H1849—An Act Relative to the Protection of Trees from Interference by Abutting Property Owners

FACT SHEET
June 8, 2021

SUMMARY OF THE ISSUE AND STATUS OF THE CURRENT LAW

Since the Supreme Judicial Court's 1931 ruling in Michalson v. Nutting[1], Massachusetts common law permits property owners to prune the roots and branches of their neighbors' trees that are encroaching onto their property. This "self-help" remedy is seen as a common-sense alternative to litigation, where trees are causing a nuisance or damage to abutting property. The courts, however, have recently expanded this rule to allow property owners to cut roots and branches of abutting trees even when they are *not* causing a nuisance, without any standard of reasonableness.[2] Thus, developers can cut back roots and branches that are in the way of their construction projects, even if they are not causing a nuisance and are not causing property damage, and even if their excavation and cutting results in the tree's death. This is particularly problematic when a developer builds right up to the property line, potentially taking out half or more of a property line tree's root system. The destruction of mature trees on property lines is particularly onerous when it is done to make room for a large development project, where those trees could otherwise serve to screen the project from the abutting property.

HOW H1849 WOULD CHANGE THE LAW

H1849 would neuter the draconian outcome from the Appeals Court's 2020 decision in *Kirk,* and impose a "reasonableness" standard which would ask property owners to act reasonably when cutting back roots and branches of trees that are encroaching on their property. Specifically, H1849 would amend our current tree statute to institute three principles:

1) A tree that straddles a property boundary at its trunk is presumed to be jointly owned by the owners of the property on which the trunk is located, and said owners shall act reasonably with one another in the cutting, pruning and trimming of the tree and its parts.

2) Any excavation occurring so close to a property line that it is within the applicable zoning setback is presumed to be unreasonable—regardless of any waivers the developer has been granted— when the excavation damages or is likely to damage the tree. The presumption is rebuttable.

3) Property owners who act reasonably when cutting or pruning a tree will be relieved of liability for monetary damages.

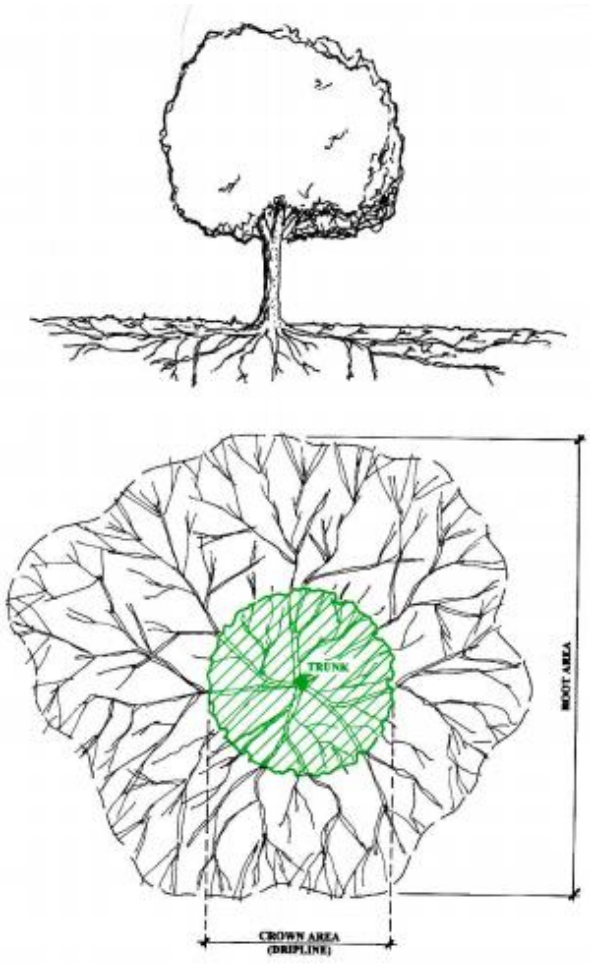
[1] 275 Mass. 232, 234 (1931).
[2] Kirk v. Weston Zoning Bd. of Appeals, 97 Mass. App. Ct. 1107 (2020), *F.A.R. denied*, 486 Mass. 1104 (2020).

There is precedent for adopting a reasonableness standard. It is already the law in states like New York, California, and Ohio.[3]

WHY SETBACKS REQUIREMENTS DURING CONSTRUCTION ARE CRUCIAL FOR TREE VITALITY

FIG. 1—*Diagram of a typical root system and (Matheny and Clark, p. 17)*

Most tree root systems are shallow and expansive, as illustrated in Figure 1. Root systems are often much more extensive than the tree itself and can extend up to 10 times the area of the canopy or crown[4]—meaning that a root system could easily spread into neighboring lots, even if the trunk is confined within a property's boundaries.



ANTICIPATED RESTISTANCE AND REBUTTAL

H1849 would merely instill reasonableness where one property owner wants to trim back roots and branches of his or her neighbor's tree. The bill recognizes that trees are important natural resources that should be valued *especially* when development is proposed that could have adversely affect abutting properties.

Opposition may come from developers who might argue that a neighbor's tree should not thwart an otherwise legitimate development project, such as affordable housing. However, we are not aware of any case where an affordable housing project could not be modified to protect property line trees, without sacrificing the project itself. The tree statute, as recently interpreted by the Appeals Court in *Kirk*, incentivizes commercial real estate developers to build as close to property lines as they may be legally permitted under the applicable zoning scheme. The plaintiffs in *Kirk* and a similar case out

[3] Fliegman v. Rubin, 1 Misc.3d 127A, 781 N.Y.S.2d 624 (N.Y. Sup. Ct. App. Term 2003); Booska v. Patel, 24 Cal.App.4th 1786, 30 Cal.Rptr.2d 241 (1994); Brewer v. Dick Lavy Farms, LLC, 67 N.E.3d 196 (Ohio Ct. App. 2016);

[4] Nelda Matheny and James R. Clark, *Trees and Development: A Technical Guide to Preservation of Trees During Land Development*, (Hagerstown, Indiana: Exponent Publishers, Inc., 1998), 16.

of Brookline in October, 2020[5] specifically asked the trial courts to apply a reasonableness test, but the courts held that the law does not require it.

From an economic standpoint, developers usually benefit in the long run from ensuring that trees survive the construction phase, as mature trees provide a unique aesthetic that adds value to prospective renters and buyers. In fact, developers often find that any increase in expenses associated with tree preservation is ultimately recaptured through higher prices and faster sales.[6]

[5] Trs. of the Winchester House Condo. Trust v. Geller, 28 LCR 480.

[6] Matheny and Clark, *Trees and Development*, 3.