

Roadside Tree & Brush Maintenance

PRIMEX³ RISK MANAGEMENT BULLETIN

Municipal road agents and highway departments maintain highway rights-of-way which include responsibility for trees and roadside growth.

The primary laws governing this function (RSA 231:139 -158) are not easily understood, as their language is largely a vestige of horse and buggy days, and the legal requirements are affected by tradition. For example, RSA 231:139 –144 deals with appointment of tree wardens and their role in the acquisition, control, and removal of shade/ornamental trees. In many municipalities these functions are now carried out by public works or highway departments. This Primex³ bulletin provides some guidance in applying these laws in the 21st century.

Acquisition of Shade/Ornamental Trees:

Municipalities may acquire shade and ornamental trees for public places, including highway rights-of way (RSA 31:51; RSA 231:143). To avoid uncertainty as to responsibility and authority to maintain, trim, or remove trees, records should be kept indicating whether the municipality or a landowner acquired or planted a tree, and to the extent feasible, whether the tree is located on public or private property or within a public right of way.

Generally speaking, municipalities may under certain circumstances have a duty to maintain publicly owned trees. A landowner may request permission to cut or remove a public tree (RSA 231:144). In addition, RSA 31:52 allows abutters to plant and protect trees between the sidewalk and street, if they do not interfere with public travel.

Removal of Hazardous Trees on Private Property:

The statutes are less clear as to municipal duty to maintain private trees within or abutting a highway right-of-way; however, under RSA 231:145 - 146, a municipality does have the power to remove trees which are “declared” to be “hazardous” because they may pose a danger to the traveling public or may spread disease. The municipality may remove such a tree at no cost to the abutter on whose property the tree is located, but only after notice to that abutter by registered mail. The abutter may appeal a hazardous declaration to Superior Court within 30 days after notice. Once the appeal period expires or if the landowner waives an appeal, the landowner is relieved of responsibility or liability in connection with the hazardous tree or any responsibility for the remaining stump.

If this hazardous tree statute is utilized, the municipality should be prepared to take action promptly if an appeal is waived or not taken within the 30-day period. Also, the municipality should make arrangements to address how the stump will be handled. In a situation where a tree poses an “imminent” threat to public safety or property, action can be taken without a “declaration” and a 30 day notice, but an attempt should be made to contact the landowner before acting if possible.

These procedures are not required when the tree is a “public” shade or ornamental tree, meaning one which the municipality has acquired or planted with the right to do so. These statutes are not intended to address tree trimming by public utilities which are governed by other statutes. Special procedures for tree maintenance within scenic roads are dealt with in RSA 231:157 and 158.



Ownership of Trees and Wood:

Statutes and Common Law: Pursuant to RSA 231:149, the public owns a shade or ornamental tree which is planted within the limits of a public highway by the tree wardens or persons with the municipal governing body's approval. Procedures are also specified for taking title to any seedling which is deemed valuable as a future shade tree.

In addition, RSA 231:150 allows municipalities, annually and at other times when deemed "advisable," to remove trees and bushes that may cause damage or pose a safety hazard to the highway. No tree with a circumference greater than 15 inches at a height of 4 feet may be removed without following the procedures for notice to abutters which are required in the case of "hazardous" trees, except in the case of imminent threat. Shade and fruit trees marked by an abutter, or by the tree wardens, and young trees which are a "proper" distance from the highway and from each other are to be preserved. Lastly, banks and hedges that protect the highway or add to its beauty must also be preserved.

Overlaying this statutory law is a veneer which arises from property law and the nature of rights a municipality obtains in a road. In the usual situation, a municipality "owns" only an easement for the road. In this case, the abutting landowner owns the "fee interest" in the road to the center line and also owns any trees within the right-of-way. The municipality's easement, however, will allow it to remove or trim trees where the trees might interfere with the use of the road for travel, unless there are restrictions in the easement. Any cut timber belongs to the abutting owner; but the owner usually has no recourse to prevent tree trimming or removal. The procedures of the statutes discussed above should also be followed.

If, however, the municipality owns the "fee interest" in the property underlying the road, then unless the road deed was restricted or limited in some way, the municipality owns not only the surface of the road, but also the land beneath it and the trees upon it. In this situation, abutters have no claims to the trees. However, a municipality is well advised to notify abutters in advance of the nature and scope of a tree maintenance project and to take their concerns into consideration.

Summary and Sources of Liability:

Municipalities may under certain circumstances be subject to liability for not taking action to protect the traveling public or for taking action which might interfere with an abutter's rights. To assist in treading the line between these two potential liability sources, municipalities should consider adopting a policy and establishing standard tree maintenance procedures.

Regardless of the legal status of title to the right-of-way and the effect of that status on the technical legal rights to cut trees and dispose of the resulting cut wood, aggravation and potential litigation may be averted by adopting a policy for research and notification prior to beginning a tree project. An example of such a policy is provided for consideration by Primex³ members, with the understanding that no single procedure is necessarily correct and, that local traditions, procedures, and requirements may necessitate alteration.

A major safeguard against liability and added problems, however, is the adoption and utilization of an appropriate process to govern the procedures for maintaining trees and roadside growth as suggested in the sample policy on page three. For members of the Primex³ Property and Liability Program, your Primex³ coverage agreement may respond on your behalf to claims arising from your negligence.



Safety Tips

Protecting Yourself and Others - Having determined that a tree must be removed, it is vital that it be done safely to protect personnel and others. The job begins with an assessment of the tree to determine what must be done. Consideration of the tree's proximity to wires and utility poles, homes and the roadway may suggest that the municipality contract the job to firms with the expertise and equipment to safely undertake the task at hand. Many municipalities lack cranes and aerial lifts to safely deal with roadside trees.

The assessment phase will also include the identification of other underlying hazards. This would include hazards from the tree canopy like widow-makers, snags, and spears. The development of a felling plan includes identifying escape routes, tree landing areas and wind potential.

Should the municipality decide to undertake the job, then personnel must be properly trained and equipped. According to the New Hampshire Department of Labor (NHDOL), head protection shall be worn by all workers engaged in tree care, and the operator of the chainsaw must be wearing leg chaps, eye and hearing protection. With this job, just like any other that your crews may undertake, an effective emergency action plan should be in place to address access to first aid kits, and emergency communications.

Training should involve both classroom and hands-on components to ensure that proper safe tree felling techniques are practiced. The Primex³ Risk Management Services Department provides hands-on training programs every spring and fall held at various locations across the State. If your employees have not taken advantage of this practical, full-day program, please do so in the future. Registration information for hands-on training is available in advance on the Primex³ website — www.nhprimex.org — under Training Catalog.

— SAMPLE POLICY —

Removal of Timber from Public Road Rights-of-Way

SCOPE:

This policy establishes procedures for removal and trimming of trees adjoining and within public highway rights-of-way, and clarifies and supplements the requirements of RSA 231:139-156, and 231:157 and 158 as they relate to scenic roads.

PROCEDURES:

A. Ownership and Rights:

Whenever the municipality proposes to remove or trim trees or shrubbery adjoining or within a publicly maintained highway right-of-way, the road agent shall first ascertain the nature of the municipality's rights to do so and the ownership rights of the wood and other materials to be removed.

B. Notice to, or Permission of, Landowners; No Imminent Threat:

1. If the municipality owns the fee interest in the right-of-way or if its easement rights clearly include the right to trim and remove the trees or shrubbery involved, the municipality shall notify adjoining landowners, by sending a written description of the project including the dates, areas of work, and, if practical, marking the trees to be removed. The notice shall be sent at least 30 days before the work begins except in the case of imminent threats to public safety, property, or the highway. Landowners shall be advised that they may submit comments on the project to the road agent not later than 20 days after their receipt of the notice. The road agent will consider their comments in determining whether to alter the scope of the project.

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2. If the municipality does not own the fee interest in the right-of-way, or its easement rights do not include the right to trim or remove the trees or shrubbery involved, the road agent shall notify abutting landowners by certified mail not less than 30 days prior to the start of the project in accordance with RSA 231:146. If the owner grants permission to proceed or does not appeal within 30 days, the road agent may proceed with the project, but shall consider any comments or suggestions that may be provided in determining the final scope of the project.

3. Whenever a landowner who has been contacted about a tree or shrubbery maintenance project objects to the scope of the project, the road agent shall review the plans for the project to determine if the landowner's objections can be addressed in a reasonable manner. If the landowner and the road agent are unable to reach an agreement, the matter shall be referred to the selectmen/city council which shall determine the scope of the project.

4. If an owner whose permission is required refuses to grant such permission and appeals to superior court, the project shall be handled as the court rules. If the municipality wishes to proceed in a situation that does not involve imminent threat, the municipality may seek to acquire permission to do the work by eminent domain or as otherwise allowed by law.

C. Imminent Threat:

When a tree poses an imminent threat to the traveling public or by reason of spread of tree disease, RSA 231:145 and 231:146 shall be followed. When small trees and bushes pose a safety hazard to the highway or the traveling public, RSA 231:150 shall be followed.

Disposition of Cut Wood:

Unless the municipality has acquired ownership interests in the cut wood, or unless the adjoining property owner who owns the cut wood has released interests in the wood, the municipality shall allow the owner to remove the cut wood within such time and in such manner as the road agent deems appropriate for the safety and convenience of municipal employees and the traveling public. If the owner does not remove such cut wood in that manner, the road agent, after notice to the owner, may dispose of the wood in a manner approved by the selectmen/city council. If the municipality owns the cut wood or if the owner releases interests therein, the selectmen/city council shall decide on its disposition.

Scenic Roads:

If the proposed work is located on a scenic road, the municipality shall follow the procedures and requirements of RSA 231:157 and 158 in addition to the procedures otherwise required by this policy. *[Insert Local Requirements Here]*

Procedures During and After Tree Maintenance:

The municipality shall erect suitable warning signs during active tree and shrubbery trimming and removal and take reasonable action to remove debris upon completion of the activities. The use of traffic control techniques is advised.

For more information, please contact your Primex³ Risk Management Consultant at 800-698-2364 or email RiskManagement@nhprimex.org.

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