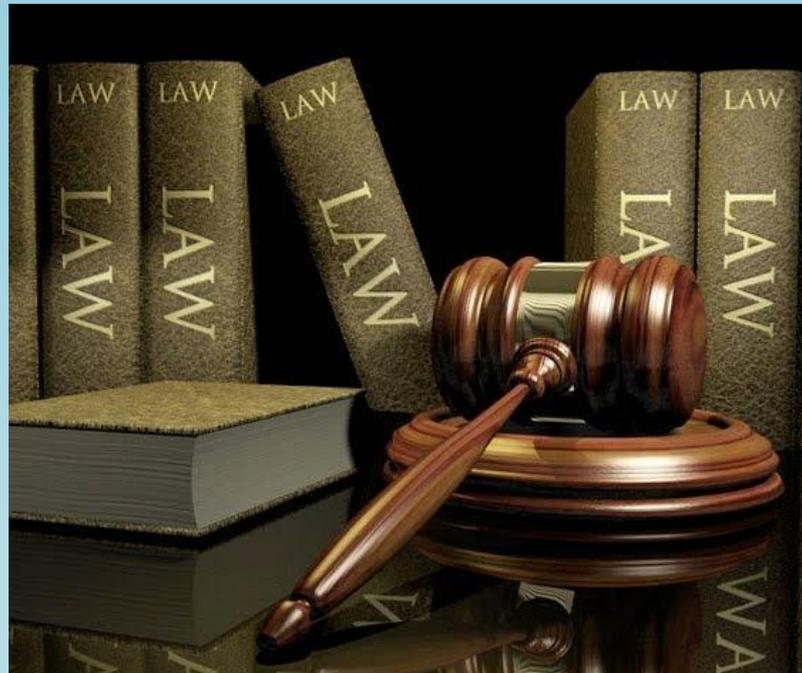


LAND TRUST LAW SCHOOL 2020

Tree and Land Law Connecticut Style



Law Offices of
Keith R. Ainsworth, Esq., LLC
51 Elm St., Suite 201, New Haven

- **Conservation Law – 30 years of investigation, negotiation and litigation**
- **Land trusts, neighborhood and condo associations, municipalities, conservationists, non-profits, small businesses and landowners impacted by questionable activities**
- **Handouts available on the CLCC website**

Tree Law

“If lightning is the anger of the gods, then the gods are concerned mostly about trees.”

— Lao Tzu



FISHER v. LOWE, ET al.

Court of Appeals of Michigan 122 Mich. App. 418; 333 N.W.2d 67; 1983

OPINION:

We thought that we would never see, A suit to compensate a tree.

A suit whose claim in tort is prest, Upon a mangled tree's behest;

A tree whose battered trunk was prest, Against a Chevy's crumpled crest;

A tree that faces each new day, With bark and limb in disarray;

A tree that may forever bear, A lasting need for tender care.

Flora lovers though we three, We must uphold the court's decree.

Affirmed. n1

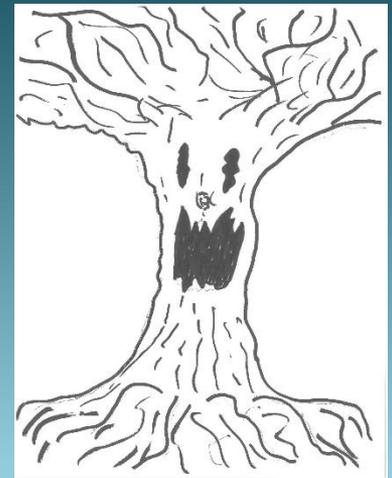
Handling Tree Issues Statutes

- **Tree warden Statute – §23-59 – Tree wardens have authority over all trees on municipal lands, parks and in rights of way or roads.**
- **Can remove trees after 10 day posting; right of appeal**
- **Exemption from posting if tree is “immediate public hazard”**
- **Sec. 16-234. Utility trimming – 10 days to Object to Tree Warden or DOT ---Appeal to PURA**
- **8 foot Utility protection zone, delivery of 15 day notice**

Why we never see a lawsuit captioned

Pat Smith v. A Bitter Red Oak
?

