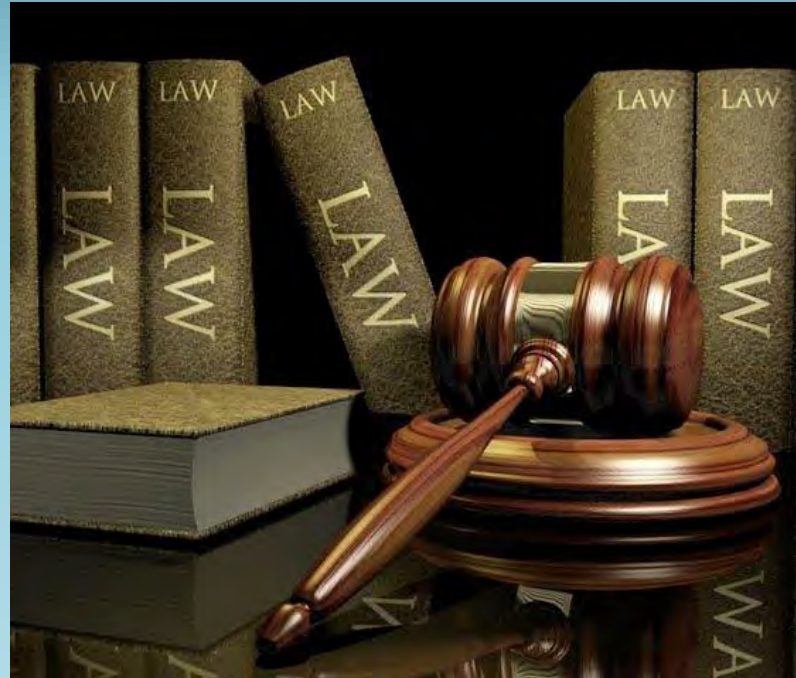


LAND TRUST LAW SCHOOL 2021

Pandemic Earth Day Edition



Keith Ainsworth, Esq.

Connecticut Council on Environmental Quality Annual Report for 2020

- <https://portal.ct.gov/CEQ/Publications/Publications/>

Tree Liability..... In a Nutshell



- Trees on private property do not have to be pruned or removed
- Land Owners/LT's not liable for fallen tree
- **Exception** – If you do something to make it fall, you can be liable for your actions
- HB 5533 -HB 5533 --AN ACT CONCERNING A PROPERTY OWNER'S LIABILITY FOR THE EXPENSES OF REMOVING A FALLEN TREE OR TREE LIMB.
- “That the general statutes be amended to impose liability on the owner of real property for the expenses of removing a tree or limb from a tree located on such real property that falls on adjoining private real property, provided an arborist, as defined in section 23-61a of the general statutes, inspected the tree or tree limb and documented that such tree or tree limb was dead, hazardous or likely to fall on an adjoining private property's land.”

Statutory Tools

Anti-SLAPP Suit C.G.S. §52-196a — Early motion to Dismiss, Award of Atty Fees/Costs Where Person is Exercising Free Speech in Environmental Forum [*NEW in 2018*](#)

Encroachment Statute Conn.Gen.Stat. §52-560a — court can award restoration or cost of restoration incl. management fees, attorney fees, costs, equitable relief & penalty of 5x restoration cost or 5K statutory damages. Attorney General can also enforce.

Park Replacement Statute - C.G.S. §7-131n Taking of land previously intended for use as park or for other recreational or open space purposes. Must provide comparable replacement in value and size and give notice and hold public hearing.

