

Public Nuisances

A nuisance has been defined as the unreasonable or unlawful use of property that causes damage, injury, inconvenience or annoyance to another in the enjoyment of his or her reasonable rights.¹

A nuisance can be a public nuisance or a private nuisance. The important difference between public and private nuisances is not the nature of the activity itself, but the party the nuisance affects.² In the case of a public nuisance, it is the general public, and not merely one or more private individuals that is impacted.³ However, it is possible for a nuisance to be both a public and a private one because of the injury it causes to a single individual or group of individuals.⁴

This discussion focuses on the topic of public nuisances because they are of most concern to local governments.

Definition

A public nuisance is an unreasonable interference with a right common to the general public. Circumstances considered by courts in determining whether an interference with a public right is unreasonable include the following:

- Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience; or
- Whether the conduct is proscribed by a statute, ordinance or administrative regulation; or
- Whether the conduct is of a continuing nature or has produced a permanent or long lasting effect, and, as the person knows or has reason to know, has a significant effect upon the public right.⁵

A public nuisance does not have to be explicitly prohibited by statute, and certain acts or conditions have been declared a public nuisance as a matter of common law.⁶ What is required is a showing that the act or condition unreasonably interferes with the rights of the public.⁷ Interference with a public right is unreasonable when the conduct involves a significant interference with the public's

¹ See *Kramer v. Pittsburgh Coal Co.*, 341 Pa. 379 (1941).

² *Phillips v. Donaldson*, 269 Pa. 244 (1920).

³ *Duquesne Light Company v. Pennsylvania American Water Company*, 850 A.2d 701 (Pa. Super. 2004); *Muehlieb v. City of Philadelphia*, 574 A.2d 1208 (Pa. Cmwlth. 1990). See also Jeff Feirick, "Pennsylvania Nuisance Law," The Agricultural Law Research and Education Center, The Pennsylvania State University, The Dickinson School of Law, 2000.

⁴ See, e.g., *Com. ex rel. Shumaker v. New York & Pennsylvania Co.*, 367 Pa. 40, 47 (1951).

⁵ 574 A.2d at 1211, citing Restatement of Torts (Second) § 821B; see also Feirick, *supra*, note 3.

⁶ *Com. v. MacDonald*, 464 Pa. 435 (1975), cert. denied, *Pennsylvania v. MacDonald*, 429 U.S. 816 (1976); see also Feirick, *supra*, note 3.

⁷ *Id.*

safety, the public peace, the public comfort or the public convenience.⁸ To be a public nuisance, the conduct must be continuous and repeated, not a single isolated act. In order for the offender to be held criminally liable, the nuisance complained of must be the natural and direct result of the offender's act.⁹

Nuisance can be distinguished from trespass. Trespass is a direct infringement of one's right of property; nuisance is the result of an act that is not necessarily unlawful in and of itself, but which is harmful because of the consequences that may result from it.¹⁰

Also, a nuisance does not necessarily involve negligence, and whether one has exercised due care or failed to do so is not a necessary element in determining whether a nuisance exists. However, nuisance and negligence are frequently viewed as partners, with nuisance presupposing negligence "when the omission to remove the nuisance after notice constitutes negligence."¹¹

Municipal Regulation

In addition to prosecution of a public nuisance as a misdemeanor under the Pennsylvania Crimes Code,¹² municipalities are authorized to provide for the prohibition of, and seek the abatement of, a public nuisance through the exercise of their police power. However, this authority is justified *only* by the ability to demonstrate that the act constituting a violation of the ordinance did in fact cause a public nuisance. Stated another way, municipalities are not authorized to simply prohibit a nuisance *per se*—that is declare that a particular act results in interference so severe that it would constitute a nuisance under any circumstance.¹³

Municipalities that enact ordinances to provide for the prosecution of public nuisances which exist within the municipalities have often sought to establish the specific conduct that would violate the ordinance. This appears to be facially supported by the special powers provisions of the various municipal codes. For example, Section 1529 of the Second Class Township Code states:

⁸ See 574 A.2d at 1211; *see also* Feirick, *supra*, note 3.

