ALL ABOUT NUISANCES

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Overview of Presentation

• Defining a public nuisance
• Police powers in statutory vs. home rule municipalities
• Enforcement mechanisms
• Alternative Remedies
• Specialty nuisances
• Pitfalls of nuisance regulation

What is a Public Nuisance?

• A public nuisance is an unreasonable interference with a right common to the general public.
• The term “nuisance” is derived from an ancient French word meaning “harm”.
• A private nuisance causes injury to a specific individual, and is remedied through a private cause of action.
• "A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard." Village of Euclid v. Ambler Realty, 272 U.S. 365 (1926)

What is a Public Nuisance?

• Key elements: (1) injury must affect the public at large; (2) injury or interference to the public must be substantial and unreasonable (not a mere annoyance).
• List of nuisances has grown historically from obstructions in the public streets and waterways to include: noxious trades, odors, weeds, dilapidated buildings, properties used for criminal activities, junk cars, and barking dogs.

What is a Public Nuisance?

• Through state and local laws, municipalities are able to define what a nuisance is. A nuisance “per se” is an act, occupation, or structure which is a nuisance at all times because it is expressly prohibited or regulated by local ordinance.
• Nuisance is generally a strict liability offense; a person’s intent is immaterial. It is the consequence of the act or activity that matters.
• Nuisances can arise from inaction (not cutting weeds) or action (excessive noise; parking junked vehicles)

Why Do (Should) Municipalities Care about Nuisance Regulation?

• Constituents expect and demand local governments to handle nuisance complaints
• Homeowners’ associations, if available, are effective as a first line of offense
• Diminishment of property values, community appearance; quality of life
Nuisance Enforcement: “I’ve got the power”

- “Police Power”
  - Inherent Power of Government
  - Power to Protect the “Public Health, Safety & Welfare”
  - Village of Euclid v. Ambler Realty Company: Police power
  - C.R.S. 31-15-401 defines general police powers to include:
    - “to declare what is a nuisance and abate the same and to impose fines upon parties who may create or continue nuisances or suffer nuisances to exist…”
    - “to provide for and compel the removal of weeds, brush, and rubbish of all kinds from lots and tracts of land and sidewalks, alleys
  - A presumption of reasonableness attaches to ordinances promulgated under the police power

- Police Power Authority
  - Statutory cities – regulate nuisances within the scope of state law
    - Prior limit on administrative charges
    - Prior lien only for weeds, brush and junk; Gold Vein v. Cripple Creek, 973 P.2d 1286
  - Home rule municipalities – broader authority to regulate nuisances through charter or through general police powers
    - No limit on administrative charges
    - Prior lien on any nuisance abatement

I’ve Got the Power, but Now What?

- Enforcement of nuisances by ordinance
  - Defines nuisances; abatement; penalties
  - Wolfe v. Abbott, 131 P.386; regulation by ordinance to avoid arbitrary enforcement
- Enforcement mechanisms:
  - Civil enforcement through abatement
  - Criminal prosecution, including abatement
  - Summary Abatement= emergency remedy where immediate threat to public safety (obstruction in road)
  - All of the above

Civil Enforcement

- Enforce nuisance violations through civil proceeding
  - Lowers burden of proof from “beyond reasonable doubt” to “preponderance of evidence” standard
  - Expands the type of evidence that can be offered in court; less formal
  - Process may allow for an administrative hearing officer and procedure
  - Civil remedies include injunctions; abatement

Criminal Prosecution

- High burden of proof
- Courts of record allow for up to 1 year in jail and up to $1000 fine per day for each violation
- Judge and prosecutor must be familiar with nuisance laws
- Potentially lengthy process but well established process
- Incentive for compliance

Abatement

- Voluntary abatement – allow violator a certain period of time to remedy the nuisance
  - Most cost effective
- Order of abatement – issued through the civil or criminal proceeding
  - Cost of clean up paid by property owner
  - Lien filed against the property
- Emergency abatement – used in limited circumstances where there is a dangerous condition (fallen tree, street obstruction)
  - No due process or notice to property owner; documentation is therefore critical
Enforcement Procedures

- Be specific in drafting enforcement procedures, including ability to remove and demolish.
- Consider written warnings for voluntary compliance.
- Due process rights of property owners.
- Fifth Amendment of U.S. Constitution: “No person shall... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”
- Written Notice to the property owner is MANDATORY; see C.R.S. Section 31-15-401(1)(c).
- Posting of property (vacant properties).
- Right of entry; consent; administrative search warrant.

Alternative Remedies – Think outside the box

- Volunteer labor assistance.
- Graffiti abatement assistance.
- Referral to public, private or non-profit entities for assistance (social services, veterans groups).
- Licensing or permitting scheme to address potential nuisance conditions and secondary effects: adult businesses, pawn shops, liquor establishments, home occupations.
- Conditional use permits for certain land use activities = junk yards, waste facilities.
- Improvement Districts – address a particular need such as fences, sidewalks.

“Specialty” Nuisances

- Nuisance Properties where criminal activities occur (“drug houses”)
- Foreclosure/ vacant properties.
- Property maintenance codes.
- Properties used for “hoarding”.

Pitfalls of Nuisance Regulation

- Defining the nuisance to avoid ambiguity.
  - List specific nuisances.
- Notice to the property owner.
- Consent to Enter; search warrant.
- Length of time to abate nuisances.
  - Provide for expedited prosecution.
- Availability of jury trials.
- Judge’s discretion in fines; extension of abatement period.
QUESTIONS