



A SELECTED READING

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Abatement of Nuisances

Section 11-47-117, Code of Alabama 1975, authorizes municipalities to abate all nuisances and to assess the costs against the person who created or maintained the nuisance. Section 11-47-118 of the Code gives municipalities the power to maintain a civil action to abate nuisances.

The statutory definition of “nuisance” is found in Section 6-5-120, Code of Alabama 1975, and reads as follows:

“A ‘nuisance’ is anything that works hurt, inconvenience or damage to another. The fact that the act done may otherwise be lawful does not keep it from being a nuisance. The inconvenience complained of must not be fanciful or such as would affect only one of a fastidious taste, but it should be such as would affect an ordinary reasonable man.”

The Alabama Supreme Court in *Milton v. Maples*, 235 Ala. 446, 179 So. 519 (1938), announced that the above definition is “but declaratory of the common law ...”

The term “nuisance” involves the idea of continuity or recurrence of the acts causing the injury. *McCalla v. Louisville and Nashville Railroad Co.*, 50 So. 971 (Ala. 1909).

Tuscaloosa v. Standard Oil Co., 221 Ala. 670, 130 So. 186 (Ala. 1930), held that the “bare possibility of injury will not warrant interference against an alleged threatened nuisance.” Even though the operation may be distasteful to the adjoining residents, the mere fact that there may be depreciation or diminution of value to their property is normally unavailing as a ground for equitable relief. *Milton*, 179 So. at 519.

Public and Private Nuisances

The Alabama Code also defines public and private nuisances in Section 6-5-121:

“Nuisances are either public or private. A public nuisance is one which damages all persons who come within the sphere of its operation, though it may vary in its effects on individuals. A private nuisance is one limited in its injurious effects to one or a few individuals. Generally, a public nuisance gives no right of action to any individual but must be abated by a process instituted in the name of the state. A private nuisance gives a cause of action to the person injured.”

The court has held that the Attorney General is the proper state official to bring action to abate public nuisances. The following language is found in *Dozier v. Troy Drive-In Theaters, Inc.*, 265 Ala. 93, 89 So.2d 537, 548 (Ala. 1956):

“If this bill of complaint describes a nuisance, it is public in nature and a court of equity at the suit of the state by the Attorney General may enjoin it, although it is the injunction of criminal conduct which is ordinarily not subject to injunctive relief. This may also be done by cities under certain circumstances... But a private individual cannot have injunctive relief against a public nuisance unless he shows irreparable injury and damage peculiar to him, and such damage must relate to the use and occupancy of property as distinguished from damage to market value of property not used or occupied.”

Abatement by Municipalities

Municipalities are granted authority to abate and enjoin public nuisances under Section 6-5-122, Code of Alabama 1975,

which states:

“All municipalities in the state of Alabama may commence an action in the name of the city to abate or enjoin any public nuisance injurious to the health, morals, comfort or welfare of the community or any portion thereof.”

Procedures

It is abundantly clear that municipalities may bring an action to abate a nuisance. Many cities and towns have ordinances proscribing nuisances but the absence of such an ordinance does not affect the right to file a lawsuit.

When allegations of a nuisance are brought before the council, the governing body should conduct a thorough investigation into the complaint. If circumstances warrant, the governing body should then adopt a resolution setting out the facts that justify the declaration of a public nuisance and authorizing the city attorney to file suit in circuit court.

In *Duncan v. Tuscaloosa*, 257 Ala. 574, 60 So.2d 438 (Ala. 1952), the city sought to abate an alleged nuisance created by the raising of chickens in a residential neighborhood. The complaint was tested by demurrer.

The complaint alleged that the brooders gave off foul and offensive odors that materially interfered with the health and comfort of the residents in the adjacent area. The respondent had obtained a permit from the city for the operation, but, at the time of issuance, he was warned that conduct of the business was to be at his own risk and that if a nuisance developed, the city would take legal action to abate.

The court held, “the city is authorized to maintain an equitable action for the abatement of a nuisance notwithstanding there is not statutory authority therefore...and the statutory definition of a nuisance to which we shall refer is but declaratory of the common law and does not supersede the common law as to the other conditions and circumstances constituting a nuisance under the common law.”

The respondent argued that the ordinance was adopted after his permit was issued. The court noted that “... the respondent can have no vested and inalienable right of property in that which is a nuisance and an owner with knowledge or notice in the premises cannot complain if loss ensues when the law deals with the property in any way reasonably necessary for the suppression of the evil in connection with which it is used.”

Although municipalities are authorized to abate nuisances, governing bodies cannot declare a legal trade to be a nuisance and abate it when the business is not a nuisance and is not operated in a manner that is likely to become a nuisance. *Russellville v. Vulcan Materials Co.*, 382 So.2d 525, 527 (Ala. 1980).

