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## GUARDIANS OF MUNICIPAL PUBLIC TREES: COMMONWEALTH OF MASSACHUSETTS TREE WARDENS' AUTHORITY AND ACCOUNTABILITY

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GUARDIANS OF MUNICIPAL PUBLIC TREES:  
COMMONWEALTH OF MASSACHUSETTS TREE WARDENS'  
AUTHORITY AND ACCOUNTABILITY

*Julie E. Steiner\**

*The Commonwealth of Massachusetts has been a pioneer in tree protection legislation. Among other things, Massachusetts enacted the first state legislation requiring a municipal tree warden. As guardians of the municipal landscape, tree wardens decide whether and when to plant new public shade trees, or to permit those that already exist to be cut, trimmed, or removed. Today's tree wardens are continually called upon to strike a balance between preservation of public trees and protection of the public from hazardous tree conditions. This Article describes the important historical role the Commonwealth of Massachusetts has played in protecting public trees, the legal basis for tree warden authority, and attendant liability issues. This Article also addresses the need to amend the Public Shade Tree Act to address current issues in arboriculture and forestry.*

INTRODUCTION

Tree wardens are guardians of municipal public trees. Their decisions have impactful consequences on the character of the municipal landscape. Yet, the wardens' protective focus extends beyond tree preservation. Tree wardens are continually called upon to balance the needs of public tree preservation against the needs of the public to be protected from hazardous or obstructive trees. Tree wardens have the authority to decide when and where to plant new public trees, and whether to allow alteration of the current municipal landscape by permitting trimming, cutting, or outright removal of existing public shade trees.

Properly placed and spaced public trees provide a variety of public health, safety, and welfare benefits.<sup>1</sup> Among other things, they preserve and enhance the character and scenic beauty of the

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1. See generally Dan Burden, Senior Urban Designer, Walkable Communities, Inc., *22 Benefits of Urban Street Trees*, (Summer 2006), <http://www.walkable.org/library/Documents/22benefitsoftrees.pdf> [<https://perma.cc/V5FP-JEML>].

natural environment.<sup>2</sup> Trees are linked to cleaner air and greater protection for pedestrians from damaging ultraviolet rays.<sup>3</sup> Research shows a link between the lack of proximity to trees and certain health effects, such as asthma, childhood obesity, and childhood diabetes.<sup>4</sup> Trees also provide shade, produce oxygen, sequester carbon, and muffle noise.<sup>5</sup>

In Part I, this Article describes the important historical role the Commonwealth of Massachusetts has played in protecting public trees. In Part II, this Article addresses the state legislative basis for the tree wardens' authority. In Part III, this Article discusses municipal liability stemming from tree warden action or inaction. In Part IV, this Article discusses the need to amend the Public Shade Tree Act<sup>6</sup> to align it with modern realities and arboriculture and forestry practices.

## I. HISTORY

The Commonwealth of Massachusetts has long been a vanguard in pioneering tree protection legislation. The earliest legislation protecting public trees originated in Massachusetts. For example, in 1636, Boston enacted an ordinance preventing “trees planted in the settlement from being spoiled.”<sup>7</sup> The first official public shade tree was planted in Massachusetts in 1646.<sup>8</sup> Massachusetts honors another historically significant public shade tree—the “Liberty Tree”—each year on August fourteenth.<sup>9</sup> Since 1886, Massachusetts has commemorated Arbor and Bird Day to

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2. See *id.* at 7, 9.

3. See *id.* at 5–6.

4. See, e.g., Catherine Martineau, *Public Health Benefits of Urban Trees*, CANOPY 1–5 (Feb. 15, 2011) <http://www.canopy.org/wp-content/uploads/Public%20Health%20Benefits%20of%20Trees%20%202-15-11.pdf> [<https://perma.cc/VP9S-NPGG>].

5. See Burden, *supra* note 1.

6. MASS. GEN. LAWS ch. 87, §§ 1–14 (2016).

7. R.M. Ricard, *Tree Wardens and the Evolution of Urban Forestry in New England*, in PROCEEDINGS OF THE 1996 SOCIETY OF AMERICAN FORESTERS CONVENTION: DIVERSE FORESTS, ABUNDANT OPPORTUNITIES, AND EVOLVING REALITIES 80, 81 (1997), <http://clear.uconn.edu/outreach/treewardens/docs/CTTreeWardenLaws.pdf> [<https://perma.cc/7WLC-7LSU>].

8. MASS. GEN. LAWS ch. 6, § 15I (2016) (“The governor shall annually issue a proclamation setting apart August fourteenth as Liberty Tree day commemorating the first public shade tree planting in the new world . . .”).

9. *Id.* The Liberty Tree was planted in Massachusetts in 1765, and grew for a decade until its removal in 1775 by British soldiers. *Id.*

recognize the importance of planting trees, shrubs, and vines.<sup>10</sup>

In 1899, Massachusetts became the first state to enact legislation requiring that every municipality have a tree warden.<sup>11</sup> That legislation, known as the Public Shade Tree Act, vests the tree warden with nearly complete authority over public shade tree care, maintenance, trimming, and removal.<sup>12</sup> This legislation set a precedent that influenced other state legislation.<sup>13</sup> Shortly after Massachusetts enacted its tree warden legislation, the five remaining New England states adopted similar legislation.<sup>14</sup>

Massachusetts is also home to the tree protection organization. The Massachusetts Tree Wardens' and Foresters' Association was founded by Dr. George E. Stone on March 27, 1913.<sup>15</sup> The Massachusetts Tree Wardens' and Foresters' Association was established for the purpose of promoting scientific knowledge in the areas of arboriculture, community forestry, and related fields.<sup>16</sup>

Early tree warden legislation was enacted as a response to policies in the late 18th and early 19th centuries permitting widespread forest clearing.<sup>17</sup> According to Professor Richard M.