⁹ 5B Summ. Pa. Jur. 2d, Criminal Law §§ 33:1, 33:5 (2d ed.) (2020).

¹⁰ 341 Pa. at 381.

¹¹ *Reedy v. City of Pittsburgh*, 363 Pa. 365, 368 (1949).

¹² 18 Pa.C.S. § 6504:

§ 6504. Public nuisances.

Whoever erects, sets up, establishes, maintains, keeps or continues, or causes to be erected, set up, established, maintained, kept or continued, any public or common nuisance is guilty of a misdemeanor of the second degree. Where the nuisance is in existence at the time of the conviction and sentence, the court, in its discretion, may direct either the defendant or the sheriff of the county at the expense of the defendant to abate the same.

¹³ 23 Summ. Pa. Jur. 2d Municipal and Local § 19:22 (2d ed.) (2020); *see, e.g., Com. v. Creighton*, 639 A.2d 1296 (Pa. Cmwlth. 1994); *Talley v. Borough of Trainer*, 394 A.2d 645 (Pa. Cmwlth. 1978).

Nuisances.--The board of supervisors may by ordinance prohibit nuisances, including, but not limited to, the storage of abandoned or junked automobiles, on private and public property and the carrying on of any offensive manufacture or business.¹⁴

However, courts in the Commonwealth have repeatedly interpreted provisions like Section 1529, above, “as authorizing the local governing bodies to declare such activities to be nuisances when, based upon the actual conditions in the [municipality], they constitute nuisances in fact.”¹⁵ Commonwealth Court has also addressed whether a municipality not limited to express powers, but enabled by statute to “confer the greatest power of local self-government consistent with the Constitution of this State” such as a home rule municipality, would be authorized to establish a nuisance *per se*. The Court found that it could not on the basis that doing so would exceed constitutional limitations on the exercise of the municipality’s police power. “What is not an infringement upon public safety and is not a nuisance cannot be made one by legislative fiat and then prohibited.”¹⁶

Nevertheless, ordinances which appear to establish a nuisance *per se* are not necessarily void, but courts in Pennsylvania are likely to “adopt an interpretation of the ordinance which requires the [municipality] to prove that a nuisance in fact exists in any given case.”¹⁷

Similarly, the converse is also true. Although a person is acting in compliance with other laws and regulations, such as a zoning ordinance, his or her conduct, nevertheless, may constitute a nuisance.¹⁸

Finally, under the Neighborhood Blight Reclamation and Revitalization Act¹⁹ a municipality may institute specified actions against the owner of any real property that is in serious violation of a code or for failure to correct a condition which causes the property to be regarded as a public nuisance²⁰ Furthermore, the act authorizes municipalities to deny the issuance of municipal permits to a property owner who fails to address serious violations of municipal codes.²¹

Abatement

Where a nuisance continues at the time of the conviction and sentence, under the Crimes Code nuisance provisions, the court may direct the abatement of the nuisance either by the defendant or by the appropriate governmental authority at the defendant’s expense.²² However, “[w]here a

¹⁴ Act 69 of 1933 (53 P.S. § 66529).

¹⁵ *Kadash v. Williamsport*, 340 A.2d 617, 619 (Pa. Cmwlth. 1975)(quoting *Commonwealth of Pa v. Hanzlik*, 400 Pa. 134 (1960).

¹⁶ 340 A.2d at 621 (citing *Commonwealth of Pa. v. Christopher*, 132 A.2d 714 (Pa. Super. 1957)).

¹⁷ 340 A.2d at 621; *Dole v. Philadelphia*, 337 Pa. 375 (1940) (“Where a reasonable interpretation can be adopted, which will save the constitutionality of an ordinance, it is the court’s duty to adopt it.”).

¹⁸ 23 Summ. Pa. Jur. 2d, Municipal and Local Law § 19:22 (2d ed.)(2020).

¹⁹ See 53 Pa.C.S. § 6101 et seq.

²⁰ See 53 Pa.C.S. § 6111.

²¹ See 53 Pa.C.S. § 6131.

