

Trees, People and the Law

by Kevin J. Best, Esq.

A fall conference workshop held in Cambridge was devoted to municipal tree issues and taught by Michael Galvin, Supervisor of the Urban and Community Forestry Division of the Maryland Department of Natural Resources (DNR). The first order of business for Mr. Galvin was to explain to the group that the purpose of the class was to provide general information and was not intended to substitute for professional legal advice. Participants were advised to consult competent legal counsel as to specific cases.

An overview of Maryland tree law can be found in *A Guide to Maryland Regulation of Forestry and Related Practices* available on DNR's website. Mr. Galvin explained that although most people think laws are only found in code books, most "tree law" is more likely to be found in case law made by the courts as it is to be found in statutes. There are five main areas of tree law promulgated by the State of Maryland: (1) Roadside Tree Law; (2) Forest Conservation Act; (3) Tree Expert Law; (4) Reforestation Law; and (5) Critical Area Law.

The Tree Expert Law covers standards of practice governing those that are licensed to provide tree services in terms of arboricultural, ethical and business practices. The regulations were enacted for the first time in 2002 and are revised based on new industry standards about every year.

State law governs roadside trees on all highways and streets in Maryland including municipal roadways. The Roadside Tree Law was dramatically revised concerning roadside tree care experts and roadside tree public agency permits. Effective January 2004, decision making authority is delegated to the local level concerning issuing permits for the removal of street trees. The authority to grant permits for tree pruning as well as removal is now with those local governments possessing a Roadside Tree Public Agency (RTPA) permit from DNR.

RTPA permits are issued to State agencies, counties and municipalities for continuing programs of general tree care using specified types of tree care, based upon the

skills of those supervising the program. Roadside Tree Maintenance (RTM) permits are issued to corporations and utilities for continuing programs of general tree care using specified types of tree care, based upon the skills of those supervising the program. Roadside Tree Individual (RTI) permits are issued for a specific tree or group of trees for specific tree care operations. The RTI permit form is used if you do not have a RTPA or RTM permit, or if your RTPA or RTM permit does not authorize the desired work.

Local governments that possess RTPA permits must observe established conditions before granting a live tree removal permit to an individual, which include (1) the need to eliminate a hazard to property or public safety and health; (2) the need to prevent the deterioration of other trees; or (3) the need to improve the general aesthetic appearance of the right of way. A hazard to property is defined as a dead tree or one that has caused damage to "hardscape" resulting in a need for repair for which previous damage to water or sewer infrastructure has occurred

or where severe surface rooting on a private lawn exists.

A hazard to public safety occurs when a tree is dead or is in a condition that poses a significant risk of failure and subsequent impact to an area used by people, which obscures traffic control devices and cannot be mitigated by pruning according to ANSI A-300 standards or which obscures sight distance where pruning according to ANSI A-300 standards cannot mitigate the obstruction. (ANSI stands for American National Standards Institute.)

A hazard to health occurs when a tree poses a specific health risk to a specific person identified in the application which may include: (1) documented severe allergies to specific tree types, flowers, or fruits; or (2) asthmatic reactions related to high VOC-emitting trees. (VOC is the acronym for Volatile Organic Compounds.) This does not include the normal processes of trees (flowering, fruiting, leaf drop, etc.) in general terms, without a documented or demonstrated health impact.

The necessary improvement of a deteriorated tree condition occurs where a tree is recognized by the



Department as an invasive exotic plant or one that is injured, decaying, declining, mechanically unstable, or in any other similar condition such that the site would be best served by removal and replacement. Furthermore, a tree will be removed for the general aesthetics of the right-of-way if it is (1) declining; (2) unsightly; (3) of poor form or structure; (4) inappropriate for the site; or (5) in a condition such that the site would be best served by removal and replacement.

A dangerous tree condition existing on public property may give rise to a cause of action for which a public entity may be held liable if the following elements are satisfied: (1) the public property was in a dangerous condition on the date of the incident; (2) the plaintiff's (victim's) injury was caused by the dangerous condition; (3) the injury occurred in a way which was a reasonably foreseeable consequence of the dangerous condition; and, (4) the dangerous condition was created by a negligent act or failure to act by an employee of the public entity acting within the scope of their employment; or, the public entity had actual or constructive notice of the dangerous condition in a sufficient amount of time before the accident so that it could have taken steps to prevent the injury.

Negligence is defined as doing something that a person of ordinary prudence would not do, or failure to do something that a person of ordinary prudence would do, under similar circumstances. Whereas an Act of God is a force of nature that is (1) unexpected and unforeseeable; (2) the sole cause of the accident; and (3) one that could not have been prevented by reasonable care.

According to Mr. Galvin, a frequent question occurs where a neighbor complains about a tree overhanging the property line. Maryland subscribes to the "Massachusetts Rule" which states that no cause of action will accrue against the tree owner for the overhanging limb; however, the offended person may exercise self-help in the matter by pruning the tree in a manner that leaves it in a reasonable condition. According to the Court of Appeals of Maryland, "a landowner has a right to cut encroaching branches, vines and roots back to the property line ... but may not enter the adjoining landowner's property ... without

the neighbor's consent." *Melnick v. CSX, Md. (1988)*.

Mr. Galvin cautioned that the courts do not consider non-noxious plants to be nuisances. Nor are natural processes (e.g. "casting shade or dropping leaves, flowers, or fruit...") to be considered nuisances. A person may engage in self-help if trees cause actual or imminent danger of harm or may request that owners remedy the problem, and charge them if they do not respond within reasonable time frame.



The next major issue addressed at the workshop dealt with the question of who is responsible for fallen trees or limbs. Mr. Galvin cited a *Washington Post* article that sarcastically stated that if "[a] healthy tree in a storm falls on your neighbor's house, it's no longer your tree ... it's now your neighbor's tree." In other words, unless your neighbor can prove you were negligent or had some foreseeability of the danger, it is probably going to be considered an Act of God and your innocent neighbor will have to have his own insurance cover the claim for damages. However, although under no legal obligation, some public agencies will remove a tree having fallen on private property which originally grew on public land, as a customer service to its residents.

Mr. Galvin explained that the courts would look at a number of factors to determine liability for falling trees. These factors include whether the tree was planted by someone or occurred naturally, whether the tree was in such poor condition that it gave the owner some notice of a potential for injury, or whether the owner was given some notice as to the foreseeability of the incident.

The final segment of the workshop involved a series of real life scenarios or case studies. Mr. Galvin presented the audience with the relevant facts and asked them to predict the decision by the court or tribunal using the rules of law he had previously discussed. Several of the participants who were called on to predict the outcome of a given case guessed incorrectly because a number of the cases presented were settled between the parties without a complete judicial ruling and application of the law. Nonetheless, the audience of municipal officials left the workshop with a deeper appreciation for trees and the law. ■

Kevin J. Best was formerly MML's Director of Legal & Information Resources.