Time Factors

Often it is more expedient to execute a warrant of arrest and process the case in municipal court than it is to seek equitable relief. Municipal court cases can be speedily disposed of whereas the procedures in equity are much more time consuming. A municipal judge may order the abatement of a nuisance as a condition of probation for the violation of a municipal nuisance ordinance. AGO 2006-0103.

Under equity, the governing body, after a thorough investigation, must draft and adopt a resolution declaring a public nuisance. The city attorney must then evaluate the case, draft the complaint, file it and obtain service on the respondent. The respondent has 30 days to file a reply and then the court must set a date for a hearing. If pleading questions are raised, actual trial may be delayed by several months. During this period, citizens may become impatient and keep up a steady barrage of protest at city hall. The expense of civil actions is also a consideration since the city attorney and often other municipal employees, will be involved in the investigation to secure evidence for the case.

Relief Afforded

Courts are reluctant to enjoin the use of property unless other property owners, in the enjoyment of their property, are seriously affected. For this reason, any relief granted will be tailored, if possible, to permit a continuation of the use if it can be done in any manner not offensive to the complaining parties. See, *Reaves v. Tuscumbia*, 483 So.2d 396, 397 (Ala. 1986).

In *McClung v. Louisville & Nashville Railroad Co.*, 255 Ala. 302, 51 So.2d 371 (Ala. 1951), a complaint was filed against several respondents charging them with a nuisance in causing the emission of large quantities of coal dust into the air, the creation of noise in unloading steel cars, and the creation of fumes and odors due to the heating and distribution of the contents of tank cars. The court found that the noise made by beating and pounding on the cars was obnoxious and that the odors and fumes were offensive. An injunction was issued against the respondents. The complaints offered evidence, which tended to show that a change in the manner of operations would materially reduce the noise level and the emission of fumes. The court also enjoined the coal haulers from loading in a manner, which raised dust and pointed out that evidence showed that sprinkling coal with water would reduce the dust. It should be noted that the injunction could probably have

been avoided if the remedial steps had been taken in advance

Other Court Decisions

Numerous types of property uses have been the subject of complaints charging the establishment of a nuisance. Cases which have held that the actions complained of might, in the proper circumstances, constitute a nuisance include:

- Dust, noise and odors – *McClung v. Louisville & Nashville Railroad Co.*, 51 So.2d 371 (Ala. 1951); *Acker v. Protective Life Insurance Co.*, 353 So.2d 1150 (Ala. 1977).
- The “flow of pure air” – *Romano v. Birmingham Railway Co.*, 182 Ala. 335, 62 So. 677 (Ala. 1913).
- Discharge of sewage into a stream by the city of Clanton – *Clanton v. Johnson*, 245 Ala. 470, 17 So.2d 669 (Ala. 1944).
- “Honky-tonks” – *Howard v. State*, 238 Ala. 185, 190 So. 278 (Ala. 1939).
- “Bawdy houses” – *Barnett v. Tedeski*, 154 Ala. 474, 45 So. 904 (Ala. 1908).
- Blasting operations – *Birmingham Realty Co. v. Thomason*, 8 Ala. App. 535, 63 So. 65 (Ala. App. 1912).
- Storage of dynamite in a thickly-populated neighborhood – *Sloss-Sheffield Steel & Iron Co. v. Prosch*, 190 Ala. 290, 67 So. 516 (Ala. 1914).
- A dump, maintained by the city of Selma – *Selma v. Jones*, 202 Ala. 82, 79 So. 476 (Ala. 1918).
- Upholding a conviction for failure to remove junk vehicles – *Nesby v. Montgomery*, 652 So.2d 784 (Ala. Crim. App. 1994).
- Heavy truck traffic that a proposed quarry would generate constituted an anticipatory public nuisance, as the traffic would render the roads adjacent to the quarry defective and dangerous. *Hall v. North Montgomery Materials, LLC*, 39 So.3d 159 (Ala.Civ.App.2008)
- A city ordinance’s definitions of “junk” and “nuisance” cannot be arbitrary, unreasonable, and overbroad, since cities may not, under the guise of police power, impose restrictions that are unnecessary and unreasonable upon the use of private property. A resolution authorizing a nuisance abatement submitted by the housing code department, accompanied by a list of the properties containing alleged nuisances and a short description of the alleged nuisances by housing code department employees, was itself sufficient evidence and that no additional evidence was required to shift the burden of proof to the property owners. *K & D Automotive, Inc. v. City of Montgomery*, 150 So.3d 752, 2014 (Ala.2014).
- City provided adequate notice to homeowner prior to demolishing his home, as required by procedural due process principles, where notice was mailed to forwarding address homeowner provided, so that it was reasonably calculated to apprise homeowner of pending action and to afford him opportunity to present his objections. *Kraft v. City of Mobile*, 588 Fed.Appx. 867 (C.A.11 (Ala.),2014)
- City’s public-nuisance ordinance, which defendant was convicted of violating based on complaints about multiple dogs barking at her home, set forth sufficient standards to place person of ordinary intelligence on notice of what conduct ordinance prohibited, and thus ordinance was not unconstitutionally vague, since ordinance incorporated objective standard by prohibiting only “disturbing noises” that were “habitually” made by animal and that caused “unreasonable annoyance or discomfort” to those in “close proximity[,]” ordinance clearly defined “disturbing noises” to include barking, and although “habitually” was not defined, reasonable person would have understood it to mean something more than incidental barking and that mere one-time disturbance was not enough to trigger ordinance. *Wallen v. City of Mobile*, 270 So.3d 1190 (Ala.Crim.App., 2018).
- Sheriff’s deputy who ordered the warrantless removal of inoperable motor vehicles from their owner’s driveway, which was a removal ordered by the deputy due to city’s nuisance ordinance, should have been aware that vehicles’ owner was entitled to some minimal process before the vehicles could be removed, and thus deputy was not entitled to qualified immunity from owner’s § 1983 claim that the vehicles’ removal violated her Fourteenth Amendment right to procedural due process; because deputy was the official who made the decision to abate the nuisance, he was in the unique position to know that vehicles’ owner had not had an opportunity to be heard. *McDonald v. Keahey*, 2019 WL 3980631 (Ala.Civ. App., 2019).
- It should have been clear to sheriff’s deputy who requested the warrantless removal of inoperable motor vehicles from their owner’s driveway, which was a removal ordered by the deputy due to city’s nuisance ordinance, that he, absent some exigent circumstance, could not seize private property from the curtilage of a home without a warrant, and thus deputy was not entitled to qualified immunity from owner’s § 1983 claim that the vehicles’ removal violated her Fourth

