



Dealing with Nuisance Properties

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The Problem

- ▶ Nuisance Properties:
 - ▶ Are unsightly.
 - ▶ Are unsafe.
 - ▶ Are environmental hazards.
 - ▶ Are detrimental to the property values of others.
 - ▶ Undermine the image of your Town.



The Problem (cont'd)

- ▶ Nuisance properties are also notoriously difficult to deal with:
 - ▶ Owners are frequently unrepresented and are often uncooperative.
 - ▶ The nuisance will change and evolve over time, necessitating continual monitoring.
 - ▶ Eliminating a nuisance does not mean it won't come back.
 - ▶ Securing compliance with enforcement orders can be difficult.
 - ▶ Owners are often unable to pay forfeitures.
 - ▶ It may take years to recover abatement costs.

The Problem (cont'd)

These challenges cannot be eliminated, but with the right tools and strategy, dealing with them can be less painful.

Your Nuisance Toolbox: Warning Letters

- ▶ Almost always the first step.
- ▶ Sometimes required by the applicable ordinance.
- ▶ A good warning letter will:
 - ▶ Describe the nuisance condition.
 - ▶ Identify what the condition violates (i.e., which ordinances).
 - ▶ Set a standard for what cleanup is necessary.
 - ▶ Set a deadline for the cleanup to be completed
 - ▶ Identify penalties for non-compliance.
- ▶ Avoid the “Town is hereby fining you” letter.



Your Nuisance Toolbox: “Consent Decrees”

- ▶ Warning letters may prompt a request from the owner for more time.
- ▶ The request may be made in good faith or in bad faith.
- ▶ If you grant extensions, consider adding teeth through a consent decree agreement.
- ▶ A consent decree agreement:
 - ▶ Gives the owner the requested deadline.
 - ▶ Establishes an agreed-upon scope of cleanup.
 - ▶ Expedites the cleanup process if the deadline is not met by use of waivers.
 - ▶ Includes a stipulated forfeiture and consent to place cleanup costs on tax bill as a special charge.
- ▶ Use these to call the property owner’s bluff.

Your Nuisance Toolbox: Citations

- ▶ Every town should consider adopting citation authority.
- ▶ Citations are sometimes sufficient to convince the owner to clean up.
- ▶ But often times they are not.
- ▶ Citation actions are used to impose financial penalties only. Injunctive relief, abatement orders, etc. are unavailable.
- ▶ Should only be used with the right type of violator.

Your Nuisance Toolbox: Special Inspection Warrants

- ▶ It is sometimes necessary to inspect a nuisance property prior to bringing an enforcement action.
- ▶ Special inspection warrants can be used when the owner does not consent to an inspection.
- ▶ Special inspection warrants can be issued by the circuit court to a “peace officer” upon submittal of an affidavit demonstrating that a warrant is needed for inspection purposes.
- ▶ The information obtained during the inspection can help determine the scope and nature of the violation and can be used in constructing a settlement.

Your Nuisance Toolbox: County Health Department

- ▶ County health departments are responsible for surveillance, investigation, control, and prevention of communicable diseases, other disease prevention, health promotion, and human health hazard control.
- ▶ Often a nuisance property will have problems in the yard, problems with structural conditions, and problems with health hazards within the home.
- ▶ If the nuisance involves conditions inside the home (e.g., mold), the County Health Department may become involved.

Your Nuisance Toolbox: Raze Orders

- ▶ If the nuisance involves the condition of structures, the Town may wish to pursue a raze order.
- ▶ Raze orders are an available remedy if the structure is “old, dilapidated, or out of repair and consequently dangerous, unsafe, unsanitary, or otherwise unfit for human habitation and unreasonable to repair.”
- ▶ Repairs are presumed unreasonable if the cost to repair the structure would exceed 50% of the assessed value of the structure.
- ▶ Raze orders are also available if there has been a cessation of construction of a building for more than two years.

Your Nuisance Toolbox: Raze Orders (cont'd)

- ▶ Before proceeding with a raze order, document the “50% rule.”
 - ▶ Have your inspector conduct an inspection of the property to identify defects. Obtain a special inspection warrant if necessary.
 - ▶ Share the results with a contractor who can provide a cost-to-repair estimate.
 - ▶ Get the assessed value of the structure from your assessor.
 - ▶ Determine whether the repair estimate exceeds 50% of the assessed value.

Your Nuisance Toolbox: Raze Orders (cont'd)

- ▶ There is a detailed statutory process for serving the raze order. Title work is necessary.
- ▶ The raze order should establish a deadline for the razing to occur.
- ▶ The raze order should also order the removal of any personal property or fixtures that would interfere with the raze.
- ▶ Owner has 30 days from service of the order to file for a restraining order or will be “forever barred” from challenging it.
- ▶ The Town may (but does not have to) commence a circuit court action to get an order to comply. Even though optional, I almost always do this.

Your Nuisance Toolbox: Raze Orders (cont'd)

- ▶ When razing a property, the owner remains entitled to the salvage value of any items recovered.
 - ▶ Be clear with your raze contractor that they should bid full price and not discount price based on value of salvage items.
 - ▶ Instead, raze contractor must salvage anything of value and then deduct that value from the full price of the raze.
 - ▶ If there is a surplus, the owner is entitled to it.
 - ▶ If a balance remains, the Town pays the contractor, invoices the owner for it, and places it on the tax bill as a special charge.
 - ▶ Include special terms in your raze contract.

