TREES in the CITY

Local governments deal with a variety of issues involving trees in both regulatory and proprietary capacities. This paper presents a brief overview of those issues with citations for practitioners to get more in-depth information on specifics. This is guide is not comprehensive.

The management of the urban forest is part of the City's general obligation to the public health, safety, and welfare since trees provide many social, economic, and environmental benefits, but also can present risk management and public safety challenges for local officials.

Since the functions of local government are often divided into regulatory and proprietary capacities, this paper will track that rubric. Regulatory functions are split between prohibiting the removal of trees and the requirement of mitigation (environmental protection) and regulation of nuisances by requiring removal of trees in certain circumstances. Proprietary functions are divided between management of the urban forest in terms of inventory assessment, trimming and removal, and acquisition issues for valuation of trees in eminent domain.

REGULATORY

The local government's regulation activities regarding trees can generally be divided into two categories: 1) preservation of certain types of trees for the protection of the environment and aesthetics of the community, and/or 2) regulating hazardous trees or nuisance species as part of the goal to prevent of public nuisances and regulate land use.

Preservation Ordinances

As the entity responsible for regulating land use, local governments often regulate tree removal through land development regulations and tree protection / mitigation ordinances. [1]

These ordinances most often will define the types of trees that are protected based on size, species, location, and health conditions, among other considerations. After defining the types of trees that are protected, these ordinances will normally require a permit for removal that will include a mitigation requirement that a certain amount of trees either be replaced on site, or an amount of money be paid into a mitigation fund.

Common Issues in Tree Preservation Ordinances:

1) What is the public purpose?

Tree protection ordinances are generally justified under the local government's police power and based on the cultural, ecological, aesthetic, and economic contributions that trees provide. More specifically, local legislatures have found that regulating tree removal helps in preventing soil erosion, controlling stormwater runoff, reducing dust and heat sink effect, offsetting carbon emissions, increasing biodiversity and protecting wildlife habitat and other ecosystems, improving property values, as well as improving the aesthetics of communities.

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[1] For example, the Arbor Day Foundation has drafted a sample tree protection ordinance, available here: https://www.arborday.org/programs/treecityusa/documents/sample-tree-ordinance-with-tree-board-2021-annotated.pdf

"The proper test for the validity of an ordinance enacted pursuant to the police power is the "rational basis" test, which the tree removal ordinance plainly satisfies." *New Jersey Shore Builders Ass'n v. Twp. of Jackson*, 199 N.J. 38, 43, 970 A.2d 992, 995 (2009).

While the public purpose of tree ordinances has been litigated, the rational basis standard should be deferential to support the authority of the local government to regulate the removal of trees.

2) Definitions of "Protected Tree":

The definition of what is protected will often trigger permit requirements for the removal and in some cases trimming of certain trees. In some cases, codes may require structural design-arounds on the development of the property. Different codes may create tiered systems for protection of higher value trees, often labeled as "grand," "specimen," "signature" or "historic" trees.

Most Tree Ordinances regulate based on species and "DBH" or "Diameter at Breast Height," which is an industry term for measuring the trunk of the tree around 4.5 feet high depending on some factors.

Older ordinances usually define any tree over 4 or 5" as protected and then exempt certain nuisance species. Newer ordinances usually take into account a multitude of factors including DBH, species, use (shade or accent), zoning of property, soil conditions, canopy coverage, among other things to create a matrix of regulations depending on the type, condition and value of the tree.

See for example City of Safety Harbor - https://library.municode.com/fl/safety_harbor/codes/land_development_code?nodeId=ARTXDEST_153.00TRPRPR

3) Mitigation Requirements:

Tree advocates will often argue that a 500-year-old tree cannot possibly be replaced because it takes generations of time for a tree to reach that level of maturity. On the other hand, developers and property rights advocates will argue that trees are a "renewable resource," and therefore, any tree should be able to be removed to accommodate development, and if mitigation is required - it should be on a basic 1-for-1, or inch-for-inch basis, regardless of the timeline required for replacement trees to reach maturity.

As such there are a multitude of ways that local governments address mitigation requirements. The only apparent legal limitation being - *Nollan / Dolan*.

Any mitigation ordinance must factor in the health of the tree that is being removed and adjust the mitigation accordingly. It is arguably a violation of the "rough proportionality" requirement, to impose mitigation requirements on the removal of dead or diseased trees.

