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ELECTRIC COMPANY TREE TRIMMING AND PROPERTY LAW

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PA 13-298

This act expands the ability of electric companies to trim or remove trees near their lines. It allows the companies to trim or remove hazardous trees without notifying the adjoining property owner under some circumstances.

QUESTIONS

What is the law on electric companies' rights relative to private property with regard to tree trimming? Does United Illuminating (UI) have legal authority to bill a customer for subsequent work if the customer refuses to allow it to remove a tree; if so what is this authority? If the trimming reduces the property value, is this a taking? If not, can the customer seek reimbursement from UI for the diminution of value? Which state agency oversees tree removal contractors?

The Office of Legislative Research is not authorized to provide legal opinions and this report should not be considered one.

SUMMARY

CGS § 16-234, as amended by PA 13-298, specifies when an electric or telecommunications companies can (1) trim or remove trees, both within the tree belt and on private property, to ensure the reliability of its service or (2) relocate its lines. The law generally requires the company to notify adjoining property owners. The property owner can object, with the Public Utilities Regulatory Authority (PURA) making the final decision in most cases. However, the law allows an electric company to trim or remove a tree, under certain circumstances, without notifying the property owner. It is not clear how these provisions relate to CGS § 52-560, which subjects anyone who cuts trees standing on another person's land without the owner's consent to damages.

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Neither the law nor PURA decisions appear to allow the company to bill the property owner for subsequent work if the owner initially refused to permit the trimming or removal. The issue was raised in a recent PURA decision, but PURA did not issue orders to permit such billing.

Neither the statutes, the legislative history of PA 13-298, nor PURA decisions address whether (1) there is a taking if trimming or removing a tree by an electric company reduces the value of the property or (2) the affected customer can seek reimbursement from the electric company. We have found little relevant Connecticut case law on these issues. While it did not address the issue of utility tree-trimming, the U.S. Supreme Court has held that regulatory takings resulting from a government's use of its police powers are only compensable when the government cannot show some social justification for its actions *(Lingle v. Chevron U.S.A. Inc.* 544 U.S. 528 (2005)).

CGS § 23-61b requires anyone seeking to contract to do arboriculture in the state to obtain a license from the Department of Energy and Environmental Protection. CGS § 23-61a defines arboriculture to include any work done for hire to improve the condition of shade, ornamental, or fruit trees by pruning, trimming, or other methods to improve a tree's conditions. A license is not required to do work on one's own property or that of one's employer.

LAW ON COMPANY TREE TRIMMING

Legislation

Prior to this year, CGS § 16-234 required the consent of the adjoining property owner if an electric or telephone company wished to trim a tree on or overhanging a highway or public ground. (Utility lines are often located in the tree belt adjoining streets and roads, which is typically part of the right-of-way.) If a property owner withheld consent, the company could appeal to PURA, which could approve the trimming if it found that the public convenience and necessity required this. PURA was required to notify the property owner and hold a hearing.

PA 13-298 expands the ability of electric and telecommunication companies to trim or remove trees near their lines. It allows the companies to trim or remove trees in the "utility protection zone" to secure the reliability of company services by protecting wires and other company infrastructure from trees and other vegetation in the zone. Under the act, the zone is the area extending eight feet horizontally each way from the outermost company line and vertically from the ground to the

sky. In many cases, this zone includes both the tree belt (the area near the roadway where company poles are typically located and which normally is part of the right of way of the road) and adjoining private property.

The act modifies the provisions of prior law requiring companies to notify abutting property owners of tree trimming. Under the law, as amended by the act, companies generally may not prune or remove any tree or shrub within the utility protection zone, or on or overhanging any highway or public ground, without notifying the abutting property owner. The property owner may file an objection to the pruning or removal with the company and either the municipal tree warden or the Department of Transportation (DOT), as appropriate, not later than ten business days after delivery of the notice. (The act implies that the objection is filed with DOT if the tree is on or overhangs a state road.) The objection may include a request for consultation with the tree warden or the DOT commissioner, as appropriate. The tree warden or DOT commissioner, as appropriate, must issue a written decision within ten business days after the filing date of the objection. This decision may not be issued before a consultation with the property owner, if requested.

The property owner or the company may appeal the tree warden's decision to PURA within ten business days after the decision. (The law does not appear to provide for appeals from the DOT commissioner's decision.) PURA must hold a hearing within 60 business days of receiving the appeal and must notify the abutting property owner, the tree warden, and the company of the hearing. PURA may authorize the pruning or removal of the tree or shrub if it finds that public convenience and necessity require this action.