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10. MASS. GEN. LAWS ch. 6, § 15 (2016)

The governor shall annually issue a proclamation setting apart the last Friday in April as Arbor and Bird Day, recommending its observance by the public in the planting of trees, shrubs and vines, particularly those attractive to birds, in the promotion of forest growth and culture, [and] in the adornment of public and private grounds, places and ways . . . .

*Id.*

11. Ricard, *supra* note 7, at 81 (“In 1899 Massachusetts passed the first [t]ree [w]arden statute.”). Three key elements contributed to the development of tree warden statutes: the urban parks movement, the Village Improvement Movement, and the Forest Conservation Movement. *Id.* at 82. See generally MASS. GEN. LAWS ch. 87, § 2 (2005) (describing the powers given to tree wardens).

12. MASS. GEN. LAWS ch. 87, §§ 3–5; (2016); *Valvoline Oil Co. v. Inhabitants of Winthrop*, 126 N.E 895 (Mass. 1920) (“The result of the legislation on this subject has been to place practically the entire control of such trees in tree wardens . . . .”).

13. Ricard, *supra* note 7, at 81.

14. *Id.*

15. MASS. TREE WARDENS' & FORESTERS' ASS'N, MASSACHUSETTS TREE WARDENS' & FORESTERS' HANDBOOK 9 (8th ed. 2003); Ricard, *supra* note 7, at 81.

16. *Constitution / Bylaws*, MASS. TREE WARDENS' & FORESTERS' ASS'N., (Jan. 13, 2015), <http://masstreewardens.org/constitution-bylaws/> [https://perma.cc/3F3R-G7GF] (“Purpose: The Association is established for the promotion of scientific tree knowledge and the dissemination of information among those engaged in arboriculture, community forestry and related fields.”).

17. Ricard, *supra* note 7, at 80.

Pushed by conservation leaders, the new laws provided for the protection of public trees, specifically those along streets and rural roads. At this time, the eastern deciduous forest was recovering from clearing and heavy

Ricard, the tree warden's role has evolved over time as a result of a shifting cultural climate and changing municipal landscape conditions.<sup>18</sup> Early after the passage of tree warden legislation, the balance between protection of public trees and protection of the public from hazardous or obstructive trees was easily struck in favor of tree preservation. At that time, population density was low, widespread policies involving land clearing had taken a toll on the municipal landscape, and many trees were either cleared or relatively immature.<sup>19</sup>

However, the subsequent decades resulted in a changing cultural climate and dramatic growth and densification of the existing municipal landscape.<sup>20</sup> The tree wardens' role has evolved from tree conservation towards hazardous tree removal and other tasks unrelated to tree conservation.<sup>21</sup>

Today's tree wardens are still called upon to balance competing interests relating to tree preservation. However, issues relating to protection of the public from well-developed municipal tree canopies, pest control, and invasive and other obstructive growth, creates real-world considerations for tree wardens that may weigh heavily when considering the balance of factors.

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cutting. As a result, the forest was young, often in pole stands, as were trees along streets and rural roads.

*Id.* at 80.

18. *Id.* at 80–81, 84.

Legislated at the turn of the century when cultural and forest conditions were very different from today, they served to conserve public trees well for several decades. But today, dramatically different cultural and forest conditions have forced the Tree Warden into a role that requires tree removal rather than tree conservation.

*Id.* at 84.

19. *Id.* at 80 (“Having been passed in an era when the population density was low, obviously the laws were not designed to address the array of problems associated with extensive road and highway systems and heavy vehicular traffic.”).

20. *Id.*

Today however, the New England landscape is crisscrossed by roads and highways (even in more remote northern regions). Trees along these roads and highways are often over mature, and having suffered from various environmental stress (road salt, air pollution, mechanical injury), are in decline. Often, they are public hazards.

*Id.*

21. *Id.* at 80–81 (“The role of the tree warden has changed. Yesterday the tree wardens' role was to protect the tree from unnecessary pruning, damage, or removal. Today, the tree warden's primary role is to protect the public safety by pruning or removal of the tree.”).

## II. STATUTORY AUTHORITY

In Massachusetts, state law governs tree wardens.<sup>22</sup> Tree wardens may also be governed by municipal law in jurisdictions that have enacted local ordinances.<sup>23</sup>

### A. *The Public Shade Tree Act*

On the state level, tree warden authority derives primarily from the Public Shade Tree Act.<sup>24</sup> As the name suggests, the act controls “public shade trees,” defined as trees situated along a public way, which includes town, city, and country highways.<sup>25</sup> The Public Shade Tree Act applies to all public shade trees, shrubs, and vegetative growths within the municipal boundary except (i) those along state highways and (ii) those in public parks under the jurisdiction of the park commissioners unless the park commissioner grants the tree warden control in writing.<sup>26</sup> If the highway boundaries are unclear because the boundaries between public and private land cannot be made certain by land records or

22. Public Shade Tree Act, MASS. GEN. LAWS ch. 87, §§ 1–14 (2016); Scenic Roads Act, MASS. GEN. LAWS ch. 40, § 15(c) (2016).

23. Because of the substantive variation that exists among municipal regulatory approaches, this Article restricts its focus to state, not municipal, level regulation.

24. MASS. GEN. LAWS ch. 87, §§ 1–14 (2016).

25. *Id.* § 1. See generally F. Sydney Smithers, *Massachusetts Streets and Ways for Surveyors*, CAIN, HIBBARD & MYERS (2011), <http://cainhibbard.com/wp-content/uploads/2011/03/Streets-Ways-May-2011.pdf> [<https://perma.cc/UU58-WZ9A>].