F.P. Dev., LLC v. Charter Twp. of Canton, Michigan, 16 F.4th 198, 206 (6th Cir. 2021) (holding that the tree preservation ordinance in question violated the "rough proportionality" requirements of Nollan / Dolan because it did not account for dead trees or make an individualized determination of the impact to surrounding environments.)

"[T]he government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts."

Id.

3) Delegation of Authority

Who has the authority to determine whether or not a tree meets the definition of being protected, and/or what mitigation should be required as a result, i.e. reduction or elimination of mitigation requirement because the tree is diseased or dead?

Watson v. City of St. Petersburg, 489 So. 2d 138, 139 (Fla. Dist. Ct. App. 1986)(finding that the tree ordinance was not unconstitutional as an unlawful delegation of legislative power to the city manager where the ordinance allowed the city manager to issue a permit for removal of trees if certain criteria were met and if there would not be a "significant adverse impact" on the environment in one of eight listed areas. For example, the permit must be denied if the tree removal "will substantially alter the water table adversely…" or "will significantly increase ambient noise levels…." and provided for an appeal process of this decision to the board of adjustment.

Public Nuisance Regulations

Local governments often regulate overgrowth of vegetation as a public nuisance in urban environments, but they may also regulate trees as a public nuisance in certain circumstances as well. Typically, these trees are defined as "hazardous" or "dangerous," in the codes. Occasionally, regulations will target the removal of nuisance species as well. Typically, nuisance species regulations are only applied in new developments or redevelopments that substantially impact a property.

Regulating Nuisance Issues

1) Method of Evaluation

What is the term of art that triggers the label of public nuisance to a tree? Is it "hazardous" or "dangerous"? Are those terms further defined by likelihood of "imminent failure" or location of possible targets, ie. Unhealthy tree located over a sidewalk, road, or inhabited structure is more of a risk than an unhealthy tree in the middle of a forest.

Terms should coincide with industry standards and practices for evaluation. Opinion testimony should meet standards of evidence.

2) Is it a public nuisance or an inverse condemnation?

For an example of where regulating nuisances goes too far and becomes a taking see the Florida Citrus Canker cases.

"There is substantial competent evidence that healthy, privately owned citrus trees are not harmful or destructive, even though found within 1,900 feet of a tree having citrus canker."

Dep't of Agric. & Consumer Servs. v. Bogorff, 35 So. 3d 84, 88 (Fla. Dist. Ct. App. 2010)

The State of Florida ultimately had to pay out millions of dollars to citrus farmers for attempting to use a nuisance regulation to require the removal of citrus trees without the necessary factual predicate, which according to the Supreme Court of Florida was that the supposedly nuisance trees must have no value at all.

PROPRIETARY

On the other side of the house, local governments manage trees as part of the entity's proprietary function managing property, e.g. trees located in parks and other government-owned real estate to street trees located in the rights-of-way or in some cases on private property, but encroaching into the City's utility easements.

Local governments also encounter issues with trees in terms of real estate transactions with issues of valuation of property that must be taken through eminent domain. Some states have laws defining the methodology of evaluation for the valuation of a tree. Other states rely on the courts, which will address the value of trees on an *ad hoc* basis.

- Adopting an Urban Forest Management Plan
- Assessment, Inventory, Maintenance and Removal Schedules
- Franchise Agreements, and issues with other users of the ROW damaging street trees (e.g. the Electric Utility)
- Procurement and contracts
- Evaluation of Value Methods for acquisition and eminent domain pre-suit negotiation.

COMMON ISSUES INVOLVING TREES

The above overview is intended to touch upon the variety of ways in which a local government will interact with trees. That said, regardless of the context in which a tree-related controversy arises for a local government, there are specific issues that seem to repeat. The local government's response to these questions may be different when approaching it from a regulatory versus a proprietary capacity.

- Who owns the tree?
- Who is liable for damage caused by a tree and to what degree?
- What is the standard of care for maintaining a tree?
- What is a tree worth when it is taken with property or unlawfully destroyed?

Who Owns the Tree?

Basic Rule at Common Law – whoever owns the land where the trunk of the tree protrudes up from the ground, owns the tree as well. This is a simple rule that gets complicated by the fact that trees do not have uniform trunks, and nature does not respect property boundary lines. People often plant trees to mark borders of property, and in some cases even refer to them in descriptions on deeds or surveys.

Where is the boundary line of property?