Trees in the Courthouse



- **If a tree branches or roots encroach on neighbor's land, neighbor can cut the branches or roots up to boundary line** -- *McCarran v. Town P&Z Commission*, 161 Conn. 65 (1971).
- **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).

Your Trees – (Not) Your Responsibility

- 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.”*

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).

McCran 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)

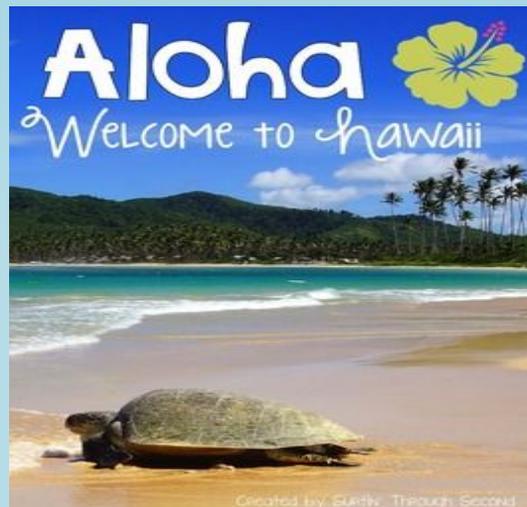
You can sue to recover damages for sensible harm. But you pay for trimming the tree back that overhangs your yard.

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

***Jordan v. Biller* – MMX-CV-17-6013438-S Middletown (2017)**

Court finds that attorney who cut over a hundred trees on neighbors property to give him a view to the CT River under a ‘view easement’ violated CGS 52-560a and awarded \$446,650

The *Ventres* court concluded that under the common law, damages for the reduction in pecuniary value of the land may be determined by the replacement cost of the trees, if appropriate under the facts of the case. *Ventres, supra*, at 160. After *Ventres*, the court in *Argentinis v. Fortuna*, 134 Conn. App. 538, 553, 39 A. 3d 538(2012) held that “diminution in value may be determined by the cost of repairing the damage, provided, of course, that that cost does not exceed the former value of the property and provided also that the repairs do not enhance the value of the property over what it was before it was damaged.”

Tree Case Law – Part 3

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.



1. City Hall
 2. Public School
 3. Danbury College
 4. Danbury Academy
 5. Danbury Church
 6. Danbury Hotel
 7. Danbury Bank
 8. Danbury Store
 9. Danbury Office
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DANBURY CONN.
 1875

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G & M Division
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 11-11-74

74-69329

6-3784
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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.

Running Bamboo

“ Tree? or Not to Tree?...that is the Question...”



Connecticut Says “Yes!”

A tree is defined as “a single stem plant which at maturity reaches more than 5 meters high”.

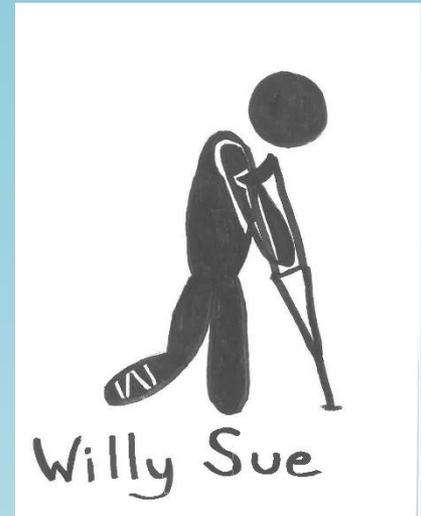
BAMBOO (*Phyllostachys gen.*)
qualifies as a tree.