“Public ways” as a generic term includes state highways, county highways, town ways and statutory private ways. Generally speaking an existing way in a city or town in the Commonwealth is not a “public way” - that is, one which a city or town has the duty to maintain free from defects . . . unless it has become public in character by one of three ways: (i) a laying out by public authority in the manner prescribed by statute (for example, M.G.L. c. 82, §§1-32); (ii) prescription; and (iii) prior to 1846, a dedication by the owner to public use, permanent and unequivocal . . . coupled with an express or implied acceptance by the public.

*Id.* at 1. Notwithstanding the broad definition of the generic term “public way,” the Public Shade Tree Law excludes state highways from the jurisdictional scope of “public way” under the authority of the tree warden. See MASS. GEN. LAWS ch. 87 §§ 2, 8 (2016).

26. MASS. GEN. LAWS ch. 87, § 2 (2016).

He shall have the care and control of all public shade trees, shrubs and growths in the town, except those within a state highway, and those in public parks or open places under the jurisdiction of the park commissioners, and shall have care and control of the latter, if so requested in writing by the park commissioners.

*Id.*

monuments, there is a presumption the tree is public.<sup>27</sup>

In Massachusetts, authority over the care, maintenance, trimming, planting and removal of shade trees is vested in the tree wardens, except where city charter, other legislative enactments or town ordinances vest that authority in other public officials.<sup>28</sup> In cities, the tree warden powers and duties are exercised by “the officers charged with the care of shade trees within the limits of the highways.”<sup>29</sup>

Tree wardens are either elected or appointed. By default, the tree warden is an elected position unless the town by vote or bylaw has made it an appointed position.<sup>30</sup> If elected, tree wardens serve for a term of at least one year.<sup>31</sup> If appointed, tree wardens serve for a term of three years.<sup>32</sup>

There is a distinction between appointed tree wardens in towns with populations of less than 10,000 individuals and towns with populations of more than 10,000 individuals. On September 28, 1996, Governor William Weld amended the Public Shade Tree Act to require that tree wardens in towns and cities with populations greater than 10,000 individuals be (i) appointed by the mayor with approval of the city council and (ii) qualified by training and experience in the field of arboriculture and licensed by the Department of Food and Agriculture.<sup>33</sup> Licensure by the Department of Food and Agriculture refers to a pesticide license.<sup>34</sup>

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27. MASS. GEN. LAWS ch. 87, § 1 (2016).

[W]hen it appears in any proceeding in which the ownership of or rights in a tree are material to the issue, that, from length of time or otherwise, the boundaries of the highway cannot be made certain by records or monuments, and that for that reason it is doubtful whether the tree is within the highway, it shall be taken to be within the highway and to be public property until the contrary is shown.

*Id.*

28. MASS. GEN. LAWS ch. 87, §§ 2–7 (2016); *see also* Valvoline Oil Co. v. Inhabitants of Winthrop, 126 N.E. 895, 896 (Mass. 1920).

29. MASS. GEN. LAWS ch. 87, § 13 (2016).

30. MASS. GEN. LAWS ch. 41, § 1 (2016) (“Every town at its annual meeting shall . . . choose by ballot . . . the following town officers . . . [:] A tree warden for the term of one or more years, unless the town by vote or by-law provides that he shall be appointed.”).

31. MASS. GEN. LAWS ch. 41, § 1 (2016).

32. MASS. GEN. LAWS ch. 41, § 106 (2016) (“If the town provides by vote or by-law that the tree warden shall be appointed . . . [t]he term of such appointment shall be for three years.”).

33. MASS. GEN. LAWS ch. 41, § 106 (2016).

34. *See Tree Wardens, Laws*, MASS. TREE WARDENS’ & FORESTERS’ ASS’N.

In municipalities with populations of less than 10,000 individuals, however, appointment is by the board of selectmen and there are no licensure requirements.<sup>35</sup>

Tree wardens carry out a number of specific functions. First, tree wardens are responsible for planting new shade trees for the purpose of improving, protecting, shading, or ornamenting the public way.<sup>36</sup> Cities and towns may appropriate, and tree wardens may spend, money to fund the acquisition and planting of new shade trees.<sup>37</sup> Under the statute, the tree warden or a private organization acting with the written consent of the tree warden, may plant shade trees in either (i) a public way or (ii) on adjoining land within twenty feet of the public way provided that the owner of the adjoining land gives written consent.<sup>38</sup>

Second, tree wardens have the authority to decide whether to permit any manmade alteration to public shade trees. Section 3 of the Public Shade Tree Act states that, with limited exception, no public shade tree shall be cut, trimmed, or removed by anyone other than the tree warden without a permit from the tree warden.<sup>39</sup> This is true even if the individual seeking to alter the tree is the owner in fee.<sup>40</sup>

Third, tree wardens notify the public of, and oversee, public shade tree hearings. Even when a tree warden grants permission to trim, cut, or remove a tree, and subject to limited exceptions, public trees cannot be altered by anyone, including the tree warden, without a public hearing.<sup>41</sup> Thus, the tree warden must make an

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(last visited Apr. 7, 2016), <http://masstreewardens.org/laws/> [<https://perma.cc/92NN-BFEN>] (explaining “licensed by the Department of Food and Agriculture” means a pesticide license). As discussed more fully in Part IV, *infra*, this provision had resulted in confusion about the appropriate level of experience and training necessary and led experts to assemble recommended qualifications for tree wardens based on population served.

35. MASS. GEN. LAWS ch. 41, § 106 (2016).

36. MASS. GEN. LAWS ch. 87, §§ 2, 7 (2016).

37. *Id.* §§ 2, 7.

