NUISANCE COMPLAINTS: THE BANE OF CODE ENFORCEMENT OFFICIALS

By Gilbert P. High

Municipalities regularly receive complaints that a resident's use and enjoyment of his property has been negatively affected by the conduct of his neighbor. For example: "My neighbor has installed a spotlight that is on all night and shines directly into my bedroom." This is generically called a nuisance complaint. Such complaints are the bane of code enforcement officials. Why? Because the official is being asked to intercede in a private dispute – and that is not government's job. But the complaining resident is a tax payer – and, perhaps more importantly, a registered voter, and expects a responsive government. In another instance, the resident may remind the code enforcement official that the municipality has enacted a lighting ordinance prohibiting glare from a light source over a property line. Doesn't the municipality have an obligation to enforce its own ordinances? Or, just as important, might the municipality be in a position to diffuse or resolve a dispute between neighbors before it escalates? The code enforcement official is thus thrust onto the horns of the dilemma created by the complex nature of nuisances.

What is a Nuisance?

A nuisance is intentional and unreasonable, or negligent, reckless or abnormally dangerous conduct that interferes with another person's use or enjoyment of a right or property. A nuisance may be classified as private or public depending on the interest invaded, and it may arise in fact (nuisance per accidens) or by law (nuisance per se). A nuisance in fact is an activity or thing that becomes a nuisance by the manner or circumstances in which it is performed. A nuisance at law is either an activity or thing declared to be a nuisance by a legislative body, or it may be so offensive at all times and under all circumstances, that it is always a nuisance. Thus the code enforcement official must first determine if the complaint involves a private or a public nuisance and, if the latter, whether it is a nuisance in fact or a nuisance at law, because the proof required is quite different.

Virtually all Pennsylvania municipal codes grant power to the governing body to prohibit and remove nuisances. For instance the Board of Supervisors of a Second Class Township is given the authority: "To make regulations to secure the general health of the inhabitants, and to remove and prevent nuisances." The Board of Commissioners of a First Class Township has the right: "To prohibit and remove . . . any noxious or offensive manufacture, art or business, or dangerous structure, or weeds, or any other nuisance whatsoever, on public or private grounds, prejudicial to the public health or safety." The power thus given to municipalities to abate nuisances relates to public nuisances, not to private nuisances. The first reaction of the municipality when getting a call about a nuisance is to determine if it is a public nuisance. If it

isn't, the caller should be advised that the municipality has no power to act, and that the matter should be resolved between the parties. This is easier said than done.

Private or Public?

A private nuisance affects a single individual or a small definite group of persons in the enjoyment of private rights not common to the public. The remedy for a private nuisance lies exclusively with the person whose rights have been disturbed. A private nuisance involves a non-trespassory, unreasonable and significant invasion of another's interest in the private use and enjoyment of land. Some examples would be excessive dog barking; allowing a dead tree to overhang a neighbor's garage; directing a spot light into a neighbor's bedroom; discharging downspouts directly onto a neighbor's property; and allowing invasive weeds or plantings to grow into a neighbor's yard.

A public nuisance is an unreasonable interference with a right common to the general public. It frequently does not involve a public right in the use or enjoyment of land, but may involve the public right to clean air or water, the public right to be free of interference in the use of streets and sidewalks, or the public right to be free from the threat of epidemic or conflagration. An interference with a public right may be found to be unreasonable when the conduct involves a significant interference with the public health, safety and welfare (a nuisance in fact), or the conduct is declared to be a public nuisance by a statute, ordinance or administrative regulation (a nuisance at law) or the conduct is so offensive that it constitutes a nuisance under all circumstances (a nuisance per se). Examples would include the discharge of toxins into a public sewer system; operation of an industrial plant allowing significant dust to be released into the air; accumulations on a property attractive to rats and other vermin; allowing a dead tree to overhang a public street; or the operation of a petting zoo where one of the animals has a communicable disease.

