NO. CV 10 5014885S	:	SUPERIOR COURT
THOMAS GERMAIN	:	JUDICIAL DISTRICT OF
v.	:	NEW BRITAIN
TOWN OF MANCHESTER ET AL.	:	JANUARY 6, 2011

MEMORANDUM OF DECISION

In 2001, the Superior Court in an administrative appeal reversed a final decision of the defendant freedom of information commission (FOIC) and held that no scanning device of any sort or model might be employed while examining deeds and other documents at the Hartford town clerk's office. See *Office of the Municipal Clerk* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV 00 05006455 (April 3, 2001, *Owens, J.*).[1]

As a result of this opinion, which was never appealed, the legislature enacted P.A. 02-137, subsection (g), now codified as General Statutes § 1-212 (g). Section 1-212 (g)

---

1 The court relied on testimony from the Hartford town clerk that the state public records administrator was concerned about damage to the volumes through the use of a scanner. The court also relied on § 1-210 (a), as it then read, allowing for the inspection or copying of public records. The court stated that obtaining an image of a document through a scanner was neither "copying" nor "inspecting."

provides as follows: "Any individual may copy a public record through the use of a hand-held scanner. A public agency may establish a fee structure not to exceed ten dollars for an individual to pay each time the individual copies records at the agency with a hand-held scanner. As used in this section, "hand-held scanner" means a battery operated electronic scanning device the use of which (1) leaves no mark or impression on the public record, and (2) does not unreasonably interfere with the operation of the public agency."[2]

Subsequently, the plaintiff, Thomas V. Germain, complained to the FOIC on March 15, 2009, that the defendant Town of Manchester (the town), through its town clerk, had erroneously held that his portable flatbed scanner was not considered a "hand-held" scanner under § 1-212 (g). (Return of Record, ROR, p. 1). The plaintiff's complaint resulted in a hearing conducted by the FOIC, and on January 13, 2010, the FOIC issued a final decision dismissing the complaint. The plaintiff then commenced this administrative appeal.[3]

2

P.A. 02-137 also amended § 1-210 (a) so that one might "copy" public records in accordance with § 1-212 (g), thus addressing one of Judge Owens' points.

3

The plaintiff has met the subject matter jurisdictional requirements of the Uniform Administrative Procedure Act (UAPA) § 4-183 (a), including the timeliness of his appeal and, because of the dismissal of his FOIC complaint, aggrievement.

The relevant findings of the January 13, 2010 final decision are as follows:

****

2. By letter dated March 15, 2009 and filed March 18, 2009, the complainant [the plaintiff] appealed to this Commission, alleging that the respondents [the town and the town clerk] violated the Freedom of Information Act (the "FOI Act") by refusing to allow him to copy land records using a portable flat bed scanner. By letter dated July 26, 2009 and filed July 30, 2009, the complainant sought to amend his complaint, by requesting that the Commission consider the imposition of a civil penalty against the respondent town clerk.

* * *

7. At the hearing, the complainant testified that he operates a title search company, which requires that he and his staff search through public records, especially land records, in the custody of the respondents to determine for his clients whether various property titles are valid or encumbered in some manner. The complainant further testified that, in many instances, his clients request that he obtain copies of the land records at issue, so that they can independently review the records.

8. The complainant testified that he began this business at the end of 2001, at which time no scanners of any kind were permitted in the town halls. At such time, the complainant owned a flatbed scanner, which he used outside of the town halls in connection with his business.

9. It is found that the provision concerning the use of a hand-held scanner, as cited in paragraph 5 above, was added to the FOI Act in 2002. See 2002 Conn. Pub. Act 02-137 § 3.

10. The complainant further testified, and it is found, that he began to use his flatbed scanner to copy land records in the respondents' town hall in 2002, when the provision concerning scanning, as referenced in paragraph 9, above,

was codified into the FOI Act. It is further found that the first time the complainant was informed by the respondent town clerk that he could not use his flatbed scanner to copy land records was in March 2009.

11. The complainant further testified that, shortly after the respondent town clerk informed him that he could not use the flatbed scanner to copy records, the complainant purchased a hand-held scanner. Since purchasing a hand-held scanner, the complainant testified that he has used this scanner at the town hall to copy records without any objection to such use by the respondent town clerk. The complainant also testified that using a hand-held scanner is more difficult than using a flatbed scanner because it requires the person operating the scanner to move it across the records with a steady hand.

