Coates' Canons Blog: Nuisance Abatement and Local Governments: What a Mess – Part II

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Several years ago I prepared a blog entitled “Nuisance Abatement and Local Governments: What a Mess.” At the end of that blog I promised a sequel to take up several other legal issues related to nuisance abatement and building condemnation. Here is that sequel. One issue concerns the nature of the process that must be used by a local government to abate a nuisance or condemn a building. In administrative proceedings particularly, what due process is due? The second issue involves the seizure or destruction of property that can occur when a local government takes direct action to abate a nuisance or demolish a dilapidated building after the owner fails to remedy the conditions that give rise to the problem. Can there be a violation of an individual’s legal rights when a local government or its contractor goes onto private property to destroy the offending property condition? These are the subjects of “Nuisance Abatement and Local Governments: What a Mess – Part II.”

Sources of Local Enabling Authority

The North Carolina Statutes provide a wide range of discrete sources of legal authority for municipalities to condemn buildings and structures and abate public nuisances. These include (1) unsafe building condemnation (G.S. 160A-426 et seq.); (2) minimum housing ordinance (G.S. 160A-441 et seq.); (3) commercial maintenance code (G.S. 160A-439); (4) abandoned structure ordinance (G.S. 160A-441, second paragraph); (5) criminal nuisance law (G.S. 19-1 et seq.); (6) nuisance abatement (G.S. 160A-193); (7) nuisance abatement (G.S. 160A-174(a)); (8) abandoned/junked vehicle ordinance (G.S. 160A-303.2); and (9) general police power (G.S. 160A-174(a)). Many of these lines of statutory authority are designed to provide due process to property owners affected by local government code enforcement. In addition, procedural due process as required by the U.S. Constitution provides safeguards to citizens prior to any governmental decision that deprives an individual of a liberty or property interest.

Required Procedures for Building Demolition

Many of the types of legal authority listed above include specific procedural requirements designed to protect the interests of property owners in code enforcement proceedings. For example, if a local government inspector’s preliminary investigation reveals the basis for a violation, the code official may be directed to serve the owner with a complaint and a notice of a hearing. That enables the property owner to appear at a hearing in person to respond to the complaint, to contest the initial determination, and to appeal an adverse decision. Such hearings held pursuant to the unsafe building statutes or under the minimum housing statutes are quasi-judicial in nature. Coffey v. Town of Waynesville, 143 N.C.App. 624, 547 S.E.2d 132 (2001); Patterson v. City of Gastonia, __N.C. App. __, 725 S.E.2d 82 (2012). The hearing ordinarily results in an order for the owner to correct property deficiencies by repairing, moving, or demolishing the building. North Carolina case law further extends an owner’s rights by requiring that owners must always be given an adequate opportunity to make the necessary repairs or improvements themselves, regardless of the economic feasibility of doing so. Horton v. Gulledge, 277 N.C. 353, 177 S.E.2d 885 (1970); G.S. 160A-443(5); G.S. 160A-439(f)(2). This logic may well apply also to the abatement of public nuisances. Furthermore, if the condition of a building changes because of deterioration or vandalism so that the remedial steps called for in the code official’s initial order are no longer feasible or appropriate, then the process of complaint, notice, hearing, and opportunity to cure must be repeated. Newton v. City of Winston-Salem, 92 N.C. App. 446, 374 S.E.2d 488 (1988). If the property owner eventually fails to comply with the code official’s order, then the unsafe building laws, the minimum housing statutes, and the commercial maintenance legislation all permit a local governing board to authorize staff to arrange for the remedial work to be performed directly. G.S. 160A-443(5); G.S. 160A-432(b); G.S. 160A-439(f)(1). An owner need not be given further notice and an opportunity to be heard when the governing board considers whether to approve the use of this self-help remedy. Patterson v. City of Gastonia, __N.C.App. __, 725 S.E.2d 82 (2012).

If these due process principles are built into the building condemnation, housing code, and commercial maintenance laws, do these principles also apply to various forms of nuisance abatement? After all, building condemnation and nuisance abatement are both predicated on the removal of public health and safety hazards. Neither type of process requires the payment of compensation for property destroyed in the removal or curing of the hazard. Are the procedural rules that apply to the abatement of public nuisances any different?