Amendment rights; law was clearly established that curtilage was part of the home itself for Fourth Amendment purposes, and there were no administrative procedures available for the purpose of abating the alleged nuisance. *McDonald v. Keahey*, 2019 WL 3980631 (Ala.Civ.App., 2019).

- Private company that towed, pursuant to a sheriff's deputy's request, inoperable vehicles from their owner's driveway, which was a removal done due to city's nuisance ordinance, was not entitled to quasi-judicial immunity from owner's § 1983 action, which was based on claim that the vehicles' removal violated her Fourth and Fourteenth Amendment rights; towing company and deputy were not enforcing a judicial order to remove the vehicles. *McDonald v. Keahey*, 2019 WL 3980631 (Ala.Civ.App., 2019).

Suggested Pleadings

Duncan v. Tuscaloosa, 60 So.2d 438 (Ala. 1952) provides an excellent example of how to file a nuisance complaint. This case sets out part of the allegations. It is also clear from this case that a good investigation was made prior to the initiation of the action.

Dilapidated Buildings

Many times, municipal officials face situations where a property owner will resist or ignore appeals to raze or rehabilitate an unoccupied dilapidated building. The officials may feel that such a building is a dangerous public menace as well as an eyesore. Destruction of the building could be handled as an abatement of a public nuisance.

Any incorporated municipality of the state may, after notice as provided in Section 11-40-31, move or demolish buildings and structures, or parts of buildings and structures, party walls, and foundations when found by the governing body of the municipality to be unsafe to the extent of being a public nuisance from any cause. See, Sections 11-40-30 to 11-40-36, Code of Alabama 1975. Also, some building abatement legislation applies only to particular classes of municipalities. Class 4 municipalities have similar authority to that mentioned above in Sections 11-53A-20 to 11-53A-26. Class 5, Class 6, and Class 8 municipalities also have authority to abate unsafe buildings in Section 11-53A-1 and Section 11-53A-6.

Section 11-53B-1, et seq., Code of Alabama 1975, was passed by the Legislature in 2002, and it provides a method for demolition or repair of unsafe structures for all municipalities. Once a municipality finds, after giving notice, that it is necessary to repair or demolish a building or structure or parts of buildings or structures, party walls and foundations which are found to be unsafe to the extent of being a nuisance, the municipality make take necessary action to demolish or repair the building or structure, and the cost shall be assessed against the property owner as provided in Section 11-53B-6. See, Section 11-52B-2, Code of Alabama 1975.

Language of a complaint regarding a dilapidated building, after alleging the jurisdictional facts, might take the following form, depending on the facts of the case and the statute followed:

“That located on the said described lot is a frame building and complaint alleges that said building is unoccupied and not tenantable; that said building is in a dilapidated condition, open to the public and to animals; that in its present condition and state of repair it constitutes a fire hazard and a menace to the City [Town] of _____ and is a nuisance under the laws of the State of Alabama, and that the existing conditions, herein described, constitute a flagrant and persistent continuing nuisance in the City [Town] of _____ which is dangerous, offensive, unwholesome and injurious to the health, safety and welfare of the City [Town] of _____.”