38. *Id.* § 2.

39. MASS. GEN. LAWS ch. 87, § 3 (2016); *see also* *Medford v. Metro. Dist. Comm’n*, 22 N.E.2d 110, 111 (1939); *Jones v. Inhabitants of Great Barrington*, 174 N.E. 118, 119 (1931).

40. MASS. GEN. LAWS ch. 87, § 3 (2016).

41. *Id.* § 3 (discussing the hearing requirement); MASS. GEN. LAWS ch. 87, §§ 4–5 (2016) (explaining the exceptions, which includes the removal of trees that create dangerous road conditions); *see also* *Jones v. Inhabitants of Great Barrington*, 174 N.E. 118, 120 (273 Mass. 483, 487 (1931)) (“[The tree wardens’] power to remove a public shade tree is somewhat limited and prescribed by the provisions of G. L. c. 87, § 3,



initial determination about whether the situation falls within one of the statutory exceptions to the public shade tree hearing requirements.

There are six exceptions that permit public shade tree alteration without a hearing.<sup>42</sup> First, trees may be trimmed, cut, or removed if they endanger persons traveling on a highway.<sup>43</sup> Second, trees may be removed if so ordered by the proper officers, for the purpose of widening a highway.<sup>44</sup> Third, trees may be trimmed, cut down, or removed for the purpose of suppressing pests declared to be public nuisances under section 11 of chapter 132,<sup>45</sup> including Dutch elm disease.<sup>46</sup> Fourth, tree wardens or their deputies may trim, cut down, or remove trees less than 1.5 inch in diameter as measured one foot from the ground, and any bushes.<sup>47</sup> Fifth, tree wardens or their deputies may, if ordered by the mayor, selectmen, road commissioner or highway surveyor, trim or cut down trees and bushes if they obstruct, hinder, or incommode persons traveling on highways.<sup>48</sup> Sixth, tree wardens or their deputies may, if ordered by the mayor, selectmen, road commissioner or highway surveyor, trim or cut down trees and bushes if they obstruct buildings being moved pursuant to section 18 of chapter 85.<sup>49</sup> As evidenced by the first and fifth exceptions,

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requiring a public hearing before he acts or authorizes action in the matter.”).

42. MASS. GEN. LAWS ch. 87, § 5 (2016) (explicating six exceptions to the public shade tree hearing requirement).

43. *Id.*

44. *Id.* This exception has been narrowly construed by at least one court to mean changing the property boundaries to acquire additional land through eminent domain, and not merely to widen already travelled portions. See *Graham v. Bd. of Pub. Works of Pittsfield*, 189 N.E. 820, 822 (1934) (“It requires the exercise of eminent domain. It is different in nature from a construction of a wider traveled or paved surface within the limits of the highway as already laid out.”); see also MASS. FOREST AND FARMLAND LAW, ENV. MA.-CLE 9-1, § 9.1.3 (2014).

[After *Graham*], [w]idening of a highway was thus seen as different in nature from constructing a wider traveled or paved surface. . . . Because of this decision, the exception for widening the road will apply only if the road officials named in G.L. c. 87, § 5 find that the trees will obstruct, endanger, hinder, or incommode persons traveling on the road after it has been widened or if the right-of-way is to be widened.

*Id.*

45. MASS. GEN. LAWS ch. 87, § 5 (2016); see MASS. GEN. LAWS ch. 132, § 11 (2016).

46. MASS. GEN. LAWS ch. 87, § 5 (2016).

47. *Id.*

48. *Id.*

49. *Id.*; see also MASS. GEN. LAWS ch. 85, § 18 (2016).

there is a difference between trees that are dangerous to persons that may be removed without a hearing, and trees that are inconvenient to travelers that may only be removed without a hearing if the warden is ordered to do so by a designated town official.

If the tree warden decides that the situation does not fall within one of the six exceptions, then a public hearing is required before the tree can be altered. The tree warden is responsible for proper public notice and participation at the hearing.<sup>50</sup> Prior to the hearing, the tree warden must provide effective public notice that apprises the public about the size, type, and location of the shade tree to be cut down or removed, and ensure it is posted (i) in two or more public places in the town, (ii) upon the tree at least seven days before the hearing, and (iii) in a town newspaper of general circulation in each of two successive weeks, the first publication at least seven days before the date of the hearing.<sup>51</sup> If no such local newspaper exists, then notice must be published in accordance with the provision of section 6 of chapter 4.<sup>52</sup> Note that when a public hearing must be held on a public shade tree that is also on a scenic road, such hearings shall be consolidated into a single public hearing before the tree warden and the planning board, selectmen, or city counsel.<sup>53</sup> This requirement is discussed more fully in Part II.B, *infra*.

The tree wardens' authority is not absolute. If there is a written objection to a tree warden's decision to permit alteration of a public shade tree by any member of the public, a public shade tree cannot be cut down or removed without the selectmen's or mayor's approval.<sup>54</sup> The written objection must be made at or

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Moving of Buildings in a Public Way: No person shall move a building in a public way without written permission from the selectmen or road commissioners, to be granted upon such terms as in their opinion the public safety may require; and the superior court shall have jurisdiction in equity to enforce this section.

*Id.*

50. MASS. GEN. LAWS ch. 87, § 3 (2016).

51. *Id.*

52. *Id.*; see MASS. GEN. LAWS ch. 4, § 6 (2016).

