Code Enforcement

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PROVIDING LEGAL SOLUTIONS FOR LOCAL GOVERNMENTS

Today's Roadmap

- Code Enforcement Generally
- Statutes relating to Code Enforcement
  - Nuisance – Sections 71.285 & 67.398, RSMo
  - Dangerous Buildings – Section 67.400 *et seq.*, RSMo
- Due Process as it relates to Code Enforcement
  - Notice Issues
  - Hearing

What is Code Enforcement?

- Code enforcement is a city utilizing its police power to protect the public health, safety and welfare.
- *Campbell v. City of Frontenac*, 527 S.W.2d 643 (Mo. App. 1975)
  - Code enforcement ordinances must have a reasonable relation to the health, safety, or welfare of the inhabitants of the City.

Campbell v. City of Frontenac - Facts

- City adopts ordinance that states "[e]quipment of the City Refuse Collector, or any other licensed or unlicensed garbage and rubbish collector shall not be parked, or stored in any manner on public or private property in the City of Frontenac, Missouri Violations of the provisions shall be subject to penalties as provided in Ordinance 454 of the City of Frontenac, Missouri, covering Nuisances."
- Owner of garbage and rubbish collection business is advised that the storage of his vehicles violates the ordinance, and that the City will begin taking actions to enforce the ordinance.

Campbell v. City of Frontenac – Holding

- We find that the ordinance imposes restrictions upon the use of property that have no reasonable relation to the health, safety or welfare of the inhabitants of the City. That the ordinance as enacted is not properly within the powers delegated or inherent to the City but is instead excessive thus invalid and unenforceable.
- Campbell v. City of Frontenac, 527 S.W.2d 643, 646 (Mo. App. 1975)

Campbell v. City of Frontenac – Reasoning

- Though not unmindful of municipal problems involving collection and transportation of garbage, unless some real relationship is shown between the intended regulation and public health, we cannot recognize the questioned ordinance as proper legislative action. 527 S.W.2d at 645
- Section 79.370 RSMo., gives the City power to enact ordinances for the abatement of nuisances, but the City has no power to declare that to be a nuisance which is not so at common law or by statute … or which is not in fact a nuisance. *Id.*
- The challenged ordinance's absolute prohibition against parking or storing garbage (or rubbish) collection equipment in any manner on public or private property in the City of Frontenac is **excessive in its scope and breadth**. It does not regulate or relate to the sanitary condition of the equipment or the manner in which they are cleaned or maintained. No attempt is made to distinguish between trucks which are clean or dirty, watertight or leaking, malodorous or otherwise. *Id.* At 645-46.

Lesson from *City of Frontenac*

- Need to establish and show a connection between the condition declared a nuisance and the public health, safety, or welfare
- Use common sense!

Key Statutes

- Nuisance
  - Section 71.285, RSMo - Weeds or trash, city may cause removal and issue tax bill, when--certain cities may order abatement and remove weeds or trash, when--section not to apply to certain cities, when--city official may order abatement in certain cities--removal of weeds or trash, costs.
  - Section 67.398, RSMo - Debris on property, ordinance may require abatement--abatement for vacant building in Kansas City--effect of failure to remove nuisance, penalties.
- Dangerous Buildings
  - Section 67.400, RSMo – Ordinance may require vacation, demolition or repair of structures, when

Section 71.285 – weeds and trash

Section 71.285 Requirements

- Conditions that may be abated
  - "Whenever **weeds or trash**, in violation of an ordinance, are allowed to grow or accumulate… the owner of the ground, or in case of joint tenancy, tenancy by entireties or tenancy in common, each owner thereof, shall be liable."
- Notice
  - "**ten days'** notice thereof, either **personally** or by **United States mail** to the owner or owners, or the owner's agents, or by **posting** such notice on the premises"

Section 71. 285 Requirements cont.

- Hearing
  - After the notice – "The marshal or other city official as designated in such ordinance shall give a hearing…"
  - "marshal or other designated city official may declare the weeds or trash to be a nuisance"
- Post Hearing abatement
  - "order the same to be abated **within five days**; and in case the weeds or trash are not removed within the five days, the marshal or other designated city official shall have the weeds or trash removed"
- Cost of Abatement
  - The designated city official from above "certify[ies] the costs of [the abatement] to the city clerk, who shall cause a **special tax bill** therefor against the property to be prepared and to be collected by the collector, with other taxes assessed against the property"

Lessons Learned from Section 71.285

- What a city may abate utilizing 71.285 is narrow
- 71.285 requires that the city hold a hearing regarding the nuisance
- Does provide for "self-help"
- Costs may be recovered through a special tax bill

Section 67.398 – unhealthy or unsafe condition

Section 67.398 Requirements

- Conditions that may be abated
  - Section 67.398.1 - "a condition of any lot or land that has the presence of a nuisance **including, but not limited to**, debris of any kind, weed cuttings, cut, fallen, or hazardous trees and shrubs, overgrown vegetation and noxious weeds which are seven inches or more in height, rubbish and trash, lumber not piled or stacked twelve inches off the ground, rocks or bricks, tin, steel, parts of derelict cars or trucks, broken furniture, any flammable material which may endanger public safety **or any material or condition which is unhealthy or unsafe and declared to be a public nuisance**."