The Invasive Non-invasive

- Conn.Gen.Stat. §22a-381e(f). Declares running bamboo that crosses border a nuisance.
- Provides for fines. (Atty's fees under CEPA 22a-16)
- Prohibits bamboo within 40 feet of a boundary
- Connecticut does not define *Phyllostachys sp.* as an invasive plant
- Does not meet the criterion: high seed production and dissemination and establishment in natural plant communities
- Very destructive.

Landowner Legal Liability

- Negligence – breach of a duty of the standard of care
- Applies to anyone who does anything
- That causes (causation)
- Harm (injury)
- To another person or property
- Includes invitees, licensees and trespassers



- **Anyone can be sued by anyone for anything at any time**
- (welcome to America...)
- Land Trusts Are Not Inherently Immune

A Word About *Standards & Practices* for Land Trusts (A Double-Edged Sword)

- That word is **CAUTION**
- **Preamble: WHEREAS**, the [land trust] agrees that the Standards are the ethical and technical guidelines for the responsible operation of a land trust
- **Standard 11C(2):** Monitor each conservation easement property at least once per calendar year
- **Standard 12C(1):** Determine the boundaries of land trust properties and physically mark them to the extent possible or necessary
- **Adopt a DISCLAIMER or DO NOT ADOPT THEM**

Standards & Practices

Land Trust Standards and Practices on Risk -

DOES NOT SAY “CREATE A RISK MANAGEMENT PLAN” !!
(it can become Exhibit A at trial....)

Practice 6I. Risk Management and Insurance

The land trust **assesses and manages its risks** and **carries liability, property and other insurance** appropriate to its risk exposure and state law. The land trust exercises caution before using its land to secure debt and in these circumstances takes into account any legal or implied donor restrictions on the land, the land trust’s mission and protection criteria, and public relations impact.

Practice 8K. Evaluating Risks

The land trust **examines the project for risks to the protection of important conservation values** (such as surrounding land uses, extraction leases or other encumbrances, water rights, potential credibility issues or other threats) and **evaluates whether it can reduce the risks**. The land trust **modifies the project or turns it down if the risks outweigh the benefits**.

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.

Sec. 52-557g(b) – No Representations

- An owner of land who, either directly or indirectly, invites without charge, rent, fee or other commercial service any person to use the land for recreational purposes
- DOES NOT
- (1) Make any representation that the premises are safe for any purpose;
- (2) Confer upon the person the legal status of an invitee or licensee to whom a duty of care is owed; or
- (3) Assume responsibility or liability for injury to person or property caused by an act or omission of the owner.

Recreational Use Immunity continued...

- Sec. 52-557g. Liability of owner of land available to public for recreation; exceptions.
- (a) Except as provided in section 52-557h – WILFUL OR MALICIOUS FAILURE TO GUARD OR WARN AGAINST A DANGEROUS CONDITION, use, structure or activity; (2) for injury suffered in any case WHERE THE OWNER OF LAND CHARGES the person or persons who enter or go on the land for the recreational use
- Except for land leased to municipalities – a charge is not a charge to lease holder

Minor Savings Clause

“Hold my beer, I got this...”

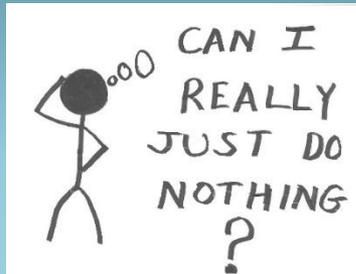


Sec. 52-557i. **Obligation of user of land.**

- **Nothing in (the act) shall be construed to relieve any person using the land** of another for recreational purposes from any obligation which he may have in the absence of said sections **to exercise care in his use of such land and in his activities** thereon, or from the legal consequences of failure to employ such care.



SIGNS, SIGNS, EVERYWHERE A SIGN.....



Recreational Use Immunity provides you with the opportunity not to have to warn of hazards.

If you act, you may be assuming responsibility by leading a land user to believe that you were taking care

Signage

“To warn or not to warn, that is the question.”



