



Trees and the Law

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BULLETIN

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***T**here are so many legal cases today that involve trees that some attorneys actually specialize in this area of the law. When trees are the issue in a dispute, it is important to rely on an experienced attorney for advice. However, much expense, time, and anxiety could be avoided by understanding a few basics about trees and the law and then using this knowledge to practice better community forestry.*

We enter dangerous ground when discussing trees and the law in Tree City USA Bulletins. This is for several reasons. Some of these reasons confront anyone who needs an understanding of the legal implications of owning or managing trees. First, laws are not always consistent. A law about trees in one state or even one city may not be the same in another state or city. Second, law is not static. It evolves and is sometimes unpredictable. Tree law, especially, has yet to be clearly determined for many situations. Future cases tried in court will decide the answers to some questions that trouble tree managers today. Third, finding good information about trees and the law is not always easy.

Trees planted on boundary lines are often a nice way to delineate the separation of properties. But when problems arise or opinions differ on the future of the tree, it is important to understand who actually controls the tree.

We have tried to remedy this through the sources cited in this issue. Finally, it must be said that your editor is not an attorney. Although this issue has been reviewed and approved by qualified attorneys, we must clearly state that this bulletin is not intended to be taken as legal advice.

Despite those limitations, the topic of law as it pertains to trees and their management is too important to not include in the Tree City USA Bulletin series. Some basic understanding is necessary in today's litigious society. Tree board members, urban foresters, and other Friends of Tree City USA should be aware of these basics so that common pitfalls can be avoided. That is the purpose behind the information selected for this issue.



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Three Kinds of Law

To understand the authority behind a law it helps to know the various ways laws have been derived. All can have an impact on disputes about trees, but some more than others.

FUNDAMENTAL LAW

“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.” This cherished statement in the Declaration of Independence was expression of “natural law,” or the idea that there is a law whose content is set by nature and that gives us natural rights.

Fundamental law in the United States was built on English law but more directly stems from our Constitution and Bill of Rights. It took the 14th amendment in 1868 to apply these rights coast to coast. Other conditions such as the right to vote regardless of color or — much later — gender, took a little longer. Today, Supreme Court decisions continue to define exactly what rights we do have under the Constitution.

WRITTEN LAW

So-called “written laws” are those that are derived from legislation. They may be federal or state, but they are created by our elected officials and recorded as “statutes.” Some of these laws grant authority to administrative units to make regulations that carry with them the force of law. For example, this is why the U.S. Forest Service can make regulations that have the force of law. Generally, state laws address the health, welfare, and morals of its citizens. State laws also grant authority to divisions of the state, namely counties and municipalities, to create their own local laws called ordinances. The violation of such legislated laws can result in a variety of penalties both civil and/or criminal as prescribed by law. Violations of city ordinances fall under this body of law.

COMMON, OR CASE LAW

Common law, or case law as it is also called, derives from decisions that judges make in specific cases brought before them. If similar cases have been decided previously and therefore set a precedent, especially by higher courts, the case is usually (but not always) judged the same way by other courts thereafter. This gives rise to the synonym “precedential law.” A ruling in a first-ever issue or dispute sets the precedent for other rulings, especially in the same state. Since these kinds of laws are not enacted by a legislature, they are non-statutory and not directly enforced by police powers. Instead of being criminal cases, they are civil cases. Disputes between neighbors about trees usually fall within this category of law.

Written law is created by elected officials at the federal, state, or local level. Ordinances are a kind of local law that impacts urban forestry most frequently. A well-written ordinance can provide the clarity and direction that is important to systematic, continuous care of the community forest.





ACTS OF GOD

Insurance companies are fond of attributing natural disasters to acts of God. Religious implications aside, the law generally will not assign blame to the controllers of sound trees that cause injury or damage resulting from severe weather events. A key word here is “sound” in the sense of being healthy and not exhibiting signs of potential failure. Planting the right tree in the right site, pruning routinely and purposely, and inspecting trees regularly help make a case that the tree was in good condition and received reasonable care before it was blown over.

SELECTION OF TOPICS IN THIS BULLETIN — AND THANKS

It would take a shelf of books rivaling those in a lawyer’s office to include every aspect of law affecting trees. In the pages that follow we have selected a sampling of property law that tree board members and professionals in urban forestry most commonly encounter. Unlike most publications about legal topics, specific court cases are not cited. This is due to space constraints, but excellent examples can be found by using the sources listed on page 8.

We are pleased to acknowledge the able assistance of Victor D. Merullo, Esq., in the preparation and review of this issue. Much of the content is based on his workshops and his book, *Arboriculture & the Law*. Please see page 8 for more information.