53. MASS. GEN. LAWS ch. 40, § 15(c) (2016).

54. MASS. GEN. LAWS ch. 87, § 4 (2016).

Tree wardens shall not cut down or remove or grant a permit for the cutting down or removal of a public shade tree if, at or before a public hearing as provided in the preceding section, objection in writing is made by one or more persons, unless such cutting or removal or permit to cut or

before the public hearing.<sup>55</sup>

Fourth, tree wardens routinely communicate with and oversee utilities, which need to ensure adequate safety, access, and maintenance of utility wires along public roads. In 2011, Governor Deval Patrick approved an amendment to the Public Shade Tree Act designed to streamline the process for approving tree maintenance and removal work and to facilitate enhanced lines of communication between electric utilities and tree wardens.<sup>56</sup>

Pursuant to section 14, the utility may, or the tree warden might require the utility to, submit two documents: (1) an annual vegetation management plan describing the proposed maintenance work to be performed,<sup>57</sup> and (2) an annual hazardous tree removal plan describing hazardous trees to be removed.<sup>58</sup> Approval of these plans exempts the utility from the statutory public hearing requirements.<sup>59</sup> The utility submits the plan no later than ninety days before the proposed work begins, and the tree warden notifies the utility within sixty days whether or not the plan has been approved.<sup>60</sup> The tree warden may approve the plan with modifications agreed to by both parties.<sup>61</sup> If a tree warden fails to approve or deny the plans within sixty days from receipt, “the utility may request a decision from the selectmen, mayor, or chief administrative officer of the municipality.”<sup>62</sup>

Utilities must always notify a tree warden in writing no less than fourteen days prior to maintenance or removal work, or such longer period if required by local ordinance or regulation, irrespective of whether the work is conducted in accordance with an approved plan.<sup>63</sup> Utilities must also submit a copy of any

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remove is approved by the selectmen or by the mayor.

*Id.*; see also *Medford v. Metro. Dist. Comm’n*, 22 N.E.2d 110, 111 (Mass. 1939).

55. MASS. GEN. LAWS ch. 87, § 4 (2016).

56. MASS. GEN. LAWS ch. 87, § 14 (2016).

57. MASS. GEN. LAWS ch. 87, § 14(b) (2016). The plan must comply with applicable local ordinances and regulations and at a minimum include a map of the circuits where the maintenance work will be performed and identify the tree maintenance standards to be followed. *Id.*

58. MASS. GEN. LAWS ch. 87, § 14(c) (2016). The plan must comply with applicable local ordinances and regulations and at a minimum identify the hazardous trees proposed for removal. *Id.*

59. MASS. GEN. LAWS ch. 87, § 14(b) (2016).

60. *Id.*

61. *Id.*

62. MASS. GEN. LAWS ch. 87, § 14(d) (2016).

63. MASS. GEN. LAWS ch. 87, § 14(e) (2016). The notice must include the date

vegetation management or hazardous tree removal plans to the state forester or other entity designated by the Secretary of Energy and Environmental Affairs, which shall acknowledge receipt and any determinations about the plan.<sup>64</sup> The utility must also comply with tree maintenance standards and specifications.<sup>65</sup> Fifth, tree wardens have the power to make regulations for public shade tree care and protection.<sup>66</sup> When those regulations are posted in one or more public places and in towns upon approval by the selectmen, those regulations acquire the force and effect of town bylaws.<sup>67</sup> Tree wardens also have statutory authority to appoint and remove deputy tree wardens.<sup>68</sup>

Sixth, tree wardens have the authority to establish fines in amounts not to exceed twenty dollars.<sup>69</sup> There are additional statutory penalties for violations of the Public Shade Tree Act. First, if any person illegally removes or trims a public shade tree not located on a state highway in violation of the act, they can be penalized by a fine of up to five-hundred dollars to the use of the city or town.<sup>70</sup> Second, any person who defaces a public shade tree by placing upon it a notice, sign, advertisement, or other thing, or cuts, paints, or marks a tree for a purpose other than protecting the tree and without a permit, shall be punished by a fine of not more than fifty dollars.<sup>71</sup> Third, trimming, cutting down, or removing a tree, shrub, or growth located on a state highway or any malicious injury, defacement, or destruction of a state highway tree shall be punished by imprisonment of no more than six months, or by a fine of no more than five-hundred dollars to the use of the Commonwealth.<sup>72</sup> Fourth, willful, malicious, or wanton cutting, destruction, or injury of a tree, shrub, or growth of another person,

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on which the work will begin and contact telephone number for the work supervisor.  
*Id.*

64. MASS. GEN. LAWS ch. 87, § 14(f) (2016).

65. MASS. GEN. LAWS ch. 87, § 14 (2016). The standards must conform with American National Standard Institute A-300; American National Standard Institute Z-133; and National Electric Safety Code 218 Tree Trimming and OSHA 29 CFR Part 1910 Line Clearance Tree Trimming Operations, and annually the utility must submit evidence of compliance with these standards. *Id.*

66. *Id.* § 2.

67. *Id.*

68. *Id.*

69. *Id.*

70. MASS. GEN. LAWS ch. 87, §§ 3, 6 (2016).

71. MASS. GEN. LAWS ch. 87, § 9 (2016).

72. MASS. GEN. LAWS ch. 87, § 10 (2016).

shall be punishable by imprisonment of not more than six months or by a fine of not more than five-hundred dollars.<sup>73</sup> Fifth, wanton injury, defacement, or destruction of a shrub, plant, or tree, or an ornamental or utilitarian fixture, in a public way or place of any public enclosure; or negligently or willfully permitting an animal to injure, deface, or destroy such a shrub, plant, tree, or fixture shall be punished by fine of not more than five-hundred dollars in addition to damages to the town or person for their shrub, plant, tree, or fixture.<sup>74</sup> Sixth, negligent or willful injury, defacement, or destruction shall result in liability to the town for all damages to its interest in the shrub, plant, tree, or fixture.<sup>75</sup>

#### B. *The Scenic Roads Act*

The Scenic Roads Act is another statute that applies to public trees. Enacted in 1973, the Scenic Roads Act protects the aesthetic, environmental, and historical values of Massachusetts' rural roads by preserving bordering trees and stone walls.<sup>76</sup> The Scenic Roads Act sets forth a procedure for municipalities to designate roads as scenic.<sup>77</sup> In accordance with the Scenic Roads Act, trees along designated scenic roads shall not be cut or removed without a public hearing except with the prior written consent of the town planning board.<sup>78</sup> In jurisdictions with no planning board, Scenic Roads Act authority lies with the selectmen or city council.<sup>79</sup>

The Scenic Roads Act and the Public Shade Tree Act complement each other, and create overlapping responsibilities for the tree warden and the planning board. Whenever there is a

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73. MASS. GEN. LAWS ch. 87, § 11 (2016).

