

Knotweed Case Breaks New Ground

Earlier this year, jurors awarded two homeowners \$186,000 in damages caused in part by a developer's failure to disclose the presence of an invasive plant on their property.

The homeowners had brought a single-family home in a new development in Pepperell. Unbeknownst to them, before their lot was graded, a contractor had alerted the developer to the presence of a five-foot-tall Japanese knotweed plant in fill on the property. The developer understood that the plant was invasive, but knew little more. He instructed the contractor to mix knotweed-contaminated soil with clean loam, which was then spread over the property.

Japanese knotweed, *fallopia japonica*, has been referred to as an "indestructible scourge," "the devil's bamboo" and "demon weed." It earned these unflattering epithets through a variety of bad habits. Its roots can split foundations, walls, and floors, ultimately [jeopardizing structural stability](#). It grows rapidly, up to 6.5 feet tall and 65 feet wide. It can outcompete and [smother native plants](#). And it's notoriously difficult to eradicate: leaving so much as a [quarter-sized piece](#) could allow the plant to regenerate.

The invasive growth was not yet visible when the Trites visited and inspected the property in early spring, but began causing problems shortly after they moved in. At their request, the developer attempted to mechanically remove the plant, which failed. He then suggested the homeowners use a chemical weedkiller, but the homeowners, who had young children, refused.

The homeowners had had their fill. They sued. Following a four-day jury trial, the jury awarded damages against the developer for breaching the implied covenant of good faith and fair dealing in the parties' purchase-and-sale agreement by failing to disclose the knotweed and other defects, and for creating a nuisance. The Trites also won attorney's fees under [G.L. c. 93A](#), which allows fee-shifting and multiple damages for "unfair or deceptive acts or practices in the conduct of any trade or commerce." In his order on the Chapter 93A claims, the Superior Court judge explained that presence of the Japanese knotweed was "unfair," and the developer's nondisclosure was "deceptive."

In the same order, however, the judge declined to award multiple damages, because the developer's infraction was not knowing or willful. He held that "[t]he law and the obligations of a developer with respect to any invasive weed like Japanese knotweed were not so developed to support the conclusion that a developer knew of their obligation to disclose its presence." After this decision, or if public awareness of knotweed and other invasive species increases, future developers may be held to a higher standard.

Public awareness of knotweed may also reduce home value for sellers and complicate prospective buyers' financing. In the United Kingdom, certain mortgage lenders require evidence of a professional treatment plan if knotweed is identified [within seven meters](#) of the subject property. Indemnity insurance for Japanese knotweed may become increasingly common.

Conservation Commissions should also stay informed on Japanese knotweed. Methods of combatting Japanese knotweed continue to develop. While diligent mechanical removal remains the [most effective](#) remedial option at present, the federal government is exploring releasing Japanese insects that feed on knotweed as a potential [bio-management](#) strategy.

In the meantime, developers faced with Japanese knotweed or any other invasive species should ensure they know what they are dealing with. With that information, they can gauge what removal methods, disclosures, or other engineering or legal measures are necessary. Proceeding in disregard of a known risk, as the developer in this case did, may not make the grade.