Natural events such as tornadoes and hurricanes are outside the control of humans. Careful tree selection and care can help prevent storm damage. When trees that have received proper care and attention do fall victim to a storm, damage they cause is more likely to be called an “act of God.”

ORDINANCES CAN CLARIFY AND PROTECT

One of the four conditions for becoming a Tree City USA community is to have “a community tree care ordinance in effect.” This has been an important topic in two previous bulletins:

- Bulletin No. 9, How to Write a Municipal Tree Ordinance
- Bulletin No. 31, Tree Protection Ordinances

Tree ordinances can make it very clear what can and cannot be done to trees in the city or county of jurisdiction. What about a tree with Dutch elm disease in someone’s private backyard, or a homeowner’s desire to remove a tree by the street because it harbors birds that make a mess when his car is parked beneath it? Ordinances are written to address these kinds of situations before they become a source of conflict between individual rights and municipal or county powers used to protect the health and welfare of the wider community.

In the pages that follow we will see examples of how ordinances can eliminate controversy and affect the protection of the community’s tree resources.

Negligence and Liability

Anyone with the most basic awareness of law worries about being sued due to his or her negligence in some way. No one wants to rear-end another auto or have someone trip on a faulty porch step. Owners and managers of trees should be especially concerned with any actions — or lack of them — that might lead to damaging someone else's property or cause injury or death. Here are guidelines to help keep you out of trouble.

SOME TESTS FOR NEGLIGENCE

A fundamental principle related to the potential of being liable for negligence is that we owe a “duty of care” to others who potentially can be adversely affected by our trees.

An administrator once objected to tree inspections in his park because he felt that his organization would be at greater risk if he learned of the hazardous condition of a tree that later caused injury. Not only is this attitude unethical, it ignores society's expectation that we proactively exercise a duty of care to prevent harm. An important concept here is the old saying, “Ignorance is no excuse.” Another thing this administrator should have considered is that “tort law” creates and provides remedies for civil wrongs (other than contractual duties) and it has been said, “The ‘golden thread’ of tort law is the protection of the vulnerable.” This is our job as managers or owners of trees.

Here are some tests of whether our duty of care is being adequately exercised. In order for a party to establish negligence, all conditions would need to be shown as “yes.”

✓ DID A BREACH OF THE ‘DUTY OF CARE’ OCCUR?

The court will look closely at what your “duty of care” is in any particular case. In common law, the basis for this decision has usually been evidence of exercising “common prudence” and/or following a profession's normal protocols. That is, what would “the reasonably prudent person” do? What would ordinarily and reasonably be expected, and was this expectation met? If not, you may be negligent.

Inspecting one's trees is ordinarily one of those expectations. Many tree cases revolve around not only whether or not a tree inspection was made, but if it was done prudently. The conclusion from common law is that: (1) regular inspections by trained, competent people are expected, (2) methods can be used that balance economic feasibility with the reasonable expectation that hazardous conditions will be spotted, and (3) that closer inspection — and corrective action — be undertaken when there are recognizable signs that the tree might be hazardous. Prudence would also

suggest that any required action be taken promptly. Another way of looking at this is to ask the question, “Did the controller of the tree know or should he have known (‘constructive knowledge’) that a tree was hazardous (or concealing a stop sign, etc.)?”

✓ IF THERE WAS A BREACH OF DUTY, DID IT RESULT IN INJURY OR DAMAGE TO PROPERTY, AND IF SO, WAS THE INJURY OR DAMAGE DIRECTLY CAUSED BY THE BREACH OF DUTY?

The results of a tree falling on a car or someone's house are pretty obvious. But the damage must be clearly linked to a specific breach of duty of care if negligence is to be established. For example, a healthy tree uprooted by strong wind would most likely fail this test for negligence. However, if roots had been severed for street or sidewalk repair closer to the trunk than recommended by qualified arborists following best management practices, the failure might be shown as directly linked to the poor practice.

✓ WERE DAMAGES SUSTAINED?

In the case of trees, damage they cause is usually evident. The problem arises in how much damage. This becomes a matter of value appraisal in the case of a damaged car, house, or — the trickier one — vegetation. In some cases, appraisal formulas established by the Council of Tree & Landscape Appraisers have been accepted to establish the value of lost trees. Sometimes double or triple dollar amounts have even been assigned depending on the state and circumstances. In other cases, the court has only been interested in how much the value of the property was diminished by the loss of its tree(s). Court awards for injury or loss of life are even more variable.

✓ WAS THE INJURY OR DAMAGE FORESEEABLE?