74. MASS. GEN. LAWS ch. 87, § 12 (2016).

75. *Id.*

76. MASS. GEN. LAWS ch. 40, § 15C (2016).

77. *Id.* ("Upon recommendation or request of the planning board, conservation commission or historical commission of any city or town, such city or town may designate any road in said city or town, other than a numbered route or state highway, as a scenic road . . .").

78. *Id.*

After a road has been designated as a scenic road any . . . work done with respect thereto shall not involve or include the cutting or removal of trees, . . . except with the prior written consent of the planning board, or if there is no planning board, the selectmen of a town, or the city council of a city. . . .

*Id.*

79. *Id.*

proposal to cut or remove public shade trees located on scenic roads, these two responsibilities overlap and state law requires a joint public hearing between the planning board under the Scenic Roads Act and the tree warden under the Public Shade Tree Act.<sup>80</sup> When there is such a consolidated hearing, the tree warden is responsible for providing notice of the joint Scenic Roads Act and Public Shade Tree Act hearing in accordance with Section 3 of the Public Shade Tree Act.<sup>81</sup>

Ideally, the planning board and the tree warden hear public input and then agree about how to respond to the request. Where there is a dispute between the planning board and the tree warden, however, the issue can be submitted for resolution to the selectmen or mayor. These are the same entities with authority over public ways, and with statutory jurisdiction to make a final resolution in the event of a conflict between a member of the public and the tree warden if a written objection is made at or before a hearing.<sup>82</sup>

### III. MUNICIPAL LIABILITY AND ACCOUNTABILITY

The potential exists for municipal liability from certain acts or omissions of tree wardens. The tree warden is a public officer.<sup>83</sup>

First, there is statutory liability for damage to property caused by trimming, cutting, removal or retention of public shade trees. Under the Public Shade Tree Act, “any person injured in his property by the action of the officers in charge of the public shade trees as to the trimming, cutting, removal or retention of any such tree, or as to the amount awarded to him for the same, may recover

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80. MASS. GEN. LAWS ch. 40, § 15C (2016).

[W]hen a public hearing must be held under the provisions of this section and under section three of chapter eighty-seven prior to the cutting or removal of a tree, such hearings shall be consolidated into a single public hearing before the tree warden and the planning board, or if there is no planning board, the selectmen of a town, or the city council of a city.

*Id.*; see also MASS. GEN. LAWS ch. 87, § 3 (2016) (discussing the procedure for notice of joint hearing by the tree warden).

81. MASS. GEN. LAWS ch. 40, § 15C (2016) (“[N]otice of such consolidated public hearing shall be given by the tree warden or his deputy as provided in said section three of chapter eighty-seven.”); see also MASS. GEN. LAWS ch. 87, § 3 (2016) (notice requirements for hearing).

82. See, e.g., MASS. GEN. LAWS ch. 87, § 4 (2016); see also *Boards & Committees, Planning Board, Scenic Roads*, AMHERST, MASS., [amherstma.gov/1253/Scenic-Roads](https://perma.cc/2BGY-6GRB) [https://perma.cc/2BGY-6GRB] (adopting the approach discussed in section four of chapter eighty-seven).

83. *Donahue v. Newburyport*, 98 N.E. 1081, 1082 (Mass. 1912); *Jones v. Great Barrington*, 174 N.E. 118, 119 (Mass. 1930).

the damages . . . sustained . . . from the town under chapter seventy-nine,” relating to compensation in situations of eminent domain.<sup>84</sup>

Second, the town has a duty to keep its highways reasonably safe and convenient for travelers.<sup>85</sup> A failure to do so will result in municipal liability where the town or tree warden had “such means of knowledge as would charge [it] with the duty either of ordering the tree trimmed or removed, or of giving warning or otherwise protecting travelers from injury . . . .”<sup>86</sup> Anything in the state or condition of a highway that renders it unsafe for ordinary travel is a defect or want of repair.<sup>87</sup>

Municipalities are liable to travelers who are injured by trees that are in otherwise sound condition but which, over time, grow onto the highway.<sup>88</sup> Municipalities are also liable to travelers injured by old, decayed or diseased trees.<sup>89</sup> Liability exists because the municipality permitted public shade trees to obstruct and hinder traffic, thereby making the condition of the way defective.<sup>90</sup>

This liability only applies to travelers on a public way.<sup>91</sup> Courts have defined this broadly, holding that it was a jury question whether persons using the highways for travel who stopped momentarily for some other purpose could be found to be travelers

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84. MASS. GEN. LAWS ch. 87, § 3 (2016).

85. *Valvoline Oil Co. v. Inhabitants of Winthrop*, 126 N.E. 895, 897 (Mass. 1920) (“Although a tree warden is the only official who may trim or remove shade trees in a highway, that circumstance does not relieve a city or town from the statutory duty of keeping its highways reasonably safe and convenient for travelers.”).