The City of Montgomery has adopted a policy of suing to abate nuisances allegedly created by dilapidated structures. The complaint alleges that all of the owners and their addresses cannot be ascertained after diligent search, although the known owners are listed in the complaint. The complaint also includes an allegation that no suit is pending to test the title to the land.

Included in the complaint is a request that the plaintiff (city) be ordered to abate the nuisance by removing the structure, but at the expense of the defendants, and that a lien against the property be established equal to the sum expended by the city to remove the structure to abate the nuisance. The complaint also requests that the award include a reasonable attorney's fee for the work of the city attorney.

Abandoned Motor Vehicles

Section 32-13-1, Code of Alabama 1975, defines an abandoned motor vehicle as a motor vehicle as defined in Section 32-8-2, that has been unclaimed as provided in Section 32-8-84 for not less than 30 calendar days from the date the notice was sent to the owner and lienholder of record, or if no owner or lienholder of record could be determined, has been unclaimed

for not less than 30 calendar days. The term “abandoned motor vehicle” also includes any attached aftermarket equipment installed on the motor vehicle that replaced factory installed equipment.

Section 32-8-84, Code of Alabama 1975 defines an unclaimed motor vehicle as:

1. A motor vehicle left unattended on a public road or highway for more than 48 hours.
2. A motor vehicle, not left on private property for repairs, that has remained on private or other public property for a period of more than 48 hours without the consent of the owner or lessee of the property.
3. A motor vehicle, left on private property for repairs, that has not been reclaimed within 48 hours from the latter of either the date the repairs were completed or the agreed upon redemption date.

Reporting Unclaimed Motor Vehicles

A person or entity in possession of an unclaimed motor vehicle is required to report the motor vehicle as unclaimed to the Department of Revenue within five calendar days from the date the motor vehicle first was considered unclaimed. The report must be made in a manner as prescribed by the department. Section 32-8-84, Code of Alabama 1975.

A person or entity in possession of an unclaimed motor vehicle, upon reporting the motor vehicle as unclaimed to the department, must utilize the National Motor Vehicle Title Information System (NMVTIS) to determine the current title state of record or, if no current title exists for the motor vehicle, the most recent state of registration for the motor vehicle. Thereafter, the person or entity must submit a records request to the state of record within five calendar days from the date the motor vehicle was reported as unclaimed to the department. The records request must be sent to the current title state of record in order to obtain the name and address of the owner and lienholder, if any, of record, if any. If no current title exists, the records request must be sent to the most recent state of registration in order to obtain the name and address of the owner.

In the event that no NMVTIS record exists and there is evidence that could be reasonably ascertained by the person or entity indicating that the motor vehicle has been registered in another state, the person or entity, within five calendar days from the date the motor vehicle was reported as unclaimed to the department, must submit a records request to the state of registration in order to obtain the name and address of the owner. Section 32-8-84, Code of Alabama 1975.

Notice to Owner and Lienholder

After completing the records request, the person or entity must send notice by certified mail with either return receipt requested or electronic delivery confirmation, within five calendar days from receipt of the title record, to the owner and lienholder of record, if any, or registration record, to the owner of record, advising the owner and lienholder of record, if any, of the location of the motor vehicle, normal business hours of the facility holding the motor vehicle, any accrued charges or fees, the daily storage rate, and the mailing address and contact telephone number of the person or entity in possession of the motor vehicle. The notice must include the following language in no smaller than 10-point type:

“If this motor vehicle is not redeemed by the recorded owner or lienholder of record within 30 calendar days from the date of this notice, the motor vehicle shall be considered abandoned as defined in Section 32-13-1, Code of Alabama 1975. The motor vehicle may then be sold pursuant to the provisions of the Alabama Abandoned Motor Vehicle Act as provided for in Title 32, Chapter 13, Code of Alabama 1975.”

Failure to Provide Notice

A person who fails to report a motor vehicle as unclaimed or fails to notify the owner and lienholder of record, if any, in accordance with this subsection forfeits all claims and liens for the motor vehicle’s garaging, parking, and storage prior to the time the motor vehicle is reported as unclaimed; provided, however, failure to report shall not result in the forfeiture of claims and liens for the towing and repair of a motor vehicle. Section 32-8-84, Code of Alabama 1975.

Removal of Unclaimed Motor Vehicles

Section 32-13-2, Code of Alabama provides that a law enforcement officer may cause a motor vehicle to be removed to the nearest garage or other place of safety under any of the following circumstances:

1. The motor vehicle is left unattended on a public street, road, or highway or other property for a period of at least 48 hours.
2. The motor vehicle is left unattended because the driver of the vehicle has been arrested or is impaired by an accident

or for any other reason which causes the need for the vehicle to be immediately removed as determined necessary by the law enforcement officer.