It should be obvious that a rotting limb is likely to fail, or that branches hiding a stop sign are likely to cause an accident. However, there is a lot of gray area when it comes to assessing the likelihood of a tree failure, so expert witnesses can be expected to contend over this issue after an accident occurs. Deciding when a tree is unsafe enough to warrant removal is one of the toughest jobs in urban forestry. Pruning to prevent unsafe conditions should be one of our highest priorities.

THE EFFECTS OF ORDINANCES

Ordinances can go a long way in preventing situations from which negligence is likely to arise.

1. **PLANTING REQUIREMENTS** Prohibiting the planting of species with brittle wood or heavy fruits in rights-of-way; prohibiting the planting of tall-maturing species beneath power lines; specifying the required width of tree lawns for small, medium, or large trees so there is room for healthy root growth.
2. **PERMITS** Requiring permits to plant on rights-of-way provides a means of communicating with residents about tree planting specifications.
3. **TOPPING** Prohibiting topping will make trees safer.

4. **NUISANCE TREES** A good ordinance will authorize the city forester to have diseased trees removed from private property if they are contagious. Likewise for hazardous trees within reach of public rights-of-way. This is necessary for the safety and welfare of the community at large.
5. **ENFORCEMENT** Ordinances “with teeth” have more value to the public than those without legal means of enforcement.

Assigning responsibility for maintenance of right-of-way trees to adjoining landowners does not absolve the city or county from its duty of care.

ARBORISTS' RESPONSIBILITIES

Arborists play a key role in keeping community forests safe and healthy. As professionals, they are expected to know the current best practices and to conduct their business accordingly. Certification and continuing education can play a roll in this regard.

If a commercial arborist is called to a person's property and, while there, notices an unsafe tree condition (even though that tree is not the purpose of the visit), he or she has the responsibility of informing the property owner of the unsafe condition. This should be done in writing. Similarly, public arborists must report unsafe conditions to administrators and would also be well-advised to put it in writing and retain a copy for possible future use.

Prompt removal and replanting of hazardous trees are not only the ethical routes to follow, but are usually the less expensive options than ignoring a bad situation or delaying corrective action.



DUTY OF CARE IS HIGHER IN CITIES

Decisions resulting in common law reveal that courts recognize a difference in the duty of care depending on the intensity of use in an area. Pedestrians and motorists on a busy highway or city street have a right to expect that they will be safe from defective trees — whether they are public trees or privately owned. Park users and arboretum visitors will also rightfully have this expectation. Hikers in a forest or drivers on a woodland road are expected to be more aware of natural hazards and therefore more responsible for their own safety. Interestingly, in some states the courts have made a distinction between “natural trees” and those that have been planted, assigning higher responsibility for the latter.



Those Troublesome Boundary Trees

At the time it seems like a good idea. What could be nicer than to delineate the boundary between two properties than to plant trees? Actually, it is a good idea because trees are generally more permanent than stakes or metal pins, they can provide screening for privacy, they look nice, and they provide a host of environmental benefits. What is important is that the property owners understand that the boundary tree is a shared tree. Essentially it is controlled by both parties and neither party is free to do with it as he wishes without permission of the other.

Here are the important guidelines established in most states by common law:

- If any part of the trunk of the tree is on both sides of the property line, it belongs to both owners.
- If Jones plants the tree entirely on his side of the line and as it grows in diameter it crosses the property line into Smith's yard, it belongs to both property owners.
- An owner generally "owns the air above a property line." This means if Jones plants a tree and its trunk is entirely on his property but a branch grows over the line into Smith's yard, Smith can legally cut off the limb at the property line. (Note: This kind of truncation is usually not the best way to prune a tree, so the best thing to do is to discuss the matter and helpfully suggest that Jones prune the limb properly at the junction with the trunk or other large limb.)
- The person who owns the tree owns its products. So, even though Smith has the right to cut off an invading limb, Jones has the right to the wood if he wants it. In fact, it is his whether he wants it or not, and some issues have arisen over how it is returned to the tree's owner!



Who owns the apple? The property owner on the right side of the fence has the right to cut off the limb where it crosses the property line, but the apple belongs to the owner of the tree. On the other hand, the apple owner would be trespassing if he or she entered the neighbor's property to harvest the apple without the neighbor's permission.

WHAT ABOUT ROOTS?

