

# LEGAL SERVICES

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## MEMORANDUM

March 27 2024

**SUBJECT:** Tree law liability and takings  
(HB 227; Work Order No. 33-LS0969(B))

**TO:** Representative Sarah Vance  
Chair of the House Judiciary Committee  
Attn: Jake Almeida

**FROM:** Ian E. Walsh   
Legislative Counsel

This memorandum follows up on two questions that Representative Sumner raised in the House Judiciary hearing on March 11, 2024, related to HB 227. Representative Sumner asked who would be liable, under existing law, for injuring or killing a tree that is rooted on private property if a utility clears vegetation from the tree inside the utility's easement or cuts a part of the tree's trunk inside the easement. Representative Sumner also asked whether a law providing immunity to a utility for damaging or killing a tree rooted on private land could be considered a taking of private property.

### Liability.

At the outset, it is important to note that Alaska law does not offer definitive answers to Representative Sumner's liability questions. Common law principles, cases from other jurisdictions, and AS 09.45.730, the trespass to trees statute,<sup>1</sup> all provide guidance, but none of these sources of binding or persuasive authority definitively resolve who would be liable in the hypothetical scenarios raised by Representative Sumner.

Courts generally agree that a landowner is permitted to remove vegetation and roots that encroach onto the owner's land from a tree that is on neighboring land—and thus owned by the neighboring landowner.<sup>2</sup> This is because, with some exceptions, land ownership extends below, and at least somewhat above, the land's surface.<sup>3</sup> Beyond this baseline,

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<sup>1</sup> See *Galipeau v. Bixby as Tr. of Irrevocable Tr. of Rose E. Fong*, 476 P.3d 1129, 1138 (Alaska 2020) (describing AS 09.45.730 as codifying the tort of "trespass to trees").

<sup>2</sup> Kathleen K. Law, *Trees—A Unique Branch of Law*, 31-APR Prob. & Prop. 60 (2017); Robert Roy, Annotation, *Encroachment of trees, shrubbery, or other vegetation across boundary line*, 65 A.L.R. 4th 604 § 8 (1988).

<sup>3</sup> At common law, a landowner's right to exclude others extended both above and below the land's surface. 2 *Tiffany Real Property* §§ 582.5 - 585 (3d ed. Sept. 2023). With the advent of air travel, different and sometimes complicated theories of property rights for

courts have adopted varying approaches to other measures that a landowner might use to address encroaching vegetation or roots from neighboring land; these approaches were outlined in a prior memorandum.<sup>4</sup>

The question becomes more complicated when the ownership of a tree is shared between neighboring landowners. The majority approach among the states determines ownership of a tree based on the location of the tree's trunk.<sup>5</sup> Under this approach, when the trunk of a tree stands on the property boundary line, it is owned by both neighboring landowners.<sup>6</sup> If the tree is owned by both landowners, courts generally hold that neither landowner has an absolute right to injure or remove the tree. Under this approach, if one landowner damages or injures such a tree beyond removing vegetation from the tree that encroaches on that landowner's land, the other landowner is usually entitled to a remedy.<sup>7</sup>

AS 09.45.730, the trespass to trees statute, provides the statutory remedy for injuring or removing a tree: "A person who without lawful authority cuts down, girdles, or otherwise injures or removes a tree, timber, or a shrub on . . . the land of another person . . . is liable to the owner of that land" for damages.<sup>8</sup> In most circumstances, the statute provides for "treble damages," which is three times the amount of actual damages.<sup>9</sup> But "if the trespass

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airspace have emerged. *Id.* § 584. One theory, which is accepted in many jurisdictions, is that the landowner's rights above the surface extend to the airspace that "is essential to the complete use and enjoyment of [the] land." *Id.* There is some conflict between this theory and federal regulation of airspace; some jurisdictions acknowledge a landowner's ownership of airspace but grant aircraft the right to navigate within that airspace. *Id.* Subsurface property rights are also complicated, but for different reasons. Land may "be divided horizontally for the purpose of ownership," and mineral rights, the "surface estate," and the right to "subjacent (surface) support" can be treated as distinct. *Id.* § 585. A comprehensive analysis of a landowner's subsurface and air rights is beyond the scope of this memorandum.

<sup>4</sup> Memorandum from Legislative Legal Services dated March 7, 2024.

<sup>5</sup> Law, *supra* note 2, at 60; F.S. Tinio, Annotation, *Rights and liabilities of adjoining landowners as to trees, shrubbery, or similar plants growing on boundary line*, 26 A.L.R. 3d 1372 § 2 (1969).

<sup>6</sup> *Id.*

<sup>7</sup> F.S. Tinio, *supra* note 5, § 4.

<sup>8</sup> The statute also applies to a number of other locations, not at issue here, where unlawful tree-cutting may occur. AS 09.45.730.

<sup>9</sup> *Id.*

was unintentional or involuntary, or the defendant had probable cause to believe that the land on which the trespass was committed was the defendant's own or that of the person in whose service . . . the act was done, . . . only actual damages may be recovered."<sup>10</sup> AS 09.45.730 does not address how a person may obtain "lawful authority," nor does it resolve the tree and land ownership questions discussed above.