3. The motor vehicle is subject to an impoundment order for outstanding traffic or parking violations.

In 2020 the Legislature passed Act 2020-130 authorizing parking enforcement officers or traffic enforcement officers who are not required to be certified by the Alabama Peace Officers' Standards and Training Commission to remove abandoned vehicles in Class 1 municipalities. Section 32-13-2, Code of Alabama 1975

Lien Requirements

An owner or owner's authorized agent, or a lessee of real property or the lessee's authorized agent, upon which a motor vehicle has become unclaimed, as provided for in Section 32-8-84, may cause the motor vehicle to be removed to a secure place. Any person or entity removing the vehicle at the direction of the owner or lessee of real property or his or her agent pursuant to this section must have a lien on the motor vehicle for a reasonable fee for the removal and for storage of the motor vehicle.

A person removing a motor vehicle or other property at the direction of an owner or owner's authorized agent, a lessee of real property or the lessee's authorized agent, or a law enforcement officer must have a lien on the motor vehicle for a reasonable fee for the removal and for the storage of the motor vehicle. Section 32-13-2, Code of Alabama 1975.

Notice Requirements for Removal

A law enforcement officer who causes the removal of any motor vehicle to a garage or other place of safety pursuant to this section, within five (5) calendar days, must give written notice of the removal. The notice must include a complete description of the motor vehicle identification number and license number thereof, provided the information is available, to the Secretary of the Alabama State Law Enforcement Agency. Section 32-13-2, Code of Alabama 1975.

Liability for Removal

A law enforcement officer who, pursuant to this section, causes any motor vehicle to be removed to a garage or other place of safety shall be liable for gross negligence only. An owner or lessee or agent of the real property owner and the towing agent or wrecker service employed shall be liable to the owner or lienholder of record for action taken under this section only for gross negligence. Section 32-13-2, Code of Alabama 1975.

Authority to Sell Abandoned Vehicles

Section 32-13-3, Code of Alabama 1975 authorizes a person, as defined in Section 40-12-240, in possession of a motor vehicle that is considered an abandoned motor vehicle to sell the motor vehicle at a public auction. Notice of the date, time, and place of the sale and a description of the motor vehicle to be sold, including the year, make, model, and vehicle identification number, must be given by publication once a week for two successive weeks in a newspaper of general circulation in the county in which the sale is to be held, provided the vehicle is currently registered in the county. In counties in which no newspaper is published, notice shall be given by posting such notice in a conspicuous place at the courthouse. The first publication or posting, as the case may be, shall be at least 30 days before the date of sale.

A person selling a motor vehicle at public auction must give notice of the public auction to the department at least 35 calendar days prior to the date of the public auction. The notice of public auction must be in a manner as prescribed by the department and shall include all of the following:

- a. The name and address of the current owner and lienholder of record, if any, as reflected on the current title or registration record of state.
- b. The contact information for the person or entity filing the notice.
- c. The motor vehicle's identification number, year, make, and model.
- d. The date, time, and location of the auction.
- e. If the motor vehicle is not being sold by a bonded agent pursuant to Section 32-8-34, Section 40-12-398, or Section 40-12-414, a statement that the purchaser is required to post a bond pursuant to Section 32-8-36 in order to obtain title to the vehicle.

The auction must occur where the vehicle is located. The department of Revenue, within five calendar days of receipt

of the notice of public auction, shall send a motor vehicle interest termination notice to the current owner and lienholder of record, if any, as disclosed on the notice of public auction. The motor vehicle interest termination notice shall advise the owner and lienholder of record, if any, that their interest in the motor vehicle, upon its sale, will be terminated pursuant to this chapter, and personal property and items contained in the motor vehicle will be disposed of in a manner determined by the person or entity conducting the sale. The notice must include all the information provided in the notice of public auction as well as the owner or other interested party's appeal rights, pursuant to Sections 32-13-4 and 40-2A-8, to contest the proposed sale of the motor vehicle. Section 32-13-3, Code of Alabama 1975.

If the purchaser of an abandoned motor vehicle fails to apply for a certificate of title within one calendar year from the date of the sale, the purchaser shall be subject to posting a bond under Section 32-8-36. Each person who sells a motor vehicle pursuant to this chapter, for three years from the date of the sale, shall maintain all of the following:

- a. Copies of the notices sent pursuant to subsection (d) of Section 32-8-84, to the previous motor vehicle owner and lienholder of record, along with evidence that the notices were sent by certified mail.
- b. Any associated National Motor Vehicle Title Information System (NMVTIS) records and owner and lienholder records received from any state pursuant to subsection (d) of Section 32-8-84.
- c. Any other records as required by the department.

If the person making the sale of the motor vehicle failed to provide proper notices as required in subsection (d) of Section 32-8-84, the sale of the abandoned vehicle shall be void and the current owners, registrants, secured parties, and lienholders of record, if any, for the motor vehicle shall retain their ownership, security interests, liens, and interests in the motor vehicle. Section 32-13-3, Code of Alabama 1975.