Roots are a bit more problematic than limbs, and common law pertaining to roots may be actively evolving. In principle, courts seem to hold that roots that cross a boundary line can be severed by the invaded property owner. However, since this affects the health of the entire tree, a California court has diverted from tradition and ruled that such root cutting must be done "reasonably." In other words, if a root from Jones' tree is lifting Smith's patio or walkway, the offending root can be severed. However, based on the California case, Smith would be unreasonable if he took a trencher and severed all of the tree's roots to a depth of say, 3 feet. This same opinion might apply if the offended property owner drenched the soil with a tree-killing herbicide, even though he did it entirely on his side of the line. The lesson here is: *Remove roots only if you can articulate a good reason for it being necessary, and do the deed in the least destructive way.*

THE EFFECTS OF AN ORDINANCE

A few little words can make a big difference in what happens to trees along a street right-of-way. A strong ordinance will protect such trees by declaring them the property of the city, and will spell out what can or cannot be done with them. In some communities, the municipality will assume all responsibility for planting, pruning, and removal; in others the adjoining landowner must shoulder these responsibilities and their costs, but must still receive city permission for some or all of these treatments.

The ordinance will need to define what trees are considered in the right-of-way and therefore subject to the conditions of the ordinance. Common law has established that if any part of the trunk is on the boundary, it belongs to both parties. Therefore, in the case of a right-of-way tree, it would therefore be subject to control by the city as specified in the ordinance. Unfortunately, some communities have given up this control by using such language in their ordinance as "a tree or shrub with 51 percent of its base" must be in the right-of-way to qualify as a public tree.

Who Owns the View?

Few legal issues in urban forestry raise the ire of residents as much as clearing trees to allow someone to have an unobstructed view. The clearing practice has been called “vista pruning,” “windowing,” and “view clearing,” but by whatever the name it pits tree lovers against those who value a view more highly than trees. The issue sometimes evokes vigilante-style lawlessness. Huge fines and even jail sentences have been levied against “view seekers” who have taken matters into their own hands and cut down trees on public land or the private property of others.



View ordinances can be a blessing to some property owners while a curse to others. In this case, property owners at the top of the steep slope may benefit from reducing the tree coverage, but the homeowners at the bottom of the hill might worry about landslides if trees are removed.

The popular press is rife with stories about neighbor suing neighbor about trees that obstruct a view. Urban foresters and arborists often find themselves caught up in the dispute. Although the issue can be complex, the sum of common law seems to warn that no one has fundamental rights that would entitle them to a view. However, the issue becomes more complicated when developers include “covenants” within a neighborhood, or a city ordinance is passed that assigns property owners the right to a view (of an ocean, lake, city, etc.). Views do have value, as any real estate sales person will attest, but so do trees. Therefore, the diminishing of trees on one person’s land will likely decrease the value of that parcel while the view seeker’s land value is maintained or increased.

SOLAR PANELS

Closely related to view problems are issues that arise over the shading of solar panels. As this is an increasingly serious problem, written law has emerged in California as the Solar Shade Control Act. This legislation essentially protects solar panels from the shade of a neighbor’s tree *unless* the tree’s shade existed before the panel was installed. In general, however, common law does not protect gardens, patios, and the like from the encroaching shade of a neighbor’s tree.

THE EFFECTS OF AN ORDINANCE

In the case of views, property owners need to be aware of ordinance provisions before they buy a home or lot. This would avoid much of the strife that arises when neighbor A asks neighbor B to cut his trees to comply with the ordinance, and the law comes as a rude surprise to the tree owner. But for those who recognize the ecological value of trees, the argument can be made that such ordinances are a bad idea in the first place. Cass Turnbull, founder of Seattle’s Plant Amnesty, published her view on this matter in the March 2008 issue of *Tree Care Industry*. These excerpts explain her view of view ordinances:

“... trees are the ones that are doing the most to stop global warming, save energy, create oxygen, sink carbon and prevent stormwater overflow, mud slides, smog, and particulate pollution. And they provide a host of other benefits that are not just nice, but increasingly essential. Just like you can’t pollute the air or water that is on your land, as it is used by everyone, you should not be allowed to degrade the environment by forcing your neighbors to top or remove trees. It just ain’t right.

“Mandating tree topping should be disallowed solely on the grounds that it creates a hidden liability for future tree owners ...” (because of weak sprouts and vulnerability to decay).

Become Better Versed in Tree Law

There are a number of ways to learn more about trees and the law. Here are some suggestions for easily accessible information:

ESSENTIAL BOOKS

Arboriculture and the Law

Victor D. Merullo and Michael J. Valentine

This 110-page paperback summarizes dozens of cases involving land use, trees, utilities, and other aspects of law that are important to anyone who owns or manages trees. Available from the International Society of Arboriculture or online book stores.

Tree Law Cases in the USA

Lew Bloch

More than 200 cases are briefly summarized in this 160-page paperback. It has been called “the most extensive compilation of arbor-related precedent.” Available from the author at his website or online book stores.

Tree law is intended both to provide fairness and safe conditions for all.



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