CT Environmental Protection Act — §22a-16 — Injunction for restoration — Attorney's fees and costs

Running Bamboo--§22a-381e(f) — prohibits running bamboo from crossing boundaries and within 40ft of property line; statutory nuisance \$100/day fine, plus damages for removal

Other Laws (handout)



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CONNECTICUT LAND USE & ENVIRONMENTAL LAWS

- C.G.S §22a-19/§22a-19a – CT Environmental Protection Act – (CEPA) environmental and historic
- C.G.S §22a-16 – injunctions under CEPA
- C.G.S §8-3(b) – Protest petition signed by owners of 20% of land area w/in 500ft of land rea affected by zone change forces 2/3 majority vote.
- C.G.S §4-174 – Administrative procedure act – allows the call of a public hearing on state agency permitting decisions on the presentation of 25 signatures.
- C.G.S §22a-41 et seq – Inland Wetlands & Watercourses Act – often adopted verbatim on local level allowing for calling of public hearing on petition of 25 people.
- C.G.S. §47-33h (2001) excludes Conservation Easements (CEs) from Marketable Record Title Act.
https://www.cga.ct.gov/current/PUB/chap_821.htm#sec_47-33h
- C.G.S § 47-27(b) (2002,2015, 2016) bars adverse possession and prescriptive easement claims against non-profit land holding organizations.
https://www.cga.ct.gov/current/PUB/chap_821.htm#sec_47-27
- C.G.S. § 47-42a. Definitions(1971) Broad definition of Preservation & Conservation Restrictions
https://www.cga.ct.gov/current/pub/chap_822.htm#sec_47-42a
- C.G.S. § 47-42b. (1971) Enforcement of conservation and preservation restrictions held by governmental body or charitable corporation. Allows

TALES FROM THE LISTSERV

Land Trusts in the Thicket



Topics from the Listserv

- Can I buy Land Trust property? (definition of CHUTZPAH)
- Hunting – to allow hunting or not?
- Off-leash dog on LT trails (recreational use immunity)
- Mountain Bikes - allowed on LT property?
- Barring Rule Breakers from LT property (crim trespass)
- Nuisance Beavers
- Avigation easement (plane overflight/landing easement)
- Affidavit affecting interest in real property C.G.S. §47-12a
- LT Tree fall policy
- Fencing off water access
- Surveyor's stakes
- Green burials and dispersal of ashes
- Tree policies – Who is responsible for tree falls?



Bear Baiting, Beavers and Bees

Property owner adjacent to Land Trust opened a bear baiting operation

LT and CT DEEP agreement to intercept and ward off bears before reaching the “bear bait and switch”

Bear Baiter threatens suit over tortious interference

Connecticut Law says “law of ferae naturae” applies

“landowners are not responsible for the activities of wild animals on their properties” *Belhumeur v. Zim* (NH)(bees)

However, *Briere v. Tusia*, landowner is responsible if animals attracted by man-made condition (berm)

BEAVER BONUS ROUND

Non-violent Rodent Conflict Resolution

The nonprofit Beaver Institute offers Land Trusts and other CT property owners grants to help them nonlethally resolve conflicts with beavers.

See
<https://www.beaverinstitute.org/management/connecticut-beaver-initiative/>

for more information.

Encroachments

Tree Cutting – A Perennial Problem

Encroachment Statute Conn.Gen.Stat. §52-560a

- court can award restoration or cost of restoration incl. management fees, attorney fees, costs, equitable relief & penalty of 5x restoration cost or 5K statutory damages. Attorney General can also enforce.

(d) In determining the amount of the award, the court shall consider the **willfulness of the violation**, the **extent of damage done to natural resources**, if any, the **appraised value of any trees or shrubs cut**, damaged, or carried away as determined **in accordance with the latest revision of The Guide for Plant Appraisal, as published by the International Society of Arboriculture, Urbana, Illinois**, or a succeeding publisher, any economic gain realized by the violator and any other relevant factors.

Guide to Plant Appraisal, 10th ed (3rd print) 2018.



Land Trust v. New Owner With a Chainsaw

Land Trust in Northwest Connecticut Owns Property with Conservation Restriction

New Neighbor clears ½ acre --- 617 trees/shrubs

(“I thought we had permission...”)

LT hires forester who estimates restoration **\$440k-\$609k**

LT hires another forester/arborist estimates **\$59k - \$65k**

Encroacher experts quote

Pirone’s Tree Maintenance 7th Edition (the essential reference for arborists, nurserymen and landscape architects) the value of the trees on any given property typically should not exceed more than 15% of the property value

Encroacher estimate **\$16k to \$40k** restoration.