12. The respondent town clerk testified, and it is found, that he was unaware until March 2009 that the complainant was using a flatbed scanner in the vault of the Manchester town hall to copy land records. It is further found that when the respondent town clerk became aware that the complainant was using a flatbed scanner, he promptly informed the complainant that use of a flatbed scanner was not permitted. It is further found that the respondent town clerk's prohibition against the use of flatbed scanners at the town hall is not personal to the complainant, but rather is a blanket prohibition against the use of flatbed scanners by any individual.

13. It is found that all of the land records at issue in this case are official copies of original documents, which are maintained in a vault at the Manchester town hall. The respondent town clerk testified that all of the records maintained in the vault in hardcopy form are also available electronically. In fact, the respondent testified that the respondents maintain all of their records from 1823 forward in hardcopy and in electronic formats. The respondent

testified that the electronic records can be accessed, free of charge, through a stand alone computer located outside the vault.

14. It is found that the respondent town clerk does not knowingly allow any member of the public to use a flatbed scanner to copy records in the respondents' possession. It is further found that, on or about October 7, 2002, the respondents posted a notice in the office of the respondent clerk to inform the public that "battery operated hand-held scanning devices may be used to copy land records and [other] public records."

15. It is found that the principal issue in this case is the meaning of the term "hand-held," as such term is used in § 1-212 (g), G.S.

* * *

19. It is found that, in March 2009, the complainant sought to copy records in the vault located in the office of the respondent clerk at the Manchester town hall.

20. It is found that the complainant sought to copy such records using a Cannon LIDE 90 flatbed scanner.

21. The Commission takes administrative notice of the fact that a hand-held scanner is commonly understood to be an optical scanner which is designed to be moved by hand across the object or document being scanned.

22. It is found that a flatbed scanner is commonly understood to be configured similar to a copier. It is further found that with a flatbed scanner, a document to be scanned is typically placed onto the transparent glass of the scanner, where a scanner head assembly moves underneath the glass to capture the image contained on the document.

23. It is found that the complainant sought to copy records in the respondents' possession using a flatbed scanner that

functioned similar to a copier, as described in paragraph 22, above.

24. It is found that some of the land records at issue in this case are contained in bound books. It is further found that, in order to obtain a useful scan of a record contained in a bound book using a flatbed scanner, it is necessary to press such a book against the glass of the scanner until the page to be scanned lies flat. It is found that pressing a bound book against the glass of a flatbed scanner is very likely to leave a mark or impression on the record.

* * *

33. It is concluded that the complainant's flatbed scanner is not a hand-held scanner within the meaning of § 1-212 (g), G.S.

34. It is therefore concluded that the respondents did not violate the FOI Act by prohibiting the complainant from using his flatbed scanner to copy public records. (ROR, pp. 294-300).

The FOIC thereupon dismissed the plaintiff's complaint. In this appeal, the plaintiff raises three issues: (1) § 1-212 (g) permits any battery operated scanner that does not mark the public record and does not interfere with the operation of the public agency; (2) the plaintiff's scanner was in fact equivalent to a hand-held scanner; and (3) the FOIC had held in a prior decision that a scanner did not have to meet the definition of "hand-held" as set forth in the final decision under review.

The UAPA sets forth the standard for review of the plaintiff's contentions. To the extent that the plaintiff is challenging the factual determinations of the FOIC, "the scope

of that review is very restricted." *Department of Public Safety* v. *Freedom of Information Commission*, 298 Conn. 703, 716, 6 A.3d 763 (2010). It is not the function of the trial court to "retry the case or to substitute its judgment for that of the administrative agency." Id. The trial court must determine "whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable." *Connecticut Light & Power Co.* v. *Dept. of Public Utility Control*, 216 Conn. 627, 639, 583 A.2d 906 (1990); *Lewin* v. *Freedom of Information Commission*, 91 Conn. App. 521, 525, 881 A.2d 519, cert. denied, 276 Conn. 921, 888 A.2d 88 (2005).

"Even as to questions of law, [t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of discretion. . . . Conclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts." *Department of Public Safety* v. *Freedom of Information Commission*, supra, 298 Conn. 716.

An agency's conclusion of law regarding the interpretation of a statute, not previously subject to judicial scrutiny, is not entitled to special deference, but its construction is undertaken "de novo" by the trial court. "When construing a statute, [the court's] fundamental objective is to ascertain and give effect to the apparent intent of the

legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratexual evidence of the meaning of the statute shall not be considered." (Citations omitted.) Id.

Turning to the first issue raised by the plaintiff, his position is that § 1-212 (g) may be read to allow scanners that are not "hand-held." He points to the third sentence: "As used in this section, "hand-held scanner" *means* a battery operated electronic scanning device [that does not mark the record or interfere with the agency's operation]. His contention is based on the word "means;" the sentence is *definitional* and does not exclude scanners other than hand-held that are battery operated.