86. *Id.*

87. *Id.*; see also *Chase v. Lowell*, 24 N.E. 212, 212 (Mass. 1890).

The cases do not go upon the ground that notice to one or more inhabitants of a town constitutes notice to the town, but that such a state of facts may be shown as will warrant an inference that the authorities either knew, or by the exercise of reasonable diligence might have known, of the defect.

*Id.*; *Wright v. Chelsea*, 93 N.E. 840, 842–43 (Mass. 1911).

88. *Valvoline Oil Co.*, 126 N.E. at 897; see also *Wershba v. Lynn*, 86 N.E.2d 511, 513 (Mass. 1949); *Wright*, 93 N.E. at 842–43; *Donahue*, 98 N.E. at 1084.

89. *Valvoline Oil Co.*, 126 N.E. at 897; see also *Nester v. Fall River*, 67 N.E. 248 (Mass. 1903); *Donahue*, 98 N.E. at 1084.

90. *Jones v. Great Barrington*, 174 N.E. 118, 119 (Mass. 1930).

91. *Wershba*, 86 N.E.2d at 513.

[T]he duty imposed on a city or town under these sections is to maintain the highways “so that they may be reasonably safe and convenient for travelers.” Consequently, to recover under the statute a plaintiff must prove that he was a traveler on the way at the time of his injury.

*Id.*

on a highway.<sup>92</sup> Courts, however, find that the injured parties' purpose for being on the highway must in some way be related to the purpose of travel.<sup>93</sup> Thus, courts have held that persons using a highway solely for play,<sup>94</sup> or to take shelter from a storm, were not travelers on a highway.<sup>95</sup>

Third, the town has a duty to keep public shade trees from becoming nuisances, and the failure to do so will result in municipal liability.<sup>96</sup> Because of its title to the land within the limits of the public street, the town owed the public a duty not to maintain a nuisance.<sup>97</sup> A public shade tree may become a nuisance by disease or decay.<sup>98</sup>

Fourth, the town may be liable for trespass.<sup>99</sup> A condition becomes a trespass when it involves a direct invasion of another's property.<sup>100</sup>

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92. See, e.g., *Hunt v. Salem*, 121 Mass. 294 (1876) (discussing how to interpret a person's use status when stopping to look at toys in store window); *Gulline v. Lowell*, 11 N.E. 723 (Mass. 1887) (determining that playful act by child while travelling does not necessarily indicate a lack of due care by the child or his guardian); *Bliss v. South Hadley*, 13 N.E. 352 (Mass. 1887) (holding that stopping to watch boys at play while using the highway for air and exercise constituted an ordinary use of the highway).

93. See, e.g., *Hunt*, 121 Mass. at 296; *Gulline*, 11 N.E. at 726; *Bliss*, 13 N.E. at 354.

94. *Blodgett v. Boston*, 90 Mass. 237, 237 (1864); *Tighe v. Lowell*, 119 Mass. 472, 472 (1876).

95. *Wershba v. Lynn*, 86 N.E.2d 511 (Mass. 1949).

96. *Jones v. Great Barrington*, 174 N.E. 118, 120 (Mass. 1930).

This liability of a town as an owner or in control of real estate does not rest upon the allegations of negligence, and counts one and four do not set out a cause of action. Its liability must rest upon the maintenance by it, upon land within its control, of a decayed and dangerous tree which at any time was likely to fall and for a substantial period of time had been so located as to expose the persons and property of others to the chance of instantaneous injury, and thereby became a "constant menace to the safety of the immediate community, and hence constituted a nuisance . . . . [W]hen direct injury to an individual results, a private action can be sustained for damages suffered."

*Id.*

97. *Wershba*, 86 N.E.2d at 514–15 ("[A] municipality owning or controlling real estate [may] be liable at common law for the consequences of a nuisance maintained thereon"). The town has to own the land in order to maintain an action for an easement. *Id.* at 515.

98. *Jones*, 174 N.E. at 120.

99. *Id.* at 121.

100. See *Id.*; see also *Hennessy v. Boston*, 164 N.E. 470, 471 (Mass. 1929).

The acts which the testimony shows caused substantial injury to the premises of the plaintiff were acts of trespass in so far as they were direct invasions of the property; and they were a nuisance, when not a trespass, because the consequence of them was to deprive the plaintiff of the



## IV. AREAS FOR LEGISLATIVE REFORM

As discussed in Part I, Massachusetts has been an early pioneer in tree protection legislation. Massachusetts led the way in planting, commemorating and protecting public shade trees. Notably, Massachusetts was the first state to legislatively require a municipal tree warden.<sup>101</sup>

During the initial decades after its passage, the Public Shade Tree Act was effective, and its approach aligned with then-existing scientific knowledge, business methods, and tree valuation methodology.<sup>102</sup> There have since been major changes in the composition, size and canopy of the community forest and the way the community interacts with trees.<sup>103</sup> Moreover, there have also been major advances in both tree science and tree care practice.<sup>104</sup>

Notwithstanding these changes, the Public Shade Tree Act has not kept pace with modern day realities and advances in the tree warden and forestry industry.<sup>105</sup> As a result, there is a need for legislative reform to align the Public Shade Tree Act with modern day realities and to keep pace with industry standards and scientific knowledge. The need for legislative reform has been recognized and supported by numerous commentators and members of the legislature, tree warden, and forestry communities.<sup>106</sup>

Certain issues are ripe for legislative amendment. First, the legislature should clarify what authority controls in the event of a conflict between a tree warden under the Public Shade Tree Act and a planning board under the Scenic Roads Act. As discussed in Part II.B, while it makes sense that any irreconcilable conflict between the tree warden and the planning board be submitted to the selectmen or mayor in the same fashion that a written objection to a tree wardens' decision would under section four, that approach

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exclusive right to enjoy the use of her premises free from material disturbance and annoyance.