If you must sign, simple is better - “Closed at Dusk”, “No Fires”, “No Hunting/Firearms” or “Hunting Allowed Oct- Dec”

Better rule: no reasonable person expects open space to have signage or to be maintained – (nature deficit disorder be damned)



LIQUOR SERVICE

- If you serve alcohol whether or not you charge a fee, you need insurance and a licensed caterer.
- **Conn.Gen.Stat. §30-102** states that a vendor that sells or gives alcohol to "an intoxicated person" may be held liable if the intoxicated person then causes injury to another.
- **Sec. 30-37b. Charitable organization permit.** A charitable organization permit allows retail sale of alcohol **by the drink** consumed **on the premises owned or leased by the organization.** Hours of sale (1 am -9am M-F)
- No more than twelve days in any calendar year.
- **Sec. 30-37h. Nonprofit corporation permit.** A nonprofit corporation permit shall allow the retail sale of wine at auction at fundraisers
- **Sec. 30-35. Temporary permit for outings, picnics or social gatherings.** "for bona fide non-commercial organization"

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.”

PREVENTING ENCROACHMENTS

1. Conduct regular monitoring of preserves and easements.
2. Make sure you have excellent **BASELINE** documentation.
3. Enlist neighbors to spot problems.
4. Measured or 'Stepped' Response
5. Develop written policies and procedures for responding to potential encroachments... (*Grovenburg* says can be oral policies)

Which of the Following Equipment Should A Land Trust Own to Maintain Its Property?

A – Machetes

B - Gas Powered Brush Hog

C- Chainsaw

D – Invasive Burning Torches

E – Mowers

Chain Saws and Land Trusts Don't Mix



- Possibly not covered by recreational use immunity
- If you provide the chain saw/mower/machete, your maintenance of it is your responsibility
- If you recommend using “Jane’s chainsaw” you may be impliedly certifying that it is safe for use

Employee Risk Concerns

Violation of federal or state civil rights laws, such as hiring, promotion or termination discrimination

Sexual or other harassment committed by staff or contractors

Unfair or illegal compensation practices - Fair Labor Standards Act or state law governing pay rates or final paychecks

Actions or statements that diminish the land trust's reputation

Unsafe working conditions - Occupational Safety and Health Act

QUESTIONS AND ANSWERS?

Keith Ainsworth, Esq.

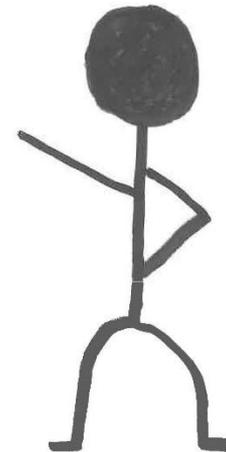
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Let's Stay Safe
Out There



The “Level” Field of Play:



Know Your Rights

Land Trusts Enjoy Special Status and Unique Protections

Adverse Possession Does Not Run Against LT's

Multiple Damages for Harm to LT Property (CGS 52-560a)

Attorney General Can Intervene (CGS 47-42e)

Non-Profit Tax Deductions for Consultants and Professionals Who Donate Time and Money

Moral High Ground and Credibility

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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Of Counsel to Cooper, Whitney & Francis, Attorneys
(203)435-2844 kainsworth@cwflaw.com

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

Case Studies

Land Trusts in the Law



Land Trust v. A Rabbit Named Marvin Schwartz

Caution with Retained Rights

Farmland Conservation Easement

Allows a “*barn for animals*” in Building Envelope A, but not in Area B

Builds tractor shed in Area B

Land Trust approaches him – “I’ll throw a couple of rabbits in there”

Land Trust sues – removes tractor – adds painting easel, bad art – “It’s an art studio”

Art studio allowed in Area B- Building permit was for “equipment storage”

Case resolves, Removes art, no tractor, reapplies for barn for animals - “What animals are in there?” “A Rabbit named Marvin Schwartz”



Land Trust v. The Pirate Ship

**Land Trust Fee adjacent to residential subdivision
Neighbor clears portion of 3rd neighbor's land and that of Land Trust**

Denies he did it – aerial photos prove it happened during his ownership

Says it was his land – survey proves it was not

Insurance company settled after restoration report compiled under Guide to Plant Appraisal



AERIAL PHOTOGRAPH
[Redacted] CT

NOTES
(1) The boundaries shown on this map are approximate.
(2) This map contains no authoritative data and is intended for planning purposes only.