Required Procedures for Nuisance Abatement

The two sources of legal authority enabling a municipality to abate a public nuisance are G.S. 160A-174(a) and G.S. 160A-193. The first provides that a "city may by ordinance . . . . define and abate nuisances." G.S. 160A-193(a) does not require the adoption of an ordinance and provides that a city "shall have authority to summarily remove, abate, or remedy everything . . . that is dangerous or prejudicial to the public health or public safety." The first statute may be interpreted to provide authority to declare certain classes of situations (e.g., tall grass and overgrown vegetation on lots) to be nuisances per se. The second statute may be interpreted to allow a town to cause a nuisance to be removed in situations that are not routine and that resist ordinance definition. Neither of these statutes spells out the administrative procedures by which the respective authority may be used.

G.S. 160A-175(e) and G.S. 153A-123(e) do provide in some detail how a municipality may seek an injunction and order of abatement for nuisance ordinance violations, but those subsections apply to judicial enforcement of local nuisance authority, not administrative enforcement. What procedures, if any, are required to comport with due process if a nuisance is abated administratively without specific judicial authorization? Note that G.S. 160A-193 permits a city to "*summarily* remove, abate, or remedy" that which is dangerous or prejudicial to the public health or public safety. (Italics added.) Summary action is understood to mean that governments may dispense with certain procedural steps in appropriate circumstances. There is no mention of "summary" abatement in G.S. 160A-174 or G.S. 153A-121. Compare these with G.S. 153A-140, which declares that authority under that section "may only be exercised upon adequate notice, the right to a hearing, and the right to appeal to the General Court of Justice." How can these statutes be interpreted or reconciled?

Nuisance Statute Deficiencies

The deficiencies of G.S. 160A-174, G.S. 160A-193, and G.S. 153A-121 can be gleaned from the case of Monroe v. City of New Bern, 158 N.C. App. 275, 580 S.E.2d 372 (2003), *cert. denied*, 357 N.C. 461 (2003). In *Monroe* the city had demolished a residence without complying with the complaint, notice, hearing, and opportunity-to-cure requirements of its own minimum housing ordinance, apparently relying on the summary abatement authority offered by G.S. 160A-193. Rather than declare G.S. 160A-193 unconstitutional because of its patent due process inadequacies, the court ruled that G.S. 160A-193 allowed a city "to summarily demolish" a building only in circumstances where the building was so structurally unsafe that it posed such an imminent danger to public safety. In other words the owner could not be provided procedural safeguards without endangering the public. The court in *Monroe* held that the subject house in question was in deplorable condition but was not endangering the public. The owner's due process rights were violated by the city and the matter was remanded for a trial to determine the city's liability in damages.

The nuisance abatement authority of G.S. 160A-174 (which requires an ordinance) may be no less shaky. A different statute, G.S. 160A-200.1, is entitled "(a)nnual notice to chronic violators of public nuisance ordinance." G.S. 160A-200.1 may be read to bolster the procedural posture of G.S. 160A-174 by implying that some type of notice is a necessary adjunct of G.S. 160A-174. That is true even though this latter statute does not expressly mention notice at all. Either the nuisance abatement clause in G.S. 160A-174 is vulnerable to a restrictive interpretation (like G.S. 160A-193 was in *Monroe*), or the municipal ordinance that implements this nuisance abatement authority must require various procedural safeguards in order to fill these constitutional breaches.

Carrying Out Demolition or Abatement and the Fourth Amendment

One other set of practical and legal problems involves the actual abatement of a nuisance or the demolition of a condemned building. City officials or their contractors go onto private property to do their work, often without the express consent of property owners. Real and personal property may be destroyed, seized, or removed from a site. The Fourth Amendment to the U.S. Constitution requires that any seizure of property by the State be examined for its overall reasonableness and must be based upon a careful balancing of governmental and private interests. Soldal v. Cook County

, 506 U.S. 56 (1992).