The act eliminates the notice requirement if a tree warden or DOT gives the company written authorization to prune or remove a hazardous tree (1) within the company protection zone or (2) on or overhanging any public highway or public ground. A "hazardous tree" is all or part of a tree that is (1) dead; (2) extensively decayed; or (3) structurally weak and that would endanger company infrastructure, facilities, or equipment if it fell. A company is also not required to provide notice to prune or remove a tree if any part of it directly contacts a live electric line or has visible signs of burning.

The tree trimming and removal provisions of PA 13-298 were added by House Amendment "A," and there was no testimony on the questions you raised at the public hearing. In the House debate on PA 13-298, the act's tree provisions were only mentioned in passing. In the Senate debate, there was a somewhat longer discussion about the notice requirements for tree trimming. Neither chamber addressed the questions you raised.

The remaining provisions of CGS § 16-234,which were not amended by PA 13-298, require a company to obtain the consent of adjoining property owners when erecting or relocating wires or other infrastructure over, on , or under streets or public grounds. If the property owner does not consent, PURA can approve the erection or relocation after notifying the owners and holding a hearing.

It is not clear to what extent the above provisions supersede CGS § 52-560, which subjects anyone who cuts any tree standing on another person's land without the owner's consent to damages. The law subjects person cutting the trees to damages equal to three times the value of the tree (five times in the case of Christmas trees). If the court finds that the defendant was guilty through mistake and believed that a tree was growing on his or her land or on the land of the person for whom he or she cut the tree, it must render judgment for no more than the tree's reasonable value.

PURA Decisions

UI presented PURA with new proposed distribution line clearance specifications in its last rate case (Docket 13-01-19), which was adjudicated after the adoption of PA 13-298. The specifications call for creating an eight-foot side clearance from the ground to sky and retaining low height or ornamental trees within the zone or those planted under the company's Right Tree – Right Place program. Additionally, UI will identify and remove whole or parts of hazardous trees outside of the zone that could fall causing damage to company infrastructure, facilities, or equipment. UI proposed spending slightly under $100 million on its enhanced tree trimming program over four years.

According to the decision, the opinions of many stakeholders led PURA to agree with the overall magnitude of the program, as defined by the proposed new clearance standards. The new standards adopted in the decision will produce a ground-to-sky clear zone within eight feet of a distribution line. However, PURA expressed concerns about the program's cost-effectiveness and required that the spending be spread over eight, rather than four years (i.e., $12.5 million per year, compared to $5.0 million in 2011). It also directed UI to develop and submit to the

PURA for review, a more carefully considered, optimized plan for the program before UI is allowed to begin the program that is now scheduled for 2014. The plan must specifically address how the work is being packaged and prioritized.

In response, UI developed a Vegetation Management Plan, which it published on November 1, 2013. In the plan, UI proposes to (1) prioritize the worst performing electric circuits based on vegetation-related outage rates and (2) incorporate state and municipal priorities as to where the program will focus. The plan also calls for making adjustments to the program to (1) accommodate excessive vegetation growth based on the timing of the previous trimming cycle and (2) meet yearly budget targets. Under the plan, UI will also consider on a case-by-case basis performing stump grinding and replanting site-appropriate trees when this is in the public interest.

PURA docket 12-01-10 addresses a wide range of tree trimming issues for both electric and telecommunications companies. As part of this docket, Connecticut Light & Power (CL&P) noted that PA 13-298 did not specifically address tree owner responsibility and liability for trees that cause damage to the company's facilities. The company argued that public and private tree owners should be (1) responsible for maintaining their trees within the right of way and (2) held responsible for resulting claims should their successful objection to line clearance work result in tree failure and damage. PURA noted that placing greater responsibility on private property owners with regard to the trees on their property would lead to improved reliability, safer roads, less cleanup costs, and faster restoration. But it stated that the legislature should address this issue and declined to issue any orders on this point. The docket did not address the issue of whether trimming may constitute a taking or whether a property owner is due any compensation for a loss of property value attributable to trimming.

Case Law

Connecticut. There is little case law on utility tree trimming arising from CGS § 16-234 and we have found no cases dealing with your questions. Most of the cases, such as *City of New Haven v. United Illuminating Co.,* 168 Conn. 478 (1975) dealt with the infrastructure provisions of CGS § 16-234, rather than its tree-trimming provisions. We found only one reported case that dealt with the section's provisions regarding trees, *Bradley v. Southern New England Tel. Co.,* 92 Conn. 633 (1895). In this case the Connecticut Supreme Court found that the adoption of legislation giving selectmen control over the placement of telephone lines did not implicitly

repeal the predecessor of CGS § 16-234 and related statutes that at that time required the consent of adjoining property owners before a company could trim trees overhanging a highway.

