Constitutional Restraints on Governmental Power to Abate Public Nuisances

Most cities, towns, and villages in New York State have enacted local laws requiring private-property owners to maintain their properties in good order and keep them from free from nuisance-like conditions which threaten public health and safety. These property maintenance laws generally address property conditions such as the outdoor storage of junk, rubbish or debris on private property, as well as the cutting, trimming or removing of brush, grass or weeds.[1]

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Many local laws adopted by cities, towns, and villages also empower local code-enforcement officers to investigate and, when appropriate, summarily abate nuisance conditions. As one court stressed many years ago, however, a municipality "acts at its peril in making . . . [a] determination and proceeding to abate . . . [a] nuisance."[2] Accordingly, government actors should proceed cautiously when investigating and deciding to abate public nuisances on private property, especially since their conduct could run afoul of important constitutional restraints on their powers.

Last year, in *Ferreira v. Town of East Hampton*, District Court Judge Joseph F. Bianco of the Eastern District issued an instructive opinion analyzing the nature and scope of various constitutional restraints on the power of local governments to summarily abate nuisances.[3] In the new age of "zombie houses" left behind by their owners in many Long Island communities in the wake of the 2008 financial crisis, many of which have, or are in the process of developing into nuisance conditions, government actors should consult Judge Bianco's opinion in *Ferreira* before taking any action to abate such conditions on their own.

Ferreira: Public Nuisance on Private Property

In *Ferreira*, the plaintiff, a self-employed mechanic, operated an automobile repair shop on family-owned private property in Montauk. He stored many unregistered and inoperative motor vehicles on the property. In an attempt to get the plaintiff to clean-up the property, the Town of East Hampton issued numerous summons to the plaintiff returnable in town justice court. When the criminal prosecutions stalled in town court and failed to produce their intended effect, *i.e.*, the clean-up of the property, town officials searched for other mechanisms in their local laws and turned to a provision of the town code which authorized the town to clean-up litter on property after providing a property owner with ten days' prior notice of the condition. The town board adopted a resolution finding the plaintiff's property violated this provision of the town code, which resolution was sent to the plaintiff. After the plaintiff still refused to clean-up the property, the town hired private contractors who went to the property and removed numerous unregistered vehicles and debris.

In response to the town's actions, the plaintiff commenced an action in federal court under 42 USC § 1983 alleging town officials violated his constitutional rights in entering onto his property and taking his property, including, without limitation, his Fourteenth Amendment right to procedural due process, and his Fourth Amendment right to be protected from unreasonable searches and seizures. The municipal defendants moved for summary judgment, contending the undisputed facts showed no constitutional violations had occurred. Judge Bianco disagreed, finding there were genuine issues of material fact whether the town and its officials violated the plaintiff's procedural due process rights and privacy rights in effecting the clean-up of his property.

Requirements of Due Process and Reasonableness

With respect to plaintiff's due process claim, the court held "[n]otice and an opportunity to be heard are the hallmarks of due process," and "[o]rdinarily, the Constitution requires some kind of hearing *before* the State deprives a person of liberty or property."[4] According to the court, however, "[t]he existence of an emergency may . . . excuse the need to provide a pre-deprivation hearing."[5] Synthesizing these principles, the court concluded "the existence of a public nuisance may excuse the failure to hold a pre-deprivation hearing if there was competent evidence allowing an official to believe reasonably that an emergency did in fact exist, and the official did not abuse her discretion in invoking an emergency. Absent such evidence, however, the failure to afford a pre-deprivation hearing would constitute a violation of the constitutional right to procedural due process in this case."[6]

Applying these principles to the facts of this case, the court found since the

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municipal defendants had failed to provide the plaintiff with a pre-deprivation hearing before entering his property, the question before the court was whether the undisputed facts showed an emergency condition existed justifying the abatement of the nuisance prior to providing a pre-deprivation hearing. On this question, the court found there were triable issues of fact whether emergency conditions existed at the property. In particular, the court focused on the fact there was considerable delay (years) after town officials identified the problems on the property and when they acted to summarily abate them. The court found the existence of this delay could support a reasonable finding the town officials acted arbitrarily in declaring the conditions on the property to be an immediate danger to the public.[7]