Legend
[Red outline symbol] [Redacted]

SCALE
0 125 250

Map Prepared by
[Redacted]
Windsor, CT 060
August, 2017

Madison Land Conservation Trust v. Suppa















Madison Land Conservation Trust Takes Action

- Contacted by letter – No response -
- WEO issues Notice of Violation, settled for 4 trees and 4 shrubs
- MLCT files own wetlands restoration permit 16 trees, 7 shrubs
- FILED PJR – *with TRO (immediate hearing)* -- **Practice Tip**
- Encroachment Statute, CEPA, Negligence, Nuisance, Trespass
- \$56k verdict x no multiplier, plus \$26k atty fees
- **NEVER ENGAGE PUBLIC OFFICIALS UNLESS YOU KNOW WHERE THEY STAND**

Google Maps



Land Trust v. House in The Conservation Easement

Encroachment with a twist

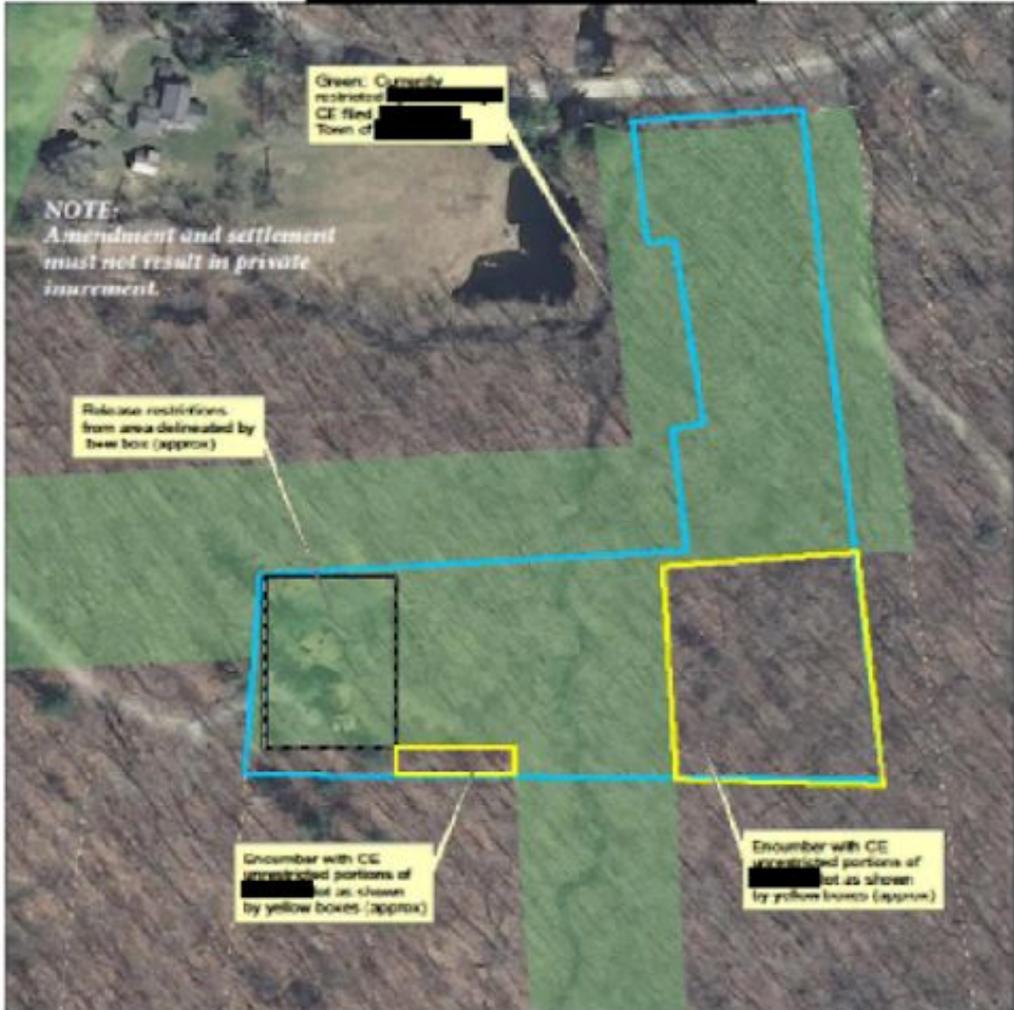
LT held a conserv. easement on 5- lot subdivision

