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

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UPDATE September 2013: Click here for the 2013 sequel to this blog.

What is a public nuisance? A public nuisance is a condition or activity involving real property that amounts to an unreasonable interference with the health, safety, morals, or comfort of the community. Of course, for many of us a public nuisance may be impossible to define; you simply know it when you see it (or hear it or smell it). Often times, it involves a real mess. But the real nuisance for our purposes may be the confusing state of the law that applies to local government nuisance actions. The purpose of this blog is to consider some of the statutory choices (and problems) facing local governments that wish to regulate and abate nuisances. A subsequent blog will consider further some of the legal issues involved.

City and County Nuisance-Abatement Authority

G.S. 160A-193 (abatement of public health nuisances) provides that a city "shall have the authority to summarily remove, abate, or remedy everything in the city limits, or within one mile thereof, that is dangerous or prejudicial to the public health or public safety." The corresponding county statute, G.S. 153A-140 (abatement of public health nuisances) declares that a county "shall have authority . . . to remove, abate, or remedy everything that is dangerous or prejudicial to the public health or safety." The catch line of each statute refers to public health nuisances although the statutory text speaks to both public health and public safety matters. Neither statute expressly authorizes the adoption of an implementing ordinance. The municipal statute allows "summary" actions to remove or abate a nuisance (more immediate, abbreviated procedures) whereas the county statute omits such a term. Municipal authority may be exercised not only inside municipal limits, but also up to one mile outside such limits. Since a county may act in any part of the county not within a city (see G.S. 153A-122), a city and a county have overlapping jurisdiction in the one-mile area around a city. In summary there are differences between municipal and county authority to abate public nuisances. However, they are minor when compared to the differences between these statutes (G.S. 160A-193 and G.S. 153A-140) and the city and county statutes authorizing the use of the general police power (G.S. 160A-174 and G.S. 153A-121) that are described below. While there may be times when summary abatement is appropriate, proceeding under an ordinance will be preferable in most cases for the reasons explained below.

Public Nuisances and the General Police Power

G.S. 160A-174(a) provides in part that a city "may by ordinance define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the city, and may define and abate nuisances." (Italics added.) G.S. 153A-121(a) is essentially identical and provides comparable authority for counties. How do these statutes compare with the so-called "nuisance statutes" discussed above?

Local Government "Police-Power Statutes"

First, the "police-power statutes" enable local governments to act only upon the adoption of an ordinance. Such an ordinance may address any of a multitude of topics that may be made subject to a local government's general regulatory power. Why should a city or county choose to adopt a nuisance ordinance under the "police-power statutes" rather than proceed under the "nuisance-abatement statutes"? For one thing a local government may use an ordinance to set forth the procedures it intends to follow in dealing with a nuisance and to ensure that it conforms to state and federal law. (Failure to follow proper notice and hearing procedures may render a local government liable in damages; see my next blog post.) For another, an ordinance provides the local government with the opportunity to define the kinds of conditions that give rise to nuisances. More specifically, a police-power ordinance allows for the definition of conditions that categorically constitute nuisances, that is "nuisances per se." For example, an ordinance may define one type of nuisance to be weeds

or grass allowed to grow to a height greater on average than 12 inches. Indeed, the police-power authority may well encompass regulation of conditions that do not now constitute a nuisance but might become one if left unregulated. In contrast a local government may use the public nuisance statutes to address “one-off” nuisance situations that are not routine and that resist ordinance definition.

Second, ordinances adopted under municipal police-power statutes apply only inside municipal limits (county ordinances apply anywhere outside municipal limits). Thus the municipal public nuisance statute, which can be applied up to one mile beyond city limits, offers more geographic versatility than a police-power ordinance.

A third comparison concerns the nature of the physical premises associated with the nuisance. Most nuisances involve the use of a building or a structure of some other sort. Several statutes address severe structural problems. G.S. 160A-441 et seq. (authority to adopt a minimum housing ordinance); G.S. 160A-426 et seq. and G.S. 153A-365 et seq. (unsafe building condemnation); and G.S. 160A-439 (authority to adopt a nonresidential building/structures ordinance) allow the demolition of a building or structure. Does that mean that these “condemnation statutes” preempt or prevent local governments from treating nuisances involving structures under the public-nuisance statutes or the police-power-ordinance statutes? Not necessarily. In 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), the North Carolina Court of Appeals implied that in proper circumstances G. S. 160A-193 (the municipal public nuisance statute) may apply to structurally-deficient residences. Whether police-power ordinances may also apply to buildings of this sort (rather than just overgrown vegetation, discarded appliances, yard debris, and the like) remains unclear.

One other major difference between the “nuisance-abatement statutes” and the “police-power statutes” is that the former allow for both an administrative determination that a nuisance exists and an administratively ordered abatement of the nuisance if the owner fails to take timely action. These “summary” procedures permit a local government to save time by being able to move quickly and to save money by being able to avoid having to file a lawsuit to obtain a court order providing for abatement. Of course, these summary actions initiated by a local government can also be a curse because the nuisance abatement statutes offer so little guidance on how to recognize a nuisance and how a local government must proceed in order to get rid of it. In contrast subsections (e) of both G.S. 160A-175 and G.S. 153A-123 (enforcement of ordinances), set forth extensive procedures for how to enforce an “ordinance that makes unlawful a condition existing upon or use made of real property” by obtaining an injunction or order of abatement from the General Court of Justice (our state judicial system). The implication is clear: in order for a local government to abate a public nuisance pursuant to an ordinance adopted under G.S. 160A-174 or G.S. 153A-121 (the general police-power statutes), the local government must file suit against the owner to obtain the appropriate court order.

Abatement by court order offers one other key advantage. It is based on a judicial determination of the scope of the nuisance and the extent of the steps needed to abate it. In North Carolina local governments are liable in damages to the extent that the demolition or removal of property undertaken to abate the public nuisance exceeds what is necessary to eliminate nuisance conditions. Administrative mistakes made in determining what needs to be done can be costly.

This blog has outlined some of the choices regarding enabling authority that local governments must make if they take action against nuisances. The next blog will review some of the constitutional issues involved in abating nuisances and demolishing buildings.

Links

- canons.sog.unc.edu/?p=7232&print=1
- www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=160A-193
- www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=153A-140
- www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=153A-122
- www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=160A-174
- www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=153A-121
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- appellate.nccourts.org/opinions/?c=2&pdf=MjAwMy8wMi00OTgtMS5wZGY=
- www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=160A-175
- www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=153A-123