The difference between a public and a private nuisance does not depend upon the nature of the thing done, but upon whether it affects the general public or merely a private individual or individuals. The distinction lies in the nature of the interest invaded. Namely whether the public right or the private interest in the use and enjoyment of land is interfered with.

At one time the creation of a public nuisance was treated as a common law crime. This is no longer true in Pennsylvania. Instead statutes, ordinances and regulations have been enacted pursuant to a municipality's police power to proscribe activity which could create a public nuisance. So long as local ordinances are not arbitrary and have a reasonable relationship to the protection of the public health, safety and general welfare, they will be upheld against a constitutional challenge.

This has resulted in the common practice of municipalities enacting ordinances under their police power which are so broad that they regulate conduct that constitutes a private nuisance. Thus is it now customary for ordinances to prohibit such matters as lights which

produce glare on abutting properties, noise which is above given levels at the property line, the collection and point discharge of water onto abutting property, and the growth of weeds and invasive vegetation on one's property.

These ordinances and regulations have been upheld against a constitutional challenge because courts cede to municipalities broad latitude to exercise their general police power to protect the public safety. Violation of these ordinances creates a nuisance at law which a municipality can abate even though the conduct might only directly affect a single property owner.

There are limits, however. The authority of a municipality to enact an ordinance whose stated purpose is to prevent a nuisance is subject to challenge where the activity regulated is recognized as lawful but nevertheless is banned. Thus local ordinances regulating nuisances must be phrased in such a way as to require the municipality to affirmatively establish that a nuisance in fact exists.

Ordinances that ban junkyards, or prohibit a certain number of dogs and cats kept by one person and/or residence, or which prohibit the storage of large quantities of gasoline have all been declared unconstitutional in the absence of justification within the ordinance for the restriction. As has been long-held in Pennsylvania, what is not an infringement upon public safety and what is not considered to always be a nuisance (nuisance per se) cannot be made one by legislative fiat and then prohibited.

An Official's Dilemma

The code enforcement officer whose dilemma we recognized in the first paragraph thus has an election to make. He can tell the resident that this is a private nuisance because the spotlight affects only one property. The general public is not impacted and the tax dollars of the Township should not be spent to supply a single resident with the office of the Township Solicitor to abate a private nuisance. He could offer to write a letter to the neighbor, advise that a complaint has been received, and ask for the light to be removed, or at least not activated through the night.

What about the ordinance prohibition against glare from lights? The code enforcement official can tell the resident that (with some exceptions as noted below) a municipality is under no duty to abate a nuisance for which it is in no way responsible, although it may be authorized by statute to abate the same. This comes as a shock to most complaining residents. "Why was the ordinance enacted if it wasn't intended to be enforced?", they ask. The answer is that it was enacted to give the Township the power to prevent the activity when the public's rights are affected, as when a spotlight interferes with traffic on the adjacent street or impacts a substantial portion of a neighborhood. It also establishes a standard of care that can be pointed to in a private nuisance action.

If the code enforcement official determines to be more aggressive, after notice to the neighbor and a refusal to remove the nuisance, a complaint before a local district judge can be filed seeking a civil fine for violation of the ordinance. Consider, however, that the cost of doing so to the Township would probably exceed the fine, even though it may be warranted to maintain peace and order between residents.

Clearly it is important for each municipality to establish a consistent enforcement policy for the handling of private and public nuisances lest residents perceive that evenhandedness in enforcement decisions is lacking.

As a final note, where the nature of a nuisance is such that a dangerous health condition is created, municipalities may have a duty to act even in the absence of a state imposed regulation requiring them to do so. Courts regard the preservation of public health and safety as a critically important municipal function. This is particularly true when municipal irresponsibility is a factor in creating or promoting the health hazard. Thus municipalities have been compelled to discontinue the discharge of sewage into the waters of the Commonwealth; to provide sufficient and proper drainage and repair along a public road, to remove obstructions from public streets constituting a public nuisance, and to remedy the flow of sewage onto public streets from failing septic systems. In such situations, municipal inaction in the face of a nuisance condition is not an alternative.

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