**House lots allowed in certain buildable squares
Deed to encroacher did not reference CE**

**Encroacher builds house in easement area
House in place for 18 years –No adverse possession**

Encroacher files claims against DONOR

**Case settles with CE amendment w/CT AG's office
LESSON: check your deeds and easements, BASELINES, stewardship checks (annually/biennially)**



Legend

[Blue outline] tax lot

[Yellow outline] CT Tax Parcels

SCALE

1 inch = 120 feet

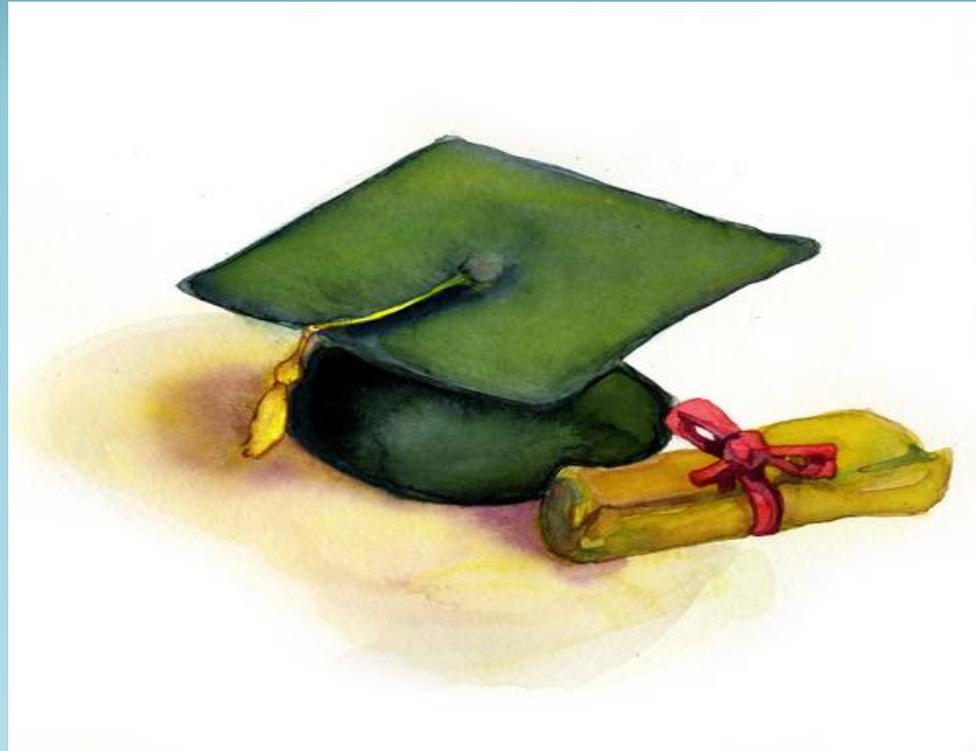
0 20 40 60 Feet

DATE

2018

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Discussion and Questions



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