Your Nuisance Toolbox: Common Law Nuisance

- ▶ A Town can initiate a nuisance enforcement lawsuit even without a public nuisance ordinance.
- ▶ “Any person, county, city, village or town may maintain an action to recover damages or to abate a public nuisance from which injuries peculiar to the complainant are suffered, so far as necessary to protect the complainant’s rights and to obtain an injunction to prevent the same.”
- ▶ However, common law claims are harder to prove and will very likely involve fact issues that necessitate a trial.

Your Nuisance Toolbox:

Common Law Nuisance (cont'd)

- ▶ A common law nuisance claim requires proof that the condition “substantially or unduly interferes with the use of a public place or with the activities of an entire community.”
- ▶ The distinction between private nuisance (which a town cannot enforce) and public nuisance (which it can) depends “not on the number of persons injured but the character of the injury and the right impinged upon.”
- ▶ Conduct does not become a public nuisance “merely because it interferes with the use and enjoyment of land by a large number of persons. There must be some interference with a public right.”
- ▶ This is complicated stuff. Don't rely on it. You can do much better with a public nuisance ordinance.

Your Nuisance Toolbox: Public Nuisance Ordinance

- ▶ When a Town has a public nuisance ordinance that legislatively defines what constitutes a public nuisance, a court must apply the ordinance definition rather than the common law definition.
- ▶ This provides an opportunity to enumerate specific conditions that, by definition, constitute public nuisances. This can eliminate issues of fact and the need for trials.
- ▶ Rather than debating “the character of the injury,” the “nature of the right impinged upon,” and whether the condition “substantially or unduly interferes” with others, the court just determines if the prohibited condition is, in fact, present.

Your Nuisance Toolbox: Public Nuisance Ordinance (cont'd)

- ▶ A good public nuisance ordinance will:
 - ▶ Include a general definition of “public nuisance” that is similar to the common law one.
 - ▶ Relying on the general definition is not the preferred approach, but it might be needed to deal with unenumerated nuisances.
 - ▶ Enumerate specific property conditions that constitute public nuisances as a matter of law.
 - ▶ Be written in the disjunctive (“and unlicensed” vs “or unlicensed”).
 - ▶ Include a procedure for notice to the owner prior to enforcement.
 - ▶ Include forfeitures that accrue daily as well as authority for injunctive relief, abatement orders, and other equitable relief.

Your Nuisance Toolbox: Zoning Ordinance

- ▶ Nuisance conditions sometimes also constitute a prohibited land use.
 - ▶ For example, a property with accumulations of junk might meet the definition of “salvage yard” under your zoning ordinance.
 - ▶ These land uses often require conditional use (or special use or special exception) approval. Without that approval, there is a zoning violation.
- ▶ Including a zoning cause of action in your enforcement proceeding can increase the potential forfeiture, thereby increasing the likelihood of compliance.

Your Nuisance Toolbox: Warrant to Abate

- ▶ A “warrant to abate nuisance” is a warrant issued under Chapter 823 of the Wisconsin Statutes.
- ▶ It is a warrant to a “proper officer” authorizing and requiring the officer to abate the nuisance at the expense of the defendant.
- ▶ Defendant gets credit for any salvage value obtained.

Practical Advice

- ▶ Proceed cautiously. Be sure the Town is willing to be involved for the long haul. Nuisance cases are rarely resolved quickly and easily. And abandoning an enforcement mid-process sends the wrong message.
- ▶ Pick your battles. Defendants often claim they are being singled out and will point out all of the other nuisance properties in town.
 - ▶ But that's almost always irrelevant.
 - ▶ “There is no obligation on the part of municipal officials to prosecute all cases in which an individual commits a violation of the municipal ordinance code. This is true notwithstanding . . . that the violation is open and notorious. To hold otherwise would be tantamount to divesting a municipality with the discretion necessary for effective and efficient law enforcement.”

Practical Advice (cont'd)

- ▶ Exhaust your ordinance procedures. Follow the notice requirements in your ordinance.
 - ▶ And as a related matter do not draft your ordinance in a way that sets traps for yourself.
- ▶ Take lots of pictures. Visual evidence is your best evidence. Take many pictures, and take them frequently to confirm the continued existence of the nuisance.
 - ▶ Have the same person take all pictures to simplify trial.

Practical Advice (cont'd)

- ▶ Win on summary judgment.
 - ▶ A court can find the existence of a nuisance on summary judgment if the defendant fails to submit evidentiary materials to place into dispute what your photographs show.
 - ▶ Attempts by defendants to create fact issues in other ways are inadequate.
 - ▶ Towns are not required to provide evidence that the nuisance conditions were present every single day. As long as the evidence gives rise to a single inference – that the junk was continuously present – nothing more is required.
 - ▶ The Town's interpretation of its public nuisance ordinance is entitled to deference.

Practical Advice (cont'd)

- ▶ Seek minimum daily forfeitures. If a court finds that a defendant violated a municipal ordinance, the court must order forfeitures of not less than the minimum daily amount set forth in the ordinance for each day that a violation occurred.
- ▶ Defeat takings claims. A person has no property right in maintaining a nuisance. Therefore, no taking occurs when a nuisance is eliminated.
- ▶ Seek as specific a judgment as possible. Vagueness in judgments will lead to problems. Identify all items to be removed or, even better, identify all items that may remain.
- ▶ Use forfeitures and site inspections strategically to encourage settlement.

QUESTIONS?