Rejection of Bids

The person making the sale has the right to reject any and all bids if the amount bid be unreasonably low and continue the sale from time to time if no bidders are present. Section 32-13-5, Code of Alabama 1975.

Deductions from Proceeds

A person or entity making the sale of the motor vehicle must deduct from the proceeds of the sale the reasonable cost of repair, towing, storage, and all reasonable expenses incurred in connection with the sale. The person or entity must also pay the balance remaining to the license plate issuing official of the county in which the sale is made to be distributed to the general fund of the county, except any Class 2 municipality that owns and operates an impound facility and sells the motor vehicles at public auction, the proceeds from the sale shall be retained by the municipality and deposited into the general fund of the municipality; provided, that the costs shall in no event exceed the customary charges for like services in the community where the sale is made. Section 32-13-6, Code of Alabama 1975

False Statements Regarding Sale of Abandoned Motor Vehicle

Section 32-13-10, Code of Alabama 1975 prohibits a person from making a materially false statement regarding the sale of an abandoned motor vehicle. A person in violation of this section commits a Class C felony. A person, whether present or absent, who aids, abets, induces, procures, or causes the commission of an act in violation of this section commits a Class C felony.

Section 11-67A-4, et seq., Code of Alabama 1975, provides for the removal of abandoned vehicles in Class 1 municipalities.

Section 11-67B-4, et seq., Code of Alabama 1975, provides for the removal or inoperable vehicles in Class 5 cities with a mayor-commission form of government.

An ordinance declaring junked vehicles to be a public nuisance and prohibiting citizens from placing or keeping junked vehicles on their property did not violate freedom of expression as applied to wrecked automobiles that the owner of a novelty shop had had colorfully painted, planted with native cacti and placed on display outside of his store. Additionally the vehicles were not "works of visual art" protected under Visual Artists Right Act. Regulation of junked vehicles was within city's traditional municipal police powers. The ordinance was not intended to regulate "speech" but was content-neutral health and safety ordinance, reasonably tailored to achieve city's legitimate interests with only incidental restriction on protected expression. *Kleinman v. City of San Marcos*, 597 F.3d 323 (5th Cir.2010).

Bars and Nightclubs

Nearly every municipal official has encountered the problem of bar and/or nightclub owners refusing to curb abuse in and around those business establishments. When such a business is operated so that it becomes a public nuisance, the district attorney or the city governing body can seek an injunction. A sample complaint, which can be adapted to local situations, is printed below.

“Plaintiff avers and shows unto this Honorable Court that the Defendant is engaging in the operation of a bar [or nightclub] upon the premises [description] and is so conducting said business in such a manner that it constitutes a flagrant and continuing nuisance in the City [Town] of _____, which is dangerous, offensive, unwholesome, and injurious to the health, morals, safety, comfort or welfare of the City [Town] of _____, and especially to that portion of the City [Town] of _____, in which said premises are located; that the Defendant has allowed said premises to be a scene of drunkenness, fighting, and vile, vulgar or obscene conduct; that the Defendant has condoned, allowed or actively promoted the described acts or conduct on the premises; such acts or conduct have constituted and constitute a continuing nuisance in the City [Town] of _____, and are dangerous, offensive or unwholesome and Plaintiff avers that such acts or conduct are injurious to the health, morals, safety, comfort and welfare of the City [Town] of _____.”

The existence of a nightclub is not *per se* a nuisance. The club may, however, become a nuisance because of the manner in which it is operated. The municipality must conduct a thorough investigation to develop facts which demonstrate that the club is a nuisance.

The language above is suggested merely as a form. Each complaint in this type of case would normally be different from any other, depending on the facts of the situation.

Massage Therapy Establishments

Alabama law gives the State Massage Therapy Board authority to suspend the operation of a massage therapy establishment without a prior hearing when public safety is at immediate risk. Public safety shall be considered at immediate risk when (1) a law enforcement agency notifies the board that the law enforcement agency is investigating a massage therapy establishment for an offense under Section 13A-6-152, Chapter 43A of Title 34, or rules adopted by the board, (2) the massage therapy establishment is operating without a valid license issued by the board, (3) the board has reasonable cause to believe that a massage therapy establishment is violating this Chapter 43A of Title 34 or a rule adopted by the board, and (4) upon physical inspection by the board, one or more violations are confirmed. Section 34-43A-13(h), Code of Alabama 1975. Additionally, during an investigation if the executive director of the massage therapy board believes a massage therapy establishment is in violation of a local, municipal, or other applicable law, the executive director shall notify local law enforcement of the possible violations.

Drug Nuisance Abatement Act

Although a detailed discussion of the subject is beyond the scope of this article, the Alabama Legislature has authorized municipalities to abate drug-related nuisances. The act has been codified at Sections 6-5-155, et seq., Code of Alabama 1975, and provides broad authority for a municipality, through its attorney, to maintain an action in circuit court to abate drug-related nuisances.