As the court stated during oral argument, however, the clear meaning of § 1-212 (g), read as whole, is that the legislature only authorized copying of public records by a hand-held scanner. The provision was passed at the next session of the General Assembly subsequent to the decision in the *Municipal Clerk* case, that had completely banned the use of scanners and reversed the FOIC's allowance of all types of scanners as

a technique to "copy" public records. The apparent legislative intention was to remedy what the Superior Court decided was lacking in the FOIA, and to act on the court's recommendation that the FOIA as it existed be amended to clarify the terms "inspect" and "copy."

Moreover, the legislation set up a procedure and payment schedule for the use of a hand-held scanners at the public agency; see § 1-212 (g), sentence two. The enactment of this specific provision, to the exclusion of any other type of scanner, supports the conclusion that only hand-held scanners were intended. Finally, while the legislature used the word "means" in the third sentence, a typical word in definitions, it is equally plausible that the legislature intended to indicate that, even in allowing hand-held scanners, it was setting forth "conditions" on their use. The court thus finds that a "reasoned" interpretation; *Department of Public Safety*, supra, 298 Conn. 716; of § 1-212 (g) is that it allows for the use of hand-held scanners under the conditions set forth in the statute. This interpretation of the third sentence of § 1-212 (g) is thus effective and workable. See *Rainforest Café, Inc.* v. *Dept. of Revenue Services*, 293 Conn. 363, 378, 977 A.2d (2009).

The plaintiff also cannot prevail on his second issue that in fact his scanner qualifies as a "hand-held" one. He admitted that the scanner that he uses is a flatbed scanner. (ROR, p. 24). Also his complaint and attached diagram shows that the scanner

in question is a Cannon LIDE 90 flatbed scanner. It does not function by being moved across the page of the document, but functions as does a copier in the town clerk's office. (ROR, p. 27). The larger deed books would have to be disassembled in order for the plaintiff's equipment to scan a particular land record. (ROR, p. 141). The record supports the FOIC final decision finding 33 that the plaintiff's scanner is not "hand-held."[4]

The plaintiff's final contention is that an earlier FOIC decision, *Kreutzer* v. *University of Connecticut*, FIC # 2004-463 (September 28, 2005) governs, and the FOIC erred in not following its own precedent. *Kreutzer* approved the use of a Visigo A4 scanner, one that functioned by feeding separate pages into a roller. The FOIC concluded that the Visigo scanner was "hand-held" and also held that there was no danger of a mark on the public document if it were unstapled during the scanning process. In the present final decision, Findings 26 and 32, the FOIC distinguished *Kreutzer* and overruled the decision to the extent that the Visigo scanner was found hand-held.

The FOIC did not err in distinguishing *Kreutzer*. The equipment there was not identical to either the plaintiff's scanner nor typical hand-held equipment. The copies sought to be scanned, while public documents, were not land record volumes in a town

---

4

The plaintiff also contends that the FOIC erred in Finding 24, when it stated that the plaintiff's scanner might leave a mark on larger deed record books. There was substantial evidence to support this finding in the testimony of the town clerk. (ROR, p. 214).

hall. As described in *Kreutzer*, the documents were a stapled collection of papers.

Even more significantly, a plaintiff may not bind an agency to a prior decision that the agency legitimately concludes needs modification. As Judge Schuman recently wrote in *Commissioner, Department of Public Safety* v. *Board of Firearms Permit Examiners*, Superior Court, judicial district of New Britain, Docket No. CV 09 4021751 (July 13, 2010, *Schuman, J.*): "The Connecticut appellate courts have not yet adopted a rule requiring administrative agencies to follow their own prior decisions. It is uncertain, at best, whether they would do so. In many cases, an agency may not have the resources or ability to compare prior decisions. . . . Many administrative decisions are heavily fact-bound or dependent on first-hand observation of the witnesses, making comparison with prior cases especially difficult. Further, an agency may have good reasons to change its course and depart from prior precedent." As the court stated in *New Britain* v. *Connecticut State Board of Labor Relations*, 31 Conn. Sup. 211, 215, 327 A.2d 268 (1974): "In those cases where reversal [due to a departure] is justified, the administrative decision must be palpably arbitrary, unreasonable or discriminatory." The FOIC decision to modify *Kreutzer* was appropriately and reasonably made.

For the foregoing reasons, the appeal is dismissed.

Henry S. Cohn, Judge