Ultimately, a utility is less likely to be liable under existing law for injuring a tree on private property by trimming vegetation that is within the utility's easement, and is more likely to be liable for injuring or killing a tree that is rooted on private property if the utility cuts a part of the tree's trunk inside the easement. If a dispute arises involving the factual scenarios presented by Representative Sumner under existing law, a court will apply binding and persuasive authority to adjudicate liability. In doing so, the court may create precedent that will apply in future cases. If a statute such as HB 227 is enacted, a court will apply the statute to adjudicate liability.

Taking of private property.

Representative Sumner's second question is whether a law providing immunity to a utility for damaging or killing a tree rooted on private land could be a taking of private property. The short answer is possibly, but only under some circumstances.

Article I, sec. 18 of the Constitution of the State of Alaska, titled "Eminent Domain," provides: "Private property shall not be taken or damaged for public use without just compensation." The Alaska Supreme Court has explained that "[e]minent domain is 'the right of a government to take and appropriate private property to public use[] whenever the public exigency requires it; which can be done only on condition of providing a reasonable compensation therefor.'"<sup>11</sup> This is distinct from the state's exercise of "police power" to enact and enforce laws, which ordinarily does not require compensation.<sup>12</sup>

However, while "[t]he distinction between eminent domain and the state's police power is well established legal doctrine, . . . [w]here one ends and the other begins . . . may be difficult to define."<sup>13</sup> Alaska has a "broad, flexible approach to takings jurisprudence,"<sup>14</sup>

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<sup>10</sup> *Id.* The statute also limits recovery to actual damages in circumstances "where the timber was taken from unenclosed woodland for the purpose of repairing a public highway or bridge on or adjoining the land." *Id.*

<sup>11</sup> *Brewer v. State*, 341 P.3d 1107, 1115 (Alaska 2014) (second alteration in original) (quoting *Wernberg v. State*, 516 P.2d 1191, 1195 (Alaska 1973)).

<sup>12</sup> *See Waiste v. State*, 10 P.3d 1141, 1154-55 (Alaska 2000). "Police power" has been "loosely described as the power of the sovereign to prevent persons under its jurisdiction from conducting themselves or using their property to the detriment of the general welfare." 1 *Nichols on Eminent Domain* § 1.42 (2024).

<sup>13</sup> *Brewer*, 341 P.3d at 1115.

and using this approach, the Alaska Supreme Court has required compensation in some circumstances even when the state exercises its police power instead of its eminent domain power.<sup>15</sup> For example, in *Brewer v. State*, the Court held that a claim by landowners for compensation for damage from firefighting efforts could proceed, even though "[f]irefighting is undoubtedly an exercise of the State's police power."<sup>16</sup>

A court is more likely to consider a law providing immunity to a utility for damaging or killing a tree rooted on private land as an exercise of the state's police power, not the power of eminent domain to take private property for public use. No property is taken for public use under such a law; instead, the law is mediating rights between private parties. Still, the determination of whether compensation is due will depend on the specific facts and circumstances surrounding what the law permits and how the law is implemented.<sup>17</sup> If a law provides immunity to a utility for damaging or killing a tree that is at least in part within a utility's easement, without allowing the government to trespass onto private land, it is less likely to require compensation, even if the tree could be considered owned by both the utility and the neighboring landowner. On the other hand, a court is more likely to require compensation if a law provides immunity to a utility for trespassing on private land and damaging or killing trees located entirely on that private land.<sup>18</sup>

Please let me know if I may be of further assistance.

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<sup>14</sup> *Waiste*, 10 P.3d at 1154.

<sup>15</sup> *Brewer*, 341 P.3d at 1115.

<sup>16</sup> *Id.*

<sup>17</sup> A court might analyze this question as a regulatory taking and conduct a "case-specific analysis" that "consider[s] four factors: (1) the character of the governmental action; (2) its economic impact; (3) its interference with reasonable investment-backed expectations; and (4) the legitimacy of the interest advanced by the regulation or land-use decision." *R & Y, Inc. v. Municipality of Anchorage*, 34 P.3d 289, 293 (Alaska 2001).

<sup>18</sup> Despite this possibility, it is not clear how the state would become a proper party under these circumstances. There is no government action when the utility damages the tree, so while the private landowner may be able to sue the utility and argue that such a law is unconstitutional, it is less clear what basis the landowner would have to sue the state for compensation. In a lawsuit against the utility, a court might analyze whether the law violates "due process or equal protection" due to the lack of "a rational basis . . . for the police power exercised." *Autotronic Sys., Inc. v. City of Coeur D'Alene*, 527 F.2d 106, 108 (9th Cir. 1975). "A law survives rational basis review 'so long as it bears a rational relation to some legitimate end.'" *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1278 (9th Cir. 2017) (quoting *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 543 (9th Cir. 2004)).