

Are towns responsible for removing a tree in a town highway right-of-way that is a danger to private property?

No. While towns have the sole authority to cut down trees in a public right-of-way (24 V.S.A. § 2291(3), 19 V.S.A. § 904), this is a power that they *may*, not must, exercise. Nevertheless, VLCT recommends that towns cut down a tree if it lies within the public right-of-way and constitutes a hazard to public safety.

A public right-of-way is an easement that allows the public to traverse private property. The most obvious are highways and trails. The less visible include that right-of-way which extends 24 ¾ feet (unless otherwise recorded) out from each side of the center of highways and trails, often times extending onto private property. 19 V.S.A. § 32. Questions such as “Who owns these trees?” and “Who is responsible for their care?” often arise when this overlap occurs. Typically, the answer is the same for both questions – the owner of the property is responsible for the tree’s care. This is not the case with trees in the public right-of-way.

Think of property rights as a bundle of sticks. Each stick represents a different right on the property. The landowner holds the stick of ownership while the town holds the stick to cut the tree down (pardon the pun). Despite the landowner’s ownership of the tree, it is the town that has the final say in who may cut it down. “(A) public shade tree shall not be cut or removed, in whole or in part, except by a tree warden or his deputy or by a person having the written permission of a tree warden.” 24 V.S.A. § 2507.

The tree warden must afford interested parties an opportunity to be heard by holding a public hearing before cutting down a public shade tree in residential areas. An exception exists if the tree is infected or infested or “constitutes a hazard to public safety, (then) no hearing shall be required.” 24 V.S.A. § 2509. Ideally, the landowner will cut down the tree after the town determines that the tree is in the public right-of-way, is a hazard to public safety, and grants permission; however, if the landowner persists in asking the town to cut the tree down, it should.

The duty for caring for trees in the public right-of-way or on any public property resides exclusively with the town. 24 V.S.A. § 2291(3). It is that exclusivity of control that makes it potentially liable for any damage resulting from breaching that duty.

From this loss prevention perspective it will be far cheaper for a town to pay the cost of cutting down a tree than to pay the court ordered costs of repairing a home it may fall upon.

- *Garrett Baxter, Associate, Municipal Assistance Center*

VLCT News, August/September 2004