In survey law, natural monuments prevail over manmade ones, which prevail over calls for courses and distances. *Kruger & Birch v. Du Boyce*, 241 F.2d 849, 853 (3d Cir. 1957)(holding that a row of trees constituted the border between properties and not the old fences)

That means that if a description of property within the chain of title references a tree, the tree would mark the actual border, regardless of subsequent transactions that referred to a distance and direction instead.

See also McIver's Lessee v. Walker, 17 U.S. 444, 447–48, 4 L. Ed. 611 (1819) "All lands are supposed to be actually surveyed, and the intention of the grant is to convey the land, according to that actual survey; consequently, if marked trees and marked corners be found, conformable to the calls of the patent, or if water-courses be called for in the patent, or mountains, or any other natural objects, distances must be lengthened or shortened, and courses varied, so as to conform to those objects."

Trees as natural monuments in legal descriptions are true "border trees" in the sense that in their function of marking the boundary of multiple properties, they become a shared asset of those properties held as a tenancy in common.

Modern surveyors are less likely to reference trees as locators in relation to boundaries, but this doesn't mean that an older survey or description of the property in the chain of title does not mention a tree as a monument. Pay close attention to older trees that appear to have been planted in a row on the property line, and keep in mind that surveying is as much an art form as it is a science. All surveys should be considered "expert opinions" of the boundary line subject to question.

All trees that straddle the border, should initially be considered shared trees owned as a tenancy in common, unless perhaps an exception applies.

Who owns a tree that borders between neighbors?

Majority Rule – (common law) Tenancy in Common – the tree is owned in equal shares by both parties, and the interest is undivided.

"A tree, standing directly upon the line between adjoining owners, so that the line passes through it, is the common property of both parties, whether marked or not; and trespass will lie if one cuts and destroys it without the consent of the other." *Griffin v. Bixby*, 12 N.H. 454, 454 (1841)

"whether marked or not" indicates that the Griffin court applied the tenancy in common concept regardless of the fact that the tree in question was not used as a natural monument in the legal description of property.

Later courts elaborated that the tenancy in common applies to give equal ownership to both owners "no matter in what proportion" the tree lies on either side of the border. *See Robinson v. Clapp*, 65 Conn. 365, 32 A. 939, 942 (Conn. 1895).

The *Robinson* Court goes into detail as to why this rule must apply, no matter the proportion because a tree cannot be divided up without destruction of the whole.

Minority Rules – Border Trees as Encroachments

Modern courts have struggled with a strict application of the tenancy in common rule to every tree on or near a boundary because not all trees are boundary trees in the truest sense as described above. Some trees sprout or are planted entirely on one property and then grow onto another. Sometimes one property owner may invest more time, effort, and money into maintaining the tree

than the other property owner. And most importantly for lawyers, oftentimes, people disagree on whether or not a tree should be removed.

The result is that while most courts appear to continue to apply the tenancy in common in a strict sense, there are exceptions. Other courts have abrogated this rule, by "reasonable use of the property" or by labeling the trees as an "encroachment" or even in one case, allowing a neighbor to have a protectable interest in a tree, when the trunk of the tree was located entirely on the neighbor's property due to the course of conduct between the parties.

The basic underlying thread here is that the location of the trunk of the tree is not always dispositive as to its ownership. Under these cases, the courts will look to the conduct of the parties to determine whether or not some kind of agreement has arisen that would create a shared ownership interest.

Some excerpts:

"'This Court is of the opinion that something more than the mere presence of a portion of a tree trunk on a boundary line is necessary to make the tree itself a 'boundary line tree' so as to bring it within the legal rule that it is owned by the adjoining landowners as tenants in common." *Holmberg v. Bergin*, 285 Minn. 250, 254, 172 N.W.2d 739, 742 (1969)

"In the instant case the trees in question, when planted, must necessarily have been wholly upon Keck's property and no agreement or consent was shown concerning ownership. The mere fact that the Rhodigs testified that they owned the trees and maintained them is not sufficient evidence to permit a recovery. This is so because they could not own something affixed to Keck's land without some agreement, right, estoppel or waiver. Apparently a test in determining whether trees are boundary line subjects entitled to protection is whether they were planted jointly, or jointly cared for, or were treated as a partition between adjoining properties."