Abatement of Weeds

The control of weeds on public property and rights of way is not as vexing as it is expensive. Conversely, the job of ridding a municipality of weeds on private property is worrisome indeed. Civic leaders and garden club members often appeal to municipal officials to remove unsanitary and weedy eyesores which have accumulated on the property of a bellicose or absentee landowner.

All municipalities have the authority to abate weeds under Sections 11-67-60 through 11-67-67, Code of Alabama 1975. In addition, all municipalities have the authority to abate weeds under the general nuisance statutes, Sections 11-47-131 through 11-47-140, Code of Alabama 1975. Under both of the above provisions, the municipality may describe the conditions declared to be a public nuisance and punish the person or persons responsible for the maintenance of such conditions.

If the municipality follows Sections 11-67-60 through 11-67-67, the municipality should closely follow the notice requirements set out in the Code provisions. It should be noted that the term municipality in Section 11-67-60 does not include the police jurisdiction; therefore, a municipality may not use Sections 11-67-60 through 11-67-67 to abate weeds in the police jurisdiction. Below is a list of steps that should be followed under Sections 11-67-60 through 11-67-67, Code of

Alabama 1975:

Under Section 11-67-61, Code of Alabama 1975, the municipality must pass a resolution declaring the weeds to be a public nuisance and declaring its abatement. The resolution should include the street name under which it is commonly known or give a legal description of the property upon which or in front of which the nuisance exists. One resolution may include multiple properties.

Under Section 11-67-62, Code of Alabama 1975, after the resolution is passed, notice of a public hearing on the matter must be mailed by certified mail, return receipt requested, 21 days prior to the date of the hearing and shall inform the owner of the time, date and place of the hearing and the reason for the hearing. The notice must be mailed to the owner of the property as the information appears on record in the office of the tax assessor. All notices shall carry a list of names of persons or private contractors, or both, who perform the work and are registered with the municipal clerk. The names shall not constitute a recommendation and the failure to include a list shall in no way affect the operation of this article. Notice must be published in a newspaper of general circulation published in the municipality once a week for two consecutive weeks, or if no newspaper is published in the municipality, notice shall be posted in three public places located in the municipality for at least 21 days prior to the hearing.

In addition, under Section 11-67-62, Code of Alabama 1975, two signs shall be conspicuously posted on the property at least 7 days prior to the public hearing. The wording of the signs shall not be less than one inch in height and shall be in substantially the following form:

Notice is hereby given that on the ____ day of ___, 20__ at ____ A.M./P.M. in the council chamber, the council of the Municipality of ____ will consider a resolution regarding the weeds growing upon or in front of the property ____ Street, in the Municipality of ___, and more particularly described in the resolution, a copy of which is on file in the office of the municipal clerk; and at that time and place will determine whether the weeds constitute a public nuisance which shall be abated by removal of the noxious or dangerous weeds; and, if so, will order the abatement and removal of the nuisance. If abatement and removal are ordered, the cost of abatement and removal shall be assessed upon the lots and lands from which or in front of which the weeds are removed, and the cost shall be added to the next regular bills for taxes levied against the respective lots and lands for municipal purposes. The costs shall be collected at the same time and in the same manner as ordinary municipal taxes are collected. The costs shall be subject to the same commissions and fees and the same procedure for foreclosure and sale in case of delinquency as provided for ordinary municipal taxes.

If no objections are filed with the municipal clerk at least five days before the meeting of the council and unless the person appears before the council in person or through his or her representative to show cause, if any, why his or her objection should be sustained, it shall be presumed that the person accepts the notice as fact and waives any rights he or she may have to contest the removal of the weeds and the action of the council shall be final unless good and sufficient cause can be otherwise shown.

Reference is hereby made to the resolution, on file in the office of the municipal clerk, for further particulars.

Dated this ____ day of ___, 20__.

Name of Municipality

City Clerk

Under Section 11-67-63, Code of Alabama 1975, if objections are filed at the time stated in the notice, the governing body of the municipality must conduct a hearing and hear and consider all evidence, objections and protests regarding the proposed removal of weeds. Upon the conclusion of the hearing, the governing body of the municipality, by resolution, must decide whether a public nuisance exists and, if so, must order it to be removed or abated with respect to any property or part thereof described.

Under Section 11-67-64, Code of Alabama 1975, after the governing body has passed a resolution finding the conditions to be a nuisance and orders its abatement, all employees and agents of the city may enter the property to abate the nuisance.

If the governing body uses outside contractors, competitive bidding is not required, and the governing body must adopt a resolution stating the name of the contractors. After the resolution is adopted the contractors may enter the property to abate the nuisance. A property owner may have the weeds removed at his or her own expense provided that the property owner's work commences before the municipal employee or contractor's work.