*Id.*

101. See discussion, *supra* Part I.

102. See *Tree Wardens, Chapter 87 Proposed Revisions*, MASS. TREE WARDENS' & FORESTERS' ASS'N., <http://masstreewardens.org/ch-87-proposed-revisions/> [<https://perma.cc/TV6C-RZJ9>] (last visited Apr. 7, 2016); see also, H.R. 1840, H.D. 390, 189th Gen. Ct. (Mass. 2015) (proposing a bill regulating the powers of tree wardens in Massachusetts).

103. *Tree Wardens*, *supra* note 102.

104. *Id.*

105. *Id.*

106. Legislation supported by the MTWFA is pending before the Massachusetts Legislature. See sources cited *supra* note 102.

to resolving authority conflicts is not expressly set forth in either of the statutes. At present, the potential for a conflict of coextensive statutory authorities under the Public Shade Tree Act and the Scenic Roads Act exists.

Second, the legislature should clarify, as a matter of public and energy policy, whether public shade trees may be cut, trimmed, or removed in order to provide surrounding landowners access to light to support the efficiency of home energy systems such as solar arrays or solar-gain architectural designs. This issue presents a contemporary challenge for tree wardens, who are increasingly called upon to strike a balance between public tree preservation and the solar exposure needs of landowners. In current practice, tree wardens likely take approaches that are idiosyncratic to the particular tree warden, with some wardens permitting alteration on a case-by-case basis and some wardens denying landowners the ability to alter public shade trees for solar efficiency purposes. Whether, and to what extent, tree wardens should be permitting tree alteration in favor of solar exposure involves important public and energy policy questions that are appropriately resolved in the legislative branch.

Third, the legislature should clarify the appropriate level of training and experience for all tree wardens. As discussed in Part II.A, currently there is a requirement that appointed tree wardens in municipalities with populations of over 10,000 individuals “be qualified by training and experience in the field of arboriculture and licensed with the [D]epartment of [F]ood and Agriculture . . . .”<sup>107</sup> However, tree wardens in municipalities with populations of less than 10,000 individuals and elected tree wardens do not have any statutory licensure or experience requirements.<sup>108</sup> The legislature should (i) require a threshold level of experience and licensure requirements and (ii) clarify the experience standards for all tree wardens.<sup>109</sup>

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107. MASS. GEN. LAWS ch. 41, § 106 (2016).

108. *Id.*

109. This confusion led to a 1999 effort by a consortium of arboriculture experts to assemble a set of recommended qualifications for tree wardens based on population served. See *Tree Wardens, Qualifications*, MASS. TREE WARDENS’ & FORESTERS’ ASS’N., <http://masstreewardens.org/qualifications/> [<https://perma.cc/S3YD-6WYL>] (last visited Apr. 7, 2016). Massachusetts House Bill H1840 proposes:

A qualified tree warden shall be defined as a person who has completed a degree in a forestry or natural resource management field, has attained certification from the International Society of Arboriculture or through the Massachusetts Certified Arborist Program of the Massachusetts Arborists

Fourth, a number of tree wardens find the current exception excluding trees of 1.5 inches in diameter measured one foot from the ground from the public shade tree hearing requirement to be unreasonably restrictive. As a result, there have been industry calls to increase the tree diameter exemption to provide greater flexibility for tree wardens to remove small trees and maintain the public landscape.<sup>110</sup>

Finally, where the current legislation is simply outdated, it should be updated to reflect current real-world experience. For example, the statute currently permits recovery for tree damage caused by a horse or other animal.<sup>111</sup> While this approach was certainly understandable in the early 1900s, it is outdated and there is a pending call to amend this section to include recovery for damage by an automobile.<sup>112</sup> Additionally, fine amounts should be updated to more accurately reflect tree values.<sup>113</sup>

#### CONCLUSION

The Commonwealth of Massachusetts has been a pioneer in tree protection legislation. Among other things, Massachusetts enacted the first state legislation requiring a municipal tree warden. As guardians of the municipal landscape, tree wardens decide whether and when to plant new public shade trees, or to permit those that already exist to be cut, trimmed, or removed. Today's tree wardens are continually called upon to strike a balance between preservation of public trees and protection from hazardous tree conditions. In light of the vintage of the well-intentioned but dated Public Shade Tree Act, the legislature should

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Association or other equivalent professional certification or, for communities with less than 10,000 residents, completed a series of Professional Development courses offered by the Massachusetts Tree Wardens and Foresters Association or equivalent training.

H.R. 1840, H.D. 390, 189th Gen. Ct. (Mass. 2015); *see also Tree Wardens*, *supra* note 102.

110. Bill H1840 contains a proposal to increase the size of a tree exempt from the public shade tree hearing requirement from its current 1.5-inch diameter to a 4-inch diameter. H.R. 1840, H.D. 390, 189th Gen. Ct. (Mass. 2015); *see also Tree Wardens*, *supra* note 102.

111. MASS. GEN. LAWS ch. 87 § 12 (2016) (“Whoever . . . negligently or willfully suffers an animal driven by or for him or belonging to him to injure, deface or destroy such shrub, plant, tree or fixture, shall be punished . . .”).

112. H.R. 1840, H.D. 390, 189th Gen. Ct. (Mass. 2015); *see also Tree Wardens*, *supra* note 102.

113. *See* H.R. 1840, H.D. 390, 189TH GEN. CT. (MASS. 2015); *and Tree Wardens*, *supra* note 102 (providing one approach regarding how to update the fine amounts).

amend the act to address current issues and modernize arboriculture and forestry practices.