²² 18 Pa.C.S. § 6504.

nuisance in fact exists, neither the municipality nor the courts may devise a remedy harsher than the minimum necessary to properly abate the nuisance.”²³

Two considerations are critical in the adoption of ordinances to abate nuisances. One, the nuisance must be a nuisance in fact—not one merely defined as a nuisance by the municipality. And, two, if the remedy includes abatement as part of the penalty, such remedy should be the minimum required to eliminate the nuisance. For example, in the case of a structure, this may mean requiring a sealing or repairing before the municipality seeks to have the structure demolished.

In Pennsylvania, the Commonwealth has delegated authority to control public nuisances to municipalities by enabling them to enact ordinances under their respective municipal codes or the Pennsylvania Municipalities Planning Code (MPC), although the Commonwealth also controls nuisances in certain instances. Under the MPC, municipalities may adopt zoning and subdivision and land development ordinances to avoid or prevent nuisance situations. For example, a zoning ordinance can avoid or minimize incompatible land use districts, such as residential and industrial, by separating uses from each other with a transitional district, or by providing for a large setback or buffer along the border of the land use that could impact an adjacent, more sensitive land use. Also, subdivision and land development ordinance provisions can require landscaping and screening in commercial developments and larger subdivisions and compliance with environmental protection standards as a condition of approval. Relevant environmental protection standards can cover erosion and sedimentation control, natural feature (e.g., wetland, floodplain, stream, steep slope, aquifer and tree) protection, and mine subsidence or karst (sinkhole) hazards.

In addition to municipalities’ ability to exercise their powers and enact and enforce ordinances to abate nuisances, the federal and state governments have the authority to do the same on a range of potential impacts, ranging from water pollution to visual impacts. For example, a transportation-related protection lies with the Junkyard and Automotive Recycler Screening Law,²⁴ which requires a 1,000-foot buffer from the edge of a highway right-of-way for all junkyards or automotive dismantlers and recyclers established after January 1, 1967. Generally, junkyards or automotive dismantlers and recyclers, which are within 1,000 feet of the edge of the highway right-of-way, must be screened.²⁵ This state law is based on Federal-Aid Policy Guide for Junkyard Control and Acquisition,²⁶ which “prescribes Federal Highway Administration policies and procedures relating to the exercise of effective control by the States of junkyards in areas adjacent to the interstate and Federal-aid primary systems.”

²³ 23 Summ. Pa. Jur. 2d, Municipal and Local Law § 19:24 (2d ed.) (2020), citing *King v. Township of Leacock*, 552 A.2d 741 (Pa. Cmwlth. 1989), *Groff v. Borough of Sellersville*, 314 A.2d 328 (Pa. Cmwlth. 1974).

²⁴ Act 4, Special Session 3, of 1996 (36 P.S. § 2719.1 et seq.); see also 67 Pa. Code § 451.1 et seq.

²⁵ Junkyard and Automotive Recycler Screening Law, § 6; 67 Pa. Code §§ 451.2, 451.4.

²⁶ 23 C.F.R. § 751.1 et seq. (2006).

Illustration: A government ordinance to abate unsafe structures is rationally related to the promotion of the public welfare and is a proper and necessary exercise of a government's police power as long as there is factual evidence to support its application to a specific structure.²⁷ The process to abate an unsafe structure must still be carried out in a manner that gives the property owner proper notice and the chance to abate the nuisance.²⁸ If the property owner fails to repair or eliminate the dangerous condition within a reasonable time, then the municipality has the ability to tear down the structure and charge the landowner the cost of disposal.²⁹

²⁷ *Herrit v. Code Mgmt. Appeal Bd. of City of Butler*, 704 A.2d 186 (Pa. Cmwlth. 1997), citing *City of Pittsburgh v. Kronzek*, 280 A.2d 488 (Pa. Cmwlth. 1971).

²⁸ *Feirick*, *supra*, note 3, citing *Keystone Commercial Properties, Inc. v. City of Pittsburgh*, 464 Pa. 607 (1975).

²⁹ *Id.*; 23 Summ. Pa. Jur. 2d, Municipal and Local Law § 19:25 (2d ed.)(2020).