Under Section 11-67-65, Code of Alabama 1975, each municipality must keep a report of the costs of abating the nuisance and submit the report to the governing body. Before the report is submitted to the governing body, the report shall be posted outside the governing body's chamber door for at least five days prior to the report along with a notice that states when the report will be submitted to the governing body.

Under Section 11-67-66, Code of Alabama 1975, the governing body must hear the report, together with any objections that may be raised by any of the property owners liable to be assessed for the work of abating the nuisance. The governing body may make amendments to the report as deemed necessary, and a motion or resolution may be passed to accept the report in its final form. The amounts of the cost in the report should be referred to as "weed liens." The liens will constitute a weed lien on the property for the amount of the weed liens. After confirmation of the reports, a copy shall be given to the tax collector or revenue commissioner of the county who, under the "Optional Method of Taxation," is charged with the collection of the municipal taxes pursuant to Article 1, Division 2, Chapter 51, of Title 11. It shall be the duty of the county tax collector or revenue commissioner to add the costs of the respective weed liens to the next regular bills for taxes levied against the respective lots and parcels of land subject to a weed lien, and thereafter, the costs shall be collected at the same time and in the same manner as ordinary municipal ad valorem taxes are collected, and shall be subject to the same penalties and the same procedure under foreclosure and sale in case of delinquency; provided, however, that if the foreclosure and sale is the result of a delinquency caused by a weed lien, the municipality shall reimburse the county tax collector or revenue commissioner for all costs associated with the foreclosure and sale unless the costs are collected at the time of sale as part of the sale.

In Act 2014-303, the Alabama Legislature gave municipalities the authority to adopt its own alternate procedures to abate overgrown grass and weeds as a public nuisance once it follows the notice process in Sections 11-67-60 through 11-67-67 on the property the first time. As such, when property on which overgrown grass or weeds have been previously abated or abatement has been attempted through the process of posting notice on the property pursuant to Sections 11-67-60 through 11-67-67, a municipality may pass an ordinance adopting a different abatement procedure for subsequent abatements. Section 11-67-68, Code of Alabama 1975.

Additional Authority to Abate Weeds

Class 5, 6 or 8 municipalities have additional authority to abate weeds using Sections 11-67-20 through 11-67-28, Code of Alabama 1975. A municipality may use the provisions found in Section 11-67-20 et seq. and Section 11-67-60 et seq., Code of Alabama, 1975, to require abutting landowners of an unopened street in a subdivision to either cut or maintain weeds up to the centerline of the unopened street. This may be done at the owner's expense, or the city may assess the owner for the costs of the removal as provided in the statute. The city may also use the statutes to require abutting landowners of opened and paved streets in a subdivision to cut or maintain weeds in the street right-of-way between the lot line and the paved surface of the street or to pay an assessment for the costs of the city doing the work as prescribed in the statute. AGO 2003-0093.

Class 2 municipalities have additional authority to abate weeds using Sections 11-67-1 through 11-67-9, Code of Alabama 1975.

Class 4 municipalities have additional authority to abate weeds using Sections 11-67-40 through 11-67-45, Code of Alabama 1975.

In Class 7 municipalities, after using the abatement procedures commencing at Section 11-67-60, the city council may adopt procedures different from the procedures provided in Article 4, Title 11 Chapter 67 to declare overgrown grass or weeds to be a public nuisance and abated pursuant to the procedures provided in the ordinance. After the abatement of any overgrown grass or weeds pursuant to the procedures provided in the ordinance, the costs of abatement must be assessed and collected as a weed lien in the same manner as provided in Section 11-67-66. The municipality may assess the costs authorized against any lot or lots or parcel or parcels of land purchased by the State of Alabama or any purchaser at any sale for the nonpayment of taxes and, where an assessment is made against a lot or lots or parcel or parcels of land, a subsequent redemption thereof by a person authorized to redeem or the sale thereof by the state shall not operate to discharge, or in any manner affect the lien of the municipality for the assessment.

The definition of the term "weed" in a municipal ordinance making it a public nuisance to have weeds over 12 inches in height on private property was not unconstitutionally vague nor did the ordinance violate due process. Further, the defendant's garden did not have sufficient communicative elements to bring it within the protections afforded by the First Amendment.

Finally, enforcement of the ordinance did not constitute an unlawful taking. *City of Montgomery v. Norman*, 816 So.2d 72 (Ala.Crim.App.1999).

Conclusion

Municipalities in Alabama have adequate legal remedies to abate and enjoin public nuisances. The manner of use, and sometimes the location of property, determines the existence of a public nuisance. Each case of alleged nuisance must be decided upon its own facts.

A wide spectrum of property use has been declared by the courts to constitute a public nuisance. The tools of abatement and injunction, although available, are costly and time consuming and should probably only be used in the absence of other remedies.

Relief afforded by the courts should not exceed the necessities of a particular case, but should be extensive enough to curb the existing nuisance and prescribe rules for future conduct and use of the property by the owner.

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