

INCREASING URBANIZATION LEADS TO CHANGE IN VIRGINIA BOUNDARY LAW

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Prior to 2007 under Virginia common law a landowner was typically limited to self-help when a neighbor's vegetation such as tree roots or branches encroached onto his or her property. The only available remedy was to trim or cut the vegetation to the property line unless the vegetation was proven to be a "noxious" one that caused "sensible injury". "Noxious has been defined as hurtful; offensive; or offensive to the smell." Fancher v. Fagella, 274 Va. 549 (2007). What plant meets the definition of "noxious" is in the eye of the beholder. Would it include poison ivy, kudzu or bamboo? The "noxious" plant standard proved to be unworkable for determining the rights of neighboring landowners. This was not as much of an issue in earlier times with a smaller population that was located in more of an agricultural/ rural setting. Now these issues arise more often with the increase in the number of landowners living closer together in urban and suburban settings. In light of the effects of the changes in population, the Supreme Court of Virginia took the rare step of modifying the Virginia common law in 2007 to shift the rights of landowners and adopted the "Hawaii Rule" which "holds that living trees and plants are ordinarily not nuisances, but can become so when they cause actual harm or pose an imminent danger to adjoining property." Fancher v. Fagella, 274 Va. 549, 554 (2007). Under the "Hawaii Rule" a landowner still has the remedy of self-help to remove the vegetation to the property line, but now it is easier to bring a cause of action for trespass and/or nuisance to seek money damages for injury to the landowner's property or improvements without having to prove the vegetation is "noxious". In some cases a court may also order the neighbor to remove the vegetation to prevent additional damage in the future. Use of the "Hawaii Rule" thus far has been limited to establish liability for property damage and has not been adopted by the courts as a rule to create liability for personal injury. See: Cline v. Dunlora South, 81 Va. Cir. 235 (2010).

*****Legal notes are not legal advice. Because legal problems are factually intensive, the reader must always consult their counsel before acting on any legal matter.***