Section 67.398.3 – Notice

- Who
  - "the owner of the property and, if the property is not owner-occupied, to any occupant of the property"
- How
  - "Written notice may be given by **personal service** or by **first-class mail** to both the occupant of the property at the property address and the owner at the last known address of the owner, if not the same"

Section 67.398.3 – Notice cont.

- Contents
  - "specifically describing **each** condition of the lot or land declared to be a public nuisance, and which notice shall **identify** what action will remedy the public nuisance"
  - "a reasonable time, **not less than ten days**, in which to abate or commence removal of each condition identified in the notice."
- Emergency exception to abatement timeframe
  - "Unless a condition presents an immediate, specifically identified risk to the public health or safety"

Section 67.398.3 – Self-Help and Costs

- Self-Help
  - "Upon a failure of the owner to pursue the removal or abatement of such nuisance without unnecessary delay, the building commissioner or designated officer may cause the condition which constitutes the nuisance to be removed or abated"
- Costs
  - Designated officer certifies "to the city clerk or officer in charge of finance who shall cause the certified cost to be included in a **special tax bill** or added to the **annual real estate tax bill**"

Lessons Learned from Section 67.398

- What may be abated utilizing Section 67.398 is significantly broader than Section 71.285
- No hearing requirement
- Requires that the notice contain specific content
- Costs may be recovered by either a special tax bill or through the annual real estate bill

Section 67.398 v. Section 71.285

- Broad coverage – "any material or condition which is unhealthy or unsafe and declared to be a public nuisance."
- No hearing requirement
- Owner gets a minimum of ten (10) days (from receipt of notice) to begin nuisance abatement, and if he fails, the City can abate.
- Requires specific notice content
- If the City abates, the cost can be certified to the city clerk who causes the cost to be included in a special tax bill or added to the annual real estate tax bill.

- Limited coverage: only weeds and trash
- City must hold hearing
- 10 days notice before hearing (unless city is in a 1st Class County, then hearing with 4 days notice)
- Hearing officer can order the owner/occupant to abated the weeds or trash within 5 days and if the owner/occupant fails, the City may abate.
- Cost of abatement must be certified to the City Clerk who has a special tax bill issued, which is a first lien on the property.

Other relevant Statutes

- Section 71.780 – Nuisances – expense of suppression, how paid
  - All cities "granted, the power to suppress all nuisances which are, or may be, injurious to the health and welfare of the inhabitants of said cities, or prejudicial to the morals thereof, within the boundaries of said cities and within one-half mile of the boundaries thereof."
  - If the nuisance is suppressed within the city limits, the expense for abating the same may be assessed against the owner or occupant of the property, and against the property on which said nuisance is committed, and a special tax bill may be issued against said property for said expenses"
- 3rd Class Cities – Sections 77.530 & 77.560
- 4th Class Cities – Sections 79.370, 79.380, & 79.383.

Section 67.400 *et seq.*- Dangerous Buildings

Dangerous Buildings

- Section 67.400, RSMo - Ordinance may require vacation, demolition or repair of structures, when.
- Section 67.410, RSMo – provisions required in ordinance
- Section 67. 440, RSMo – Emergency powers may be authorized

What are Dangerous Buildings?

- Section 67.400
  - "buildings or structures … which are detrimental to the health safety or welfare of the residents and declared to be a public nuisance."
- Section 67.410.1(1) requires that a city's Dangerous Building Ordinance
  - "Set forth those conditions detrimental to the health, safety or welfare of the residents of the city … the existence of which constitutes a nuisance."
- Common Dangerous Building Ordinance conditions
  - Those that have wracked, warped, buckled, or settled to such an extent that walls or other structural portions have materially less resistance to winds or earthquakes than is required in the case of similar new construction.
  - Those that are likely to fail, or to become detached or dislodged, or to collapse, and thereby injure persons or damage property.
  - Those that, because of dilapidation, deterioration, or decay; faulty construction; the removal, movement or instability of any portion of the ground necessary for the purpose of supporting such building; the deterioration, decay or inadequacy of its foundation; or any other cause, are likely to partially or completely collapse.
  - Those that are, for any reason, so unsafe, unsanitary, or dangerous so that they threaten the health, safety, or general welfare of the occupants or the general public.