Abatement or demolition actions may be taken pursuant to an injunction or other court order. If so, the order should reflect the *Soldal* balancing-of-interests analysis in authorizing the destruction of offending buildings and site conditions to the extent that the nuisance requires. There are relatively few Fourth Amendment problems involving this type of judicial authorization.

If the demolition of a building is instead administratively authorized, ordinarily there is no Fourth Amendment violation if the substantive and procedural safeguards inherent in due process have been fulfilled. Freeman v. City of Dallas, 242 F.3d 642 (5th Cir. 2001) (en banc); Samuels v. Meriwether, 94 F.3d 1163 (8th Cir. 1996); Edmundson v. City of Tulsa, 152 F. App'x 694 (10th Cir. 2005); *see also* Taylor v. Town of Franklin, 2007 WL 674577 (W.D.N.C.). Thus satisfying the requirements of the Due Process Clause is generally sufficient to satisfy the requirements of the Fourth Amendment.

However, a peculiar problem arises when the nuisance abatement or property demolition involves the disposition of various items of personal property. Federal courts have allowed local officials and contractors considerable latitude in determining the extent and type of abatement and demolition that a nuisance demands. Hroch v. City of Omaha, 4 F.3d 693 (8th Cir. 1993)(no Fourth Amendment violation where personal property salvaged from other demolitions by contractor-owner were destroyed with building itself); Samuels v. Meriwether, 94 F.3d 1163 (8th Cir. 1996) (no Fourth Amendment violation when debris and burnt furniture from fire-damaged building destroyed); Edmundson v. City of Tulsa, 152 F. App'x 694 (10th Cir. 2005) (no violation where owner allowed to remove some junked vehicles, other vehicles on site allowed to remain); Taylor v. Town of Franklin, 2007 WL 674577 (W.D.N.C.) (various personal items and trash contained within junked vehicles deemed to be part of public nuisance itself and could be destroyed); *but see* Conner v. City of Santa Ana, 897 F.2d 1487 (9th Cir. 1990) (Fourth Amendment violation where city apparently followed necessary due process steps but broke down fence surrounding back yard to remove old and inoperable junked cars).

North Carolina law in this regard is unsettled. G.S. 160A-443(6)(c.) (minimum housing) directs the code official to "sell the materials of the dwelling, and any personal property, fixtures or appurtenances found in or attached to the dwelling" and to credit the proceeds against the cost of removal or demolition. A similar provision in G.S. 160A-439(i)(3)) (commercial maintenance codes) applies to "recoverable" materials. North Carolina state courts have emphasized that government cannot take, remove, or destroy private property unless such action is "in fact necessary to remove or abate a nuisance." Rhyne v. Town of Mount Holly, 251 N.C. 521, 528, 112 S.E.2d 40, 46 (1960) (claim for compensation upheld for destruction of oak trees in enforcing overgrown vegetation ordinance). *See* Yates v. City of Raleigh, 46 N.C. App. 221, 264 S.E.2d 798 (1980) (dismissal of damage claim reversed where concrete finishing equipment destroyed as part of public health nuisance). *But see* Patterson v. City of Gastonia, __N.C. App. __, 725 S.E.2d 82 (2012) (sovereign immunity may bar claims for conversion of mobile home and other personal property, trespass to chattels, and trespass to real property); Estate of Hewitt v. County of Brunswick, 199 N.C. App. 564, 681 S.E.2d 531 (2009) (sovereign immunity bars claim for damages where county removed and kept antiques, tools, motor parts, and building supplies recovered from barn demolished by mistake).

What, then, are the lessons for local governments?

• First, our nuisance statutes are deceivingly Spartan. Local ordinances can be used to flesh necessary procedural detail. But local officials need to be aware that the law often requires more than the nuisance statutes require. Some of the building condemnation legislation may furnish a useful guide.
• Failure to follow proper procedures may render a local government liable in damages.
• Nuisance abatement based upon a judicial order offers various advantages in determining the scope and nature of a nuisance and in defining the appropriate steps for local governments to take in abatement.

Keeping these ideas in mind may make nuisance abatement and building demolition a bit less of a mess than it might otherwise be.

Links

- canons.sog.unc.edu/?p=4747
- www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=160A-426

- www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=160A-441
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