Conclusion

Turning to the plaintiff's Fourth Amendment claim, the court noted the law is unclear whether a warrant is required to enter private property to abate a known public nuisance.[8] After reviewing United States Supreme Court rulings on administrative searches and the Fourth Amendment, and numerous federal circuit court decisions applying those rulings to the abatement of public nuisances by government actors, the court found, with the exception of the Ninth Circuit, all other federal circuit courts that have considered the issue have held governmental actors need not obtain a warrant before abating an established public nuisance.[9] Although the Second Circuit has yet to weigh in on the issue, the court stated, based on holdings the Second Circuit has issued in other cases, it is likely to follow the vast majority of circuit court decisions that have already found a warrant is not necessary to abate a known nuisance. Thus, the court concluded "a municipality need not necessarily obtain a warrant to enter private property to abate a public nuisance."[10]

But Judge Bianco's analysis of the Fourth Amendment issue did not end with this finding. Instead, the court held even a warrantless abatement of a public nuisance by governmental actors must still be "reasonable" to comply with the requirements of the Fourth Amendment.[11] In this regard, the court found adherence to well-established principles of procedural due process is required before government actors may reasonably abate a known public nuisance without violating a private-property owner's Fourth Amendment rights.[12] Turning back to procedural due process analysis, the court found there were genuine issues of material facts whether the defendants' seizure of plaintiff's property was "reasonable" under the Fourth Amendment because the defendants failed to conduct a pre-deprivation due process hearing in what appeared to be a non-emergency situation.[13]

Judge Bianco's opinion in *Ferreira* makes clear governmental actors who seek to summarily abate known nuisance conditions on private property must proceed cautiously and take heed of constitutional limitations on their powers. Although such actors may not need a warrant to enter private property and abate a public nuisance, at the very minimum, they must afford private-property owners pre-deprivation due process, *i.e.*, notice and an opportunity to be heard, before abating a public nuisance under non-emergency circumstances. Failure to provide such due process could lead to costly and time-consuming civil-rights litigation.

Perhaps the most prudent course of conduct for a municipality to abate or eliminate a nuisance is to obtain injunctive relief from the New York State Supreme Court. The courts of this state have long allowed municipalities to enforce zoning ordinances and other code provisions.[14] One advantage a municipality has when obtaining a preliminary injunction is not being held to the customary three-prong test to be entitled to the relief. A municipality must only demonstrate its ordinance is being violated and the balance of the equities are in their favor.[15] It does not need to allege a special injury or damage to the public.[16] Seeking a preliminary injunction rather than proceeding in some other "extra-judicial" manner, also ensures the procedural due process and privacy rights of private property owners are respected prior to the abatement of a nuisance.

If a municipality has provided some mechanism in its local laws for providing pre-deprivation due process to a property owner prior to abating a public nuisance, and such process had been adhered to, a municipality should still consider obtaining a warrant prior to actually performing an abatement. Although Judge Bianco found that a warrant was not required in *Ferreira*, his opinion showed that the law is not settled on this question in the Second Circuit and there is a split of authority on this issue at the circuit court level among the circuit courts that have considered this issue.

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1. 14 New York Zoning Law and Practice Report 1.
2. *Shedrick v. Bd. of Health of Consol. Dist. of Prattsburg*, 204 Misc. 545, 547 (Sup. Ct., Steuben Co., 1953).
3. 56 F. Supp.3d 211 (E.D.N.Y. 2014).
4. 56 F. Supp.3d at 225.
5. *Id.* at 227.
6. *Id.* at 227-28.
7. *Id.* at 228.
8. *Id.* at 229.
9. *Id.* at 231.
10. *Id.* at 230.
11. *Id.* at 231.
12. *Id.* at 231.
13. *Id.* at 231.
14. *Benele v. Town of Santa Clara*, 45 A.D>3d 1164 (3d Dept. 2007); *Town of New Baltimore v. Winslow*, 39 A.D.3d 1074 (3d Dept. 2007); 15. Town of Hempstead v. Davis, 245 A.D.2d 366 (2d Dept. 1997); *Town of Coeymans v. Malphrus*, 160 A.D.2d 1178 (3d Dept. 1990).
15. *Town of Huntington v. Reuschenberg*, 70 A.D.3d 814 (2010).
16. *Inc. Village of Freeport v. Jefferson Indoor Marina*, 162 A.D.2d 434 (2d Dept, 1990).