Dangerous Building – Notice

- Two Notices
  - Notice of Declaration of Nuisance – Section 67.410.1(3)
  - Notice of Dangerous Building Hearing – Section 67.410.1(4)

Notice of Declaration of Nuisance

- Who
  - owner, occupant, lessee, mortgagee, agent, and all other persons having an interest in the building or structure as shown by the land records of the recorder of deeds of the county wherein the land is located
- How
  - "notice be served either by **personal service** or by **certified mail**, return receipt requested, but if service cannot be had by either of these modes of service, then service may be had by **publication**."
- Contents
  - "the property is to be vacated, if such be the case, reconditioned or removed, listing a reasonable time for commencement"

Notice of Dangerous Building Hearing

- Section 67.410.1(4), RSMo -If there is a failure to commence rehabilitation or demolition (or unnecessary delay in doing so) then there is a hearing to determine if the structure is a dangerous building (and the hearing office can order it demolished or rehabilitated)
- City must give "affected parties at least **ten days written** notice of the hearing."

Hearing

- Hearing must be "full and adequate" – 67.410.1(4), RSMo.
- Parties have the right to "be represented by counsel, and all parties shall have the opportunity to be heard."
- After the hearing, "if the evidence supports a finding that the building or structure is a nuisance or detrimental to the health, safety, or welfare of the residents of the city … the building commissioner … shall issue an order making specific findings of fact, based upon competent and substantial evidence, which shows the building or structure to be a nuisance and detrimental to the health, safety, or welfare of the residents of the city … and ordering the building or structure to be demolished and removed, or repaired."

Costs of Post-Hearing Action

- The cost of demolishing, securing, or repairing, or cleaning up the property "shall be certified to the city clerk or officer in charge of finance, who shall cause a **special tax bill** or **assessment** therefor against the property to be prepared and collected …" unless done by an outside contractor

Miscellaneous Dangerous Building Issues

- Ordinance must comply with statutory requirements. *Goe v. City of Mexico*, 64 S.W.3d 836 (Mo. App. E.D. 2001) (City failed to provide for hearing as required by statute prior to demolishing house).
- Emergency Situations - Section 67.440, RSMo
  - "[t]he ordinances may provide that in cases where it reasonably appears there is an immediate danger to the health, safety, or welfare of any person, the building commissioner or designated officer or officers may take emergency measures to vacate and repair or demolish a dangerous building or structure."
  - *City of Kansas City v. Jordan*, 174 S.W.3d 25 (Mo. App. W.D. 2005)
- Insurance Proceeds – Section 67.410.2, RSMo
  - "If there are proceeds of any insurance policy based upon a covered claim payment made for damage or loss to a building or other structure caused by or arising out of any fire, explosion, or other casualty loss, the ordinance may establish a procedure for the payment of up to **twenty-five percent of the insurance proceeds**, as set forth in this subsection."
- Appeals – Section 67.430, RSMo

Due Process

No person shall be…deprived of life, liberty, or property, without due process of law…."

Requirements of Due Process

- "Fundamental Fairness"
  - Providing "notice and opportunity for hearing …" *Mullane v. Central Hanover Bank,* 339 U.S. 306, 313 (1950)
- Due process analysis requires the balancing of three competing interests
  - (1) the private interest affected;
  - (2) the risk of erroneous deprivation and the probable value of additional safeguards; and
  - (3) the government's interest.
    - *Matthews v. Eldridge,* 424 U.S. 319 (1976)

Notice

- "Due process does not require that a property owner receive actual notice before the government may take his property" but a city must provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objects." *Arbogast v. City of St. Louis*, 285 S.W.3d 790, 796 (Mo. App. E.D. 2009)*; quoting Jones v. Flowers*, 547 U.S. 220 (2006).

Arbogast v. City of St. Louis - Facts

- Fire damage to building/structure
- Plaintiff moves out and registers change of address with Post Office
- City's attempted mailed notice is returned to sender with notice of new address
- City has to board up building/structure twice because of "squatters" removing boards and other items
- City decides to demolish – sends notice to fire-damaged building/structure and posts notice on property.

Arbogast v. City of St. Louis - Holding

- "If the [city] becomes aware prior to a taking that its attempt at notice has failed, due process requires the government to take further reasonable steps if any were available." 285 S.W.3d at 797.
- Held that in this case, the City's follow-up measure failed to provide adequate notice.
- Holding based on the fact that:
  - (1) City had received notice of the owners' new address so send notice to the fire damaged building was not sufficient; and
  - (2) Posting notice was insufficient because city knew squatters were on the property (*See Greene v. Lindsey*, 456 U.S. 444 (1982).

Sufficient Notice

- Personal service is the "gold standard of notice." *Schlereth v. Hardy,* 280 S.W