In an unreported Superior Court case from 2009, homeowners with a transmission line easement on their property sued CL&P, alleging that the company performed work that "overburdened" the easement. The work included, among other things, cutting down trees and shrubbery and building electrical towers that were substantially larger than the previous ones. The plaintiffs sought relief under several theories, including trespass, private nuisance, inverse condemnation, and takings.

CL&P moved for summary judgment on various counts of the complaint. The court granted the company's motion regarding the plaintiffs' inverse condemnation claims. The court held that the plaintiffs could not succeed on these claims, because "the plaintiffs have neither alleged nor offered any evidence indicating that their use or enjoyment of their property has been abridged or destroyed to a substantial or sufficient degree to be confiscatory." The court denied CL&P's motion for summary judgment on certain other claims (*Passariello v. Connecticut Light & Power Co*, 2009 WL 1141184 (Conn.Super.), 47 Conn. L. Rptr. 520 (209)).

We also found several relevant cases based on CGS Sec. § 52-560. The Connecticut Supreme Court has held that cutting a tree on another's property without the owner's permission creates a cause of action for trespass. It stated that in cases where trees have "peculiar" value as shade or ornamental trees, damages must be calculated as the reduction in the pecuniary value of the land where the trees are located (*Hoyt v. Southern New England Telephone Co.,* 60 Conn 385 (1893)). In *Maldanado v. Connecticut Light & Power,* 31 Conn. Sup. 536 (1974), the court stated that this common-law rule had been embodied in CGS § 52-560. This case addressed a situation where a CL&P contractor cut the plaintiff's large maple tree under the mistaken impression that it had permission to do so (the property's former owners had given their consent and the contractor was unaware that the property had been sold before it cut the tree). The decision dealt with the valuation of the tree and held the cost of replacing a tree cannot be considered as a measure of its reasonable value. Instead, following *Whitman Hotel Corporation v. Elliott & Watrous Engineering Co.,* 137 Conn. 562 (1951), the court held that the appropriate measure of damages is the diminution of the plaintiff's property caused by the defendant's tort. Similarly, the Appellate Court held that the reasonable value of cut trees is either the (1) market value of the tree once severed from the soil or (2) diminution of the market value of the real estate caused by the cutting *Hardie v. Mistriel*, 133 Conn. App. 572 (2012).

Other States. The issue of a utility's liability for damages for its tree-trimming activities has been addressed in other states. Many of these cases are discussed in F.M. English, "Liability of public utility to abutting owner for destruction or injury of trees in or near highway or street" 64 A.L.R.2d (1956). The article notes that most of the cases it describes found that an abutting owner has a sufficient proprietary interest in the trees to recover damages for their unlawful cutting, even if they are located on a right-of-way owned by the government, on the theory of trespass. But it also notes that when a utility has received authorization from the government to cut trees within a roadway under its jurisdiction, the utility company will not ordinarily incur liability, so long as the cutting does not exceed that reasonably necessary to install or operate its facilities and the governmental unit was acting within its authority in granting such permission. Most of these cases were decided in the late 19th or early 20th century.

A more recent pertinent case is *Miller-Lagro v. Northern States Power Company*, 582 N.W.2d 550 (1998). In this case, Northern States Power Company (NSP) and its contractor, Asplundh Tree Company, cut down several trees located on the city right-of-way between the lot owned by the Miller-Largo household and the paved roadway, notwithstanding the fact that Mr. Lagro did not sign the permission form and instead directed the companies to only trim what is necessary and not cut down any trees. Asplundh Tree Company initially trimmed the trees but later cut them down after authorization from a tenant at the residence.

The Lagros sued NSP and Asplundh, but the trial court rejected their claim finding that the trees were located on city land rather than the Lagros' property. The Lagros appealed and NSP and Asplundh moved for summary judgment based on the Lagros' lack of standing because the trees removed were not on their property. The court granted NSP's and Asplundh's motion for summary judgment, interpreting Minn.Stat. § 561.04 as creating a cause of action only to the owner of the property where trees are trimmed without permission. On appeal, the state appellate and supreme courts held that the law recognized a landowner's rights in trees on public rights-of-way abutting his or her property, and thus Lagros had standing to sue. The Supreme Court also noted that the landowner's rights had been recognized in 10A *McQuillen, The Law of Municipal Corporations*, §§ 30.66–.68 (3d ed.1990), which states that "even if the abutting owners do not own the fee of the street, they have a right in the nature of an easement to grow and maintain a shade tree in the street in front of their premises, and may maintain an action against a wrongdoer for injuring the tree, or removing it." But, the Supreme Court held the Lagros' common law interest in the trees that stood on city land in front of

their property is subordinate to the right of the municipality, exercised by NSP in its company line maintenance function pursuant to state and local law, to trim or cut the Lagros' trees in the performance of its public works.

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