Rhodig v. Keck, 161 Colo. 337, 339–40, 421 P.2d 729, 730–31 (1966)

In this case, the Rhodigs accidentally planted border trees on the neighbor's property. The neighbor, Mr. Keck had a survey done and confirmed that one of the trees was entirely on his property, and the others were mostly on his property. Even though the Rhodigs purchased and maintained these trees, the court held that Mr. Keck had the right to remove them because they were encroachments.

"In *Weisel*, plaintiff sought to enjoin his neighbor from destroying a boundary line tree. It appeared, however, that the tree was located entirely on the defendant's property. Nevertheless, the Weisel court found that since both plaintiff and defendant had jointly gone to considerable lengths to care for the tree, the plaintiff had "an interest in the tree sufficient to demand that the owner of the other portion shall not destroy the tree." (Weisel, 138 Neb. 656, 662, 294 N.W. at 452.) Weisel thus stands for the proposition that an agreement or course of conduct can give one party a protectable interest even if the subject tree is not actually on a boundary line, but not for the proposition that such agreement is necessary when the tree is actually on the line."

Ridge v. Blaha, 166 Ill. App. 3d 662, 668, 520 N.E.2d 980, 983 (1988)

Can one owner claim ownership of the entire tree by claiming Adverse Possession?

Generally speaking, courts have rejected the theory of adverse possession supported only by planting and then maintaining a tree that encroaches onto neighboring property because it doesn't meet the level of hostility required.

Happy Bunch, LLC v. Grandview N., LLC, 142 Wash. App. 81, 93, 173 P.3d 959, 965 (2007)(holding that adverse possession could not apply to a border tree because it was owned as a tenancy in common, and since "The trees [were] owned in common, the trial court correctly ruled that Grandview had an interest in the trees proportionate to the percentage of their trunks growing on Grandview's property."

One court has held that planting a tree and an arbor on the neighbor's property was more akin to "mowing the grass and doing minor landscaping or cultivation" and as such, could not satisfy an adverse possession claim because it would not be hostile to the true owner. *See Crown Credit Co. v. Bushman*, 2007-Ohio-1230, ¶ 51, 170 Ohio App. 3d 807, 821, 869 N.E.2d 83, 94

What about trees located in the right of way?

It is often assumed that local governments "own" trees located within the right of way, but based on the principles already discussed, that is not exactly the case.

Local governments maintain rights of way in a variety of ownership forms, e.g. public dedication in a plat, by easement agreement or grant, in fee simple by deed or even in some cases, by statutory presumption (see for example Fla. Stat. § 95.361).

The City's ownership interest in the right of way, should determine whether or not the City owns the tree as well, which will dictate what other rights or obligations the City may have in regard to maintaining and/or possibly removing the tree.

Generally speaking, the owner of the underlying fee would own the tree, but with rights of way (and other easements), those interests are limited because the party holding interest in the right-of-way or easement would have a right to remove objects that interfere with the right of way, but not necessarily the right to destroy trees that are not located completely within the right of way or easement area.

See for example:

Nat'l Rating Bureau, Inc. v. Fla. Power Corp., 94 So. 2d 809 (Fla. 1956)

"Our decision would necessarily be otherwise if the defendant had the right to cut the trees on the right-of-way without compensating the abutting owner for any damage occasioned thereby. The chancellor should have determined the damage, if any, occasioned by the cutting of the trees on plaintiffs' lands." In Fla. Power Corp. the court held that the electric utility did not have to compensate for trees that were in the right of way because the utility had the easement right to remove them, but for trees that were located outside of the ROW.

It will generally be accepted that an easement or dedicated land for right of way purposes would include the right to plant or remove trees, but If the City merely has an easement for a particular purpose, e.g. a water line, removal of a tree may not be allowed in all circumstances. *See Twp. of*

Piscataway v. Duke Energy, 488 F.3d 203, 209 (3d Cir. 2007)(holding that homeowners had standing to pursue a cause of action against Duke Energy for removal of trees located within a gas pipeline easement, and that removal of the trees had to be "reasonably necessary" to further the purposes of the easement grant).

In the case of an easement, the local government should recognize that interference with the easement is a necessary predicate to removal of the tree.

When is one liable for damage caused by a tree?

The common law rule is that one cannot be held liable for nuisances resulting from trees and natural vegetation because neighboring property owners have the right to remove said vegetation from their property. This has been referred to as the "Massachusetts Rule," and is adopted in Florida with the *Gallo* case.

