen pointed out that the actual diameter of the tree was twenty-four (24) inches and not the fourteen (14) inches set forth in the application.

Attorney Veara concluded by stating that the main issue appears to be the health of the tree with a difference of opinions. He claimed that Mr. Holbrook's report appears to be focusing on the long-term viability of the tree. Mr. Allen's report indicates that the tree does not need to be taken down.

He suggested that the proper issue for consideration ought to be whether or not the tree needs to come down now. He stated that in view of evidence, the decision of the Dennis Town Committee should be annulled and the tree allowed to stand.

Town Committee Rebuttal:

Mr. Lomenzo stated that the Dennis Town Committee was very thorough in its efforts to get this matter discussed openly. It is unfortunate that Dr. Latimer and the other abutters were not able to attend the final hearing on July 13, 2011. He pointed out that they had the right and opportunity to send us some information or ask for a continuance and for some reason choose not to do that.

The Town Committee considered two different sets of reports and a third position from the Tree Warden. He indicated that he did not believe that the Town Committee was arbitrary or capricious, exceeded its authority or used poor judgment. He acknowledged that it was a close vote, but that in the final analysis he felt that the Town Committee focused on the appearance of Route 6A and the effect of the removal of the damaged tree.

He reported that the Town Committee did not focus on the construction of a driveway or other issues that might be the proper subject of future applications and hearings.

Commission Discussion:

George Jessop of Barnstable began the discussion by describing his observation of the visual impact of the tree on the scenic appearance of the scenic road. He described the crown of the damaged tree as being combined with a larger adjacent tree. He described the damaged tree as representing about $\frac{1}{4}$ of the total volume of two-tree cluster. He noted that the damaged tree is located on the sunny side of the larger tree. Based on his observations, he concluded that it would appear that the removal of the damaged tree would not be detrimental scenic beauty of Route 6A and that the larger tree would eventually fill in the area occupied by the damaged tree.

William Collins of Sandwich stated that he was reluctant to cut down a tree when some of the facts are in dispute or cloudy. There appear to be some issues about whether people were notified about a meeting. There are conflicting appraisals by experts on the health of the tree. There is uncertainty about the liability and safety issues. He indicated that he was pleased by the plan to get people together in September to discuss alternative options for the situation. He stated that he felt that delaying taking the tree down was his preferred course.

Notwithstanding his personal preference for delaying the removal of the tree, he agreed with Mr. Jessop's observation that the larger tree located behind the damaged tree would in time fill in the space that is occupied by the damaged tree. He indicated that he did not see where the Dennis Town Committee went beyond their authority, exercised poor judgment, or were arbitrary or capricious.

Acting Chairman Houghton stated that there were many interesting issues that had been raised in the appeal, but that the Commission's role is to focus on action of the Town Committee and determine if it made a mistake in acting on the application.

He stated that based on all the information before the Commission, it appeared that the Dennis Town Committee acted in good faith in giving permission to remove the damaged tree. He indicated that he agreed with the observation that the scenic view would recover from the removal of the damaged tree and that he did not see any mistakes on the part of the Dennis Town Committee that would give cause to a reversal of its action. He concluded by stating that he found that the Town Committee appeared to act within its authority; exercise proper judgment; and did not act in an arbitrary, capricious, or erroneous manner.

Mr. Jessop moved, seconded by Mr. Collins, to affirm the decision of the Dennis Town Committee in giving written permission to remove a tree located at 952 Route 6A, Dennis, Massachusetts.

The motion carried by a vote of 3-0-1. (Jessop Collins & Houghton in favor and Lomenzo abstaining)

The Commission findings:

The Commission found as follows:

The Dennis Town Committee did not exceed its authority in giving written permission to the removal of a damaged maple tree located at 952 Route 6A, Dennis, Massachusetts.

The Dennis Town Committee did not exercise poor judgment in granting permission to the Applicant.

The Dennis Town Committee did not act in an arbitrary, capricious or erroneous manner in granting permission to the Applicant.

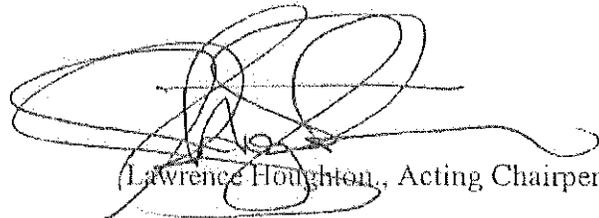
The approval of the request to remove the damaged maple tree located at 952 Route 6A, Dennis, Massachusetts is affirmed.

Commission's Determination:

As to Appeal #2011-7, the Decision of the Dennis Town Committee in granting permission to Anne Ranstrom to remove a damaged maple tree located at 952 Route 6A, Dennis, Massachusetts is affirmed. (3-0-1).

Any person aggrieved by this decision has a right to appeal to the District Court Department, Orleans Division, within 20 days of the filing of this decision with the Dennis Town Clerk.

Dated: September 22, 2011


Lawrence Houghton, Acting Chairperson