NONE OF THE EXPERTS USED THE GUIDE TO PLANT APPRAISAL

Case settles – case withdrawn (\$50k)

LESSON:

USE THE FORMULA!

The Guide to Plant Appraisal is the statutory standard





Land Trust v. New Owner With a Chainsaw

Case #2

Land Trust in Northwest Connecticut Owns Property with Conservation Restriction

New Neighbor clears ½ acre --- 68 trees/shrubs (“I thought we had permission...”)

LT hires arborist who estimates restoration \$375,745

Using Guide to Plant Appraisal

Functional Replacement Cost and Cost Compounding Method

Appraisal method accounts for loss of ecological function and benefits incurred over the period of time from replanting to when landscape reaches ecological parity with the original landscape.

Case settles – case withdrawn \$125,000

LESSON: USE THE FORMULA!

The Guide to Plant Appraisal is the statutory standard



Land Trust v. New Owner With a Chainsaw

Case #3

Land Trust in Northwest Connecticut Owns Property with Conservation Restriction

New Neighbor clears 3/4 acre --- 81 trees (“I thought we had permission...” “It was storm damage” “You can’t prove it”)

LT hires arborist who estimates restoration \$232,000

Using Guide to Plant Appraisal

Case Initial Offer – \$120,000

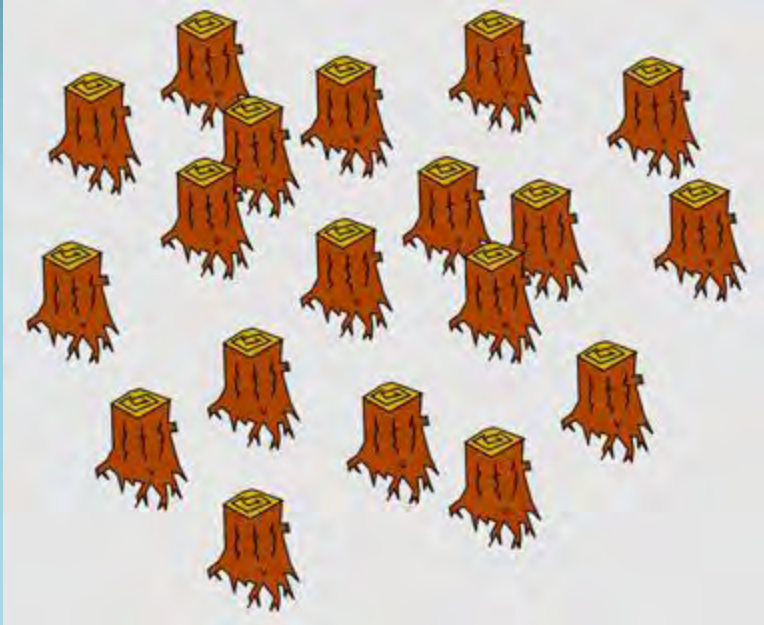
Case #4 – 28 trees, formula estimate \$64k (settlement \$50k)

LESSON:

USE THE FORMULA!

The Guide to Plant Appraisal is the statutory standard

STUMP THE EXPERT



Questions and Answers?

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Connecticut Superior Court –

“We Really Mean It -Trees Are Not Your Responsibility”

Private landowner sued neighbor after tree fell onto shed after notification that tree was dangerous. Court struck claim b/c tree was natural condition and CT failed to pass liability statute- *Corbin v. HSBC Bank USA, N.A.*, 2016 WL 3536424, 62 Conn. L. Rptr. 451 (June 3, 2016).

See also, New London County Mutual Ins. Co. v. Playhouse Condominium Ass’n, Inc., 2017 WL 1334280, 64 Conn. L. Rptr. 204 (March 2, 2017).

Tree Case Law – Part 1

- **Massachusetts Rule** – (a/k/a the CT Rule...)
- If tree branches or roots encroach on neighbor's land, neighbor can cut the branches or roots up to boundary line

Michalson v. Nutting, 275 Mass. 232, 175 N.E. 490, 76 A.L.R. 1109 (Sup.Jud.Ct. Mass. 1931).

McCann v. Town Planning & Zoning Commission, 161 Conn. 65 (1971).



Virginia Rule – (not the CT Rule)



Owner has a duty to prevent trees from causing “sensible damage” to his neighbor’s property.

Smith v. Holt, 174 Va. 213 (Va. 1939)

You can sue to recover damages for sensible harm. But you pay for trimming the tree back that overhangs your yard.

Hawaii Rule – (definitely not the CT Rule)

...when there is imminent danger of overhanging branches causing “sensible” harm to property other than plant life, tree owner is liable for the cost of trimming the branches as well as for damage caused.

Whitesell v. Houlton, 632 P.2d 1077 (App. Ct. 1981)

You can trim the tree **and** sue for damages caused.



Origin of the “Connecticut Rule”

trespass quare clausum fregit

Latin for *Pear theft*

- " The law as to growing trees may be regarded so far peculiar as to call for a more extended statement of its rules as laid down by different courts.
- In the first place, ***trees which stand wholly within the boundary line of one's land belong to him, although their roots and branches may extend into the adjacent owner's land.***
- ***But the adjacent owner may lop off the branches or roots of such trees up to the line of his land.***
- If the tree stand so nearly upon the dividing line between the lands
- that portions of its body extend into each, the same is the property in common of the landowners. And neither of them is at liberty to cut the tree without the consent of the other, nor to cut away the part which extends into his land, if he thereby injures the common property in the tree."

Lyman v. Hale, 11 Conn. 117 (1835)

Tree Case Law – Part 2

Maybe we *are* liable?

Heidi Cordeiro v. Rockville General Hospital, Inc. et al. TTD-CV-07-5001627-S

Court went through mental gymnastics to find that

“....it is widely held, in modern cases, that a tree owner in an urban setting is subject to liability

....only if he or she had actual or constructive notice of a dangerous condition in the tree.”

Cited to *McDermott v. Calvary Baptist Church* , 263 Conn. 378, 388, 819 A.2d 795 (2003).” “plaintiff bore the burden of establishing that there were visible signs of decay or weakness of structure . . . and that the church failed to observe . . . but the reasonable care would have resulted in these signs being seen.”

Not the majority law in CT and relied on cases from other states.

Lesson: Bad lawyering makes bad law. Defense attorney dropped the ball.

Connecticut Forests Over Time

At the Time of *Lyman v. Hale* --- In 1825, only 25% of Connecticut was forested. USDA Forests of CT, Wharton, Widman, et al 2004

TODAY

Connecticut is 60% forested

Litchfield County is about 75%

New Haven County 47%

Fairfield County 37%

Upper Hartford County 53%

83% of Connecticut's Forests are Privately Held

17% is controlled by governmental entities

Connecticut

A Very Tree State

Connecticut the fourth (4th) most densely populated state.

Yet it ranks 13th in percentage (%) of forest cover.

Few places on earth have as many people living among so much forest.

Recreational Use Immunity

"To fee or not to fee..."

- Sec. 52-557f. Landowner liability for recreational use of land.
- "Land" means land, roads, water, watercourses, private ways and buildings, structures, and machinery or equipment when attached to the realty, exceptions for municipality
- "Recreational purpose" includes, but is not limited to:
- Hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, snow skiing, ice skating, sledding, hang gliding, sport parachuting, hot air ballooning, bicycling and viewing or enjoying historical, archaeological, scenic or scientific sites.

Landowners Not Liable for Free Public Recreational Use



- An owner of land who
- Makes all or any part of the land **available to the public without charge, rent, fee or other commercial service**
- for recreational purposes
- **Owes no duty of care to keep the land..... safe** for use for recreational purposes,
- **Or to give any warning of a dangerous condition**, use, structure or activity on the land to persons entering for recreational purposes.