"[T]he rule at common law and the majority rule in this country, which is followed in Florida, is that a possessor of land is not liable to persons outside the land for a nuisance resulting from trees and natural vegetation growing on the land. The adjoining property owner to such a nuisance, however, is privileged to trim back, at the adjoining owner's own expense, any encroaching tree roots or branches and other vegetation which has grown onto his property." *Gallo v. Heller*, 512 So. 2d 215 (Fla. 3d DCA 1987)

However, this common law rule has been questioned and possibly abrogated in some states in recent years.

In *Balzer v. Ryan*, 263 So. 3d 189 (Fla. 1st DCA 2018), the Court again addressed the situation of encroaching tree branches or roots. Based upon Gallo, the Court again held, "[u]nder Florida law, it is well-established that an owner of a healthy tree is not liable to an adjoining property owner for damage caused by encroaching tree branches or roots." Id. at 191. (emphasis added).

The Court in Balzer allowed the dismissal of a claim by saying that it was not an error for the trial court to do so based on common law self-help. At the same time, the Court acknowledged that had the tree damaged persons or property, the ruling may have been different. The use of the term "healthy tree" has led some commentators to argue that if a property owner has notice that the tree is *not* healthy, then they could in fact be liable in nuisance.

Compare the Massachusetts rule with the Hawaii or Virginia Rule.

From a Hawaii court: "We agree with Judge Hood that the Massachusetts rule is 'simple and certain.' However, we question whether it is realistic and fair."

See Footnote – "It is especially unrealistic and unfair when applied to banyan trees in the tropics."

Whitesell v. Houlton, 2 Haw. App. 365, 367, 632 P.2d 1077, 1079 (1981), *holding modified by Spittler v. Charbonneau*, 145 Haw. 204, 449 P.3d 1202 (Ct. App. 2019)

"[W]e prefer a modified Virginia rule. We hold that non-noxious plants ordinarily are not nuisances ; that overhanging branches which merely cast shade or drop leaves, flowers, or fruit are not nuisances; that roots which interfere only with other plant life are not nuisances; that overhanging branches or protruding roots constitute a nuisance only when they actually cause, or there is

imminent danger of them causing, sensible harm to property other than plant life, in ways other than by casting shade or dropping leaves, flowers, or fruit; that when overhanging branches or protruding roots actually cause, or there is imminent danger of them causing, sensible harm to property other than plant life, in ways other than by casting shade or dropping leaves, flowers, or fruit, the damaged or imminently endangered neighbor may require the owner of the tree to pay for the damages and to cut back the endangering branches or roots and, if such is not done within a reasonable time, the damaged or imminently endangered neighbor may cause the cutback to be done at the tree owner's expense.

However, we also hold that a landowner may always, at his own expense, cut away only to his property line above or below the surface of the ground any part of the adjoining owner's trees or other plant life."

Whitesell v. Houlton, 2 Haw. App. 365, 367, 632 P.2d 1077, 1079 (1981), *holding modified by Spittler v. Charbonneau*, 145 Haw. 204, 449 P.3d 1202 (Ct. App. 2019)

The Court in Whitesell leaves open several questions, first, being, what are "non-noxious plants"?

Addressed in a later decision:"In Whitesell we did not define the word "noxious" or formulate a test to determine when a plant could be considered "noxious."

Spittler v. Charbonneau, 145 Haw. 204, 209, 449 P.3d 1202, 1207 (Ct. App. 2019)

A noxious plant — i.e., one that is "physically harmful or destructive to living beings" — is one that actually causes, or that could pose an imminent danger of causing, material harm to persons or to property other than plant life. *Id. At* 1208

See this Tennessee Case where the defendant was held liable for the damage caused by a tree, and note the extent of the damage.

Lane v. W.J. Curry & Sons, 92 S.W.3d 355, 366 (Tenn. 2002)

"The record reveals that the defendant's trees caused a hole in the plaintiff's roof. Water from that hole ruined the plaintiff's ceilings and the stove in her kitchen. Also, it is uncontroverted that the plaintiff has severe plumbing problems as a result of encroaching roots. The plaintiff has not been able to use her bathroom sink or tub in two years. Nor can she flush her toilet. She must go to a neighbor's house to use the restroom. Raw sewage bubbles up into her bathtub. Her bathroom floor has been replaced because her toilet continually backs up, spilling water onto her floor. Neighbors have complained to her about the foul smell of sewage coming from her property. When asked about the condition of her home, the plaintiff replied, "everything is all messed up. I can't bathe. I can't cook. I don't want people coming to my house because it has odors in it, fleas, flies, bugs. It has just been awful for me." These circumstances have understandably taken a toll on the plaintiff. She is under the care of a psychiatrist and takes medication for emotional problems. She testified that she may have to move out of her house because she "just can't take too much more." Clearly, the defendant's encroaching trees have adversely affected the plaintiff's reasonable and ordinary use and occupation of her home, not to mention posing hazards to the plaintiff's health and safety. Accordingly, we reject the defendant's assertion that its trees do not constitute a nuisance."

See Herring v. Lisbon Partners Credit Fund, Ltd. P'ship, 2012 ND 226, ¶ 24, 823 N.W.2d 493, 502

"We therefore strongly encourage neighbors to make every attempt to settle these disputes amicably and in a conciliatory manner, giving the tree's owner an opportunity to prune the offending growth before resorting to drastic self-help measures."

Who has the authority to cut down a border tree?

Under the majority rule on ownership of boundary trees, neither property owner can cut down a tree that straddles the shared boundary line. *Scarborough v. Woodill*, 7 Cal.App. 39, 93 P. 383, 383–84 (1907). However, under the minority rule in *Rhodig*, the landowner of the property where the tree was first planted can cut the tree down, over the other, encroached-on landowner's objections, unless the other landowner can prove that the tree was jointly planted, jointly cared for, or treated as a partition between the properties. 161 Colo. at 340, 421 P.2d at 731. Because, like the trial court, we are also bound by *Rhodig*,

Love v. Klosky, 2016 COA 131, ¶ 3, 417 P.3d 862, 863, *aff'd on other grounds*, 2018 CO 20, ¶ 3, 413 P.3d 1267

When the Colorado Supreme Court decided Rhodig, courts in at least fourteen other jurisdictions had adopted the majority rule, while courts in only four had adopted the minority rule. Since the Rhodig decision, courts in eight jurisdictions have decided boundary tree cases. Of those eight courts, only two have agreed with Rhodig. Of the remaining six which have adopted the majority *866 rule, courts in two jurisdictions, Illinois and Washington, have criticized the Rhodig decision. The Illinois case, *Ridge*, criticized *Rhodig* for misinterpreting the cases upon which it relied, and the Washington case, Happy Bunch, asserted that Rhodig's policy was unsound because the Rhodig court created a new theory of adverse possession. Happy Bunch, 173 P.3d at 965.

Love v. Klosky, 2016 COA 131, ¶ 26, 417 P.3d 862, 865–66, aff'd on other grounds, 2018 CO 20, ¶ 26, 413 P.3d 1267 – Good case for analysis on co-ownership of trees.

SELF HELP REMEDIES

What if in exercising the self-help right to trim to the property line, you damage or destroy the tree?

"The issue in this case, however, is whether the adjoining property owner is liable to the tree owner when the self-help remedy authorized by *Gallo* causes damage to the tree. There is conflicting authority on this issue in other states (see footnote 2 below) but we have found no Florida case addressing the issue. Accordingly, in the absence of any controlling precedent, it follows that the circuit court did not violate clearly established law in ruling the way that it did."

Balzer v. Ryan, 263 So. 3d 189, 191 (Fla. Dist. Ct. App. 2018)

Minority Rule – A California decision imposes a duty to act reasonably in exercising the self-help remedy. *Booska v. Patel*, 24 Cal.App.4th 1786, 30 Cal.Rptr.2d 241, 245 (1994)

Referred to as the "Urban Tree Rule" – in Alvarez v. Katz, 2015 VT 86, ¶ 16, 199 Vt. 510, 516, 124 A.3d 839, 844 (2015)

Atkins v. Adams, 2023 ME 59, ¶ 16, 301 A.3d 802, 808 – Good Case for analysis on Self-Help Remedies

A few courts have identified such a limitation. *See, e.g., Booska v. Patel*, 24 Cal.App.4th 1786, 30 Cal. Rptr. 2d 241, 244-45 (1994); Fliegman v. Rubin, 781 N.Y.S. 2d 624, 624 (App. Div. 2003) (unpublished table decision); Balzer v. Ryan, 263 So. 3d 189, 191 & n.2 (Fla. Dist. Ct. App. 2018). As the Court of Appeals of Washington noted, however, these decisions appear to be "outliers." Mustoe v. Xiaoye Ma, 193 Wash.App. 161, 371 P.3d 544, 547 (2016)

FOOTNOTE 2 – *Balzer v. Ryan*

Compare Mustoe v. Ma, 193 Wash.App. 161, 371 P.3d 544 (2016) (holding that landowner does not owe a duty of care to prevent damage to neighbor's tree when cutting roots that are encroaching onto the landowner's property) *with Brewer v. Dick Lavy Farms*, LLC, 67 N.E.3d 196 (Ohio Ct. App. 2016) (holding that landowner exercising his right to cut encroaching branches from his neighbor's tree must use reasonable care so as not to cause damage to the neighbor's property) and Fliegman v. Rubin, 1 Misc.3d 127A, 781 N.Y.S.2d 624 (N.Y. Sup. Ct. App. Term 2003) (table) (holding that "an adjoining landowner's right to engage in self-help [by cutting encroaching tree roots] 'does not extend to the destruction or injury to the main support system of the tree' " (quoting 1 N.Y. Jur 2d, Adjoining Landowners § 57)) and Booska v. Patel, 24 Cal.App.4th 1786, 30 Cal.Rptr.2d 241, 245 (1994) (holding that landowner had a duty to act reasonably when cutting encroaching roots from a tree on his neighbor's property).

A property owner's common law right to remove encroaching vegetation is founded on the maxim "cujus est solum ejus est usque ad coelum et ad inferos (to whomsoever the soil belongs, he owns also to the sky and to the depths)," *Harding v. Bethesda Reg'l Cancer Treatment Ctr.*, 551 So. 2d 299, 302 (Ala. 1989) (quotation marks omitted)

What is the standard of care for the maintenance of a tree?

Generally speaking, an owner or occupant of land has a duty to use reasonable care to protect passers-by on adjoining public ways from hazardous trees on his land, *See Husovsky v. United States*, 590 F.2d 944, 952–53 (D.C. Cir. 1978)

The duties owed in connection with the condition of land are not invariably placed on the person in whom the land is titled, but, rather, are owed by the person in possession of the land, *See Carver v. Salt River Valley,* 8 Ariz.App. at 498, 446 P.2d 492; because the occupant or possessor has supervisory control over the activities conducted upon, and the condition of the land.

That said, is the maintenance of trees a discretionary or ministerial function? In other words, when do principles of sovereign immunity apply?

For in depth discussion of these functions as well as the difficulties in establishing a standard of care for tree maintenance *See Walen v. United States*, No. CV 15-1718 (BAH), 2019 WL 4261160, at *10 (D.D.C. Sept. 9, 2019).

In one case, the court held that “drive-through observations were not sufficient to meet the standard of care required.” Where the trees in question had V shaped trunk systems that were known to be prone to failure. *See Husovsky v. United States*, 590 F.2d 944, 951 (D.C. Cir. 1978).

In Florida, the Florida Supreme Court has held that foreseeable zone of risk does not apply to a street tree, and instead the standard is that a tree must create a foreseeable hazard to traffic on adjacent streets. They have also held that there is no duty to prune the roots.

“We conclude that a landowner does not have a duty to retard the subterranean root growth of his trees, and, therefore, reverse the final judgment against Silver Palm Properties, Inc.”

Silver Palm Properties, Inc. v. Sullivan, 541 So. 2d 624, 624 (Fla. Dist. Ct. App. 1988), approved, 558 So. 2d 409 (Fla. 1990)

We conclude that these prior decisions can best be reconciled by a recognition that ordinarily a private residential landowner should be held accountable under the zone of risk analysis principles of McCain only when it can be determined that the landowner has permitted conditions on the land to extend into the public right-of-way so as to create a foreseeable hazard to traffic on the adjacent streets.

Williams v. Davis, 974 So. 2d 1052, 1062 (Fla. 2007)

1. What about general negligence law?

“Whether and how the general principles of negligence discussed in McCain and its progeny would apply if Respondents' actions were alleged to have caused damages to persons or property other than the tree is a different issue that is not presented in this case.” *See Balzer*.

What is the tree worth?

Trimming maintenance / tree evaluation / contracts

A review across Florida in 2024, municipalities are generally spending in the range of $30k - $500k on tree trimming and removal services annually.

Eminent Domain

Valuation

Florida FAC 14-10.057