

Trees Within a Highway - Ownership and Rights

By Peter T. Fallis, of the law firm of Fallis, Fallis & McMillan Durham, Ontario
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This has reference to a statement in my article published in the January 1994 issue of *Municipal World* (pages 19 & 20 of this issue of *The Ontario Land Surveyor*) that reads: "*the ownership of trees within road allowances belongs to the nearest adjacent owner.*"

Subsection 312(3) of the *Municipal Act* states as follows:

Every tree upon a highway shall be appurtenant to the land adjacent to the highway and nearest thereto.

Subsection 312(1) of that Act expands the definition of a "tree" by stating as follows:

In this section, "tree" includes a growing tree or shrub planted or left growing on either side of a highway for the purpose of shade or ornament.

Subsection 312(6) of that Act requires the permission of council or its committee or officer before anyone removes, cuts down or injures any tree growing upon a highway, and states as follows:

Except with the authority of the council or a committee or officer thereof appointed as aforesaid [authorized under clause 312(4)(g)], no person shall remove or cut down or injure any tree growing upon a highway.

Clause 312(4)(e) of that Act allows a municipality to pass a by-law to require the removal of any tree planted within a highway that, in the public interest, ought to be removed, provided 10 days notice of the intention to remove such tree is given by the municipality to the owner of the land to which the tree is appurtenant, and that owner shall be recompensed for planting and protecting it, but is not entitled to any further or other compensation. That clause states as follows:

The council of every municipality may pass by-laws ... (e) for causing any tree planted upon a highway to be removed when consid-

ered necessary in the public interest, but the owner of the land to which the tree is appurtenant shall be given ten days notice of the intention of the council to remove such tree and be recompensed for planting and protecting it and, if the owner so desires, is entitled to remove the tree, but is not entitled to any further or other compensation.

With due respect to those readers who have expressed concern with my statement that *every tree within a highway belongs to the nearest adjacent owner*, the above sections do not, in any way, detract from that statement. An "appurtenance" is something that "belongs to" someone. "Belongs to" suggests all "interest therein" to the exclusion of those without an interest. Accordingly, the Legislature has stated that trees within a highway belong to the nearest adjacent landowner.

None of the other sections diminish the adjacent owner's proprietary rights in the highway trees. Subsection 312(6) requires the consent of the municipality to remove any tree, but this does not create title in the municipality. Compare this with a municipality's requirement for a landowner to obtain a demolition permit from the municipality before tearing down a building. The permission requirement does not in any way detract from, or affect ownership in the building, nor in the trees.

If a municipality does not pass a trees by-law under the authority of clause 312(4)(e) of the *Municipal Act*, then the municipality has no authority whatsoever to remove trees upon a highway. If a tree is removed by a third person or the local municipality, the adjacent owner has every right to claim damages from the remover. If the remover is a municipality, the municipality is able to limit its liability to recompensation damages only if it has previously passed a "clause 312(4)(e) authorized by-law." The lum-

ber in any trees that are removed remains the property of the adjacent owner to the highway.

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Subsection 308(6) does not allow a municipality to appropriate title to the timber or trees within the road allowance. It merely provides a regulatory mechanism for preserving and selling trees or timber within original allowances for road. Such regulations could require minimum trunk diameters before cutting, cleanup standards, cutting and/or milling standards, etc. The adjacent owner would still have to be governed by those regulatory terms in his or her continued ownership of the trees.

Unless a municipality, in the public interest, has passed a by-law to permit trees to be removed, it may not remove any tree without the consent of the nearest adjacent owner and would, therefore, be liable in damages if it did remove the trees directly. However, an adjacent owner may not unilaterally, and without the permission of the municipality, remove any such trees, either. This is reinforced in the decision of Mr. Justice Weekes in the *Goudreau* case, cited by W.D. (Rusty) Russell in his article "Who's the Boss?"

Clearly, a municipality can put itself in the driver's seat by passing appropriate legislation, failing which, it runs a very real risk of a claim for damages for unlawful removal of highway trees without the consent of the adjacent owner. In every case, however, the lumber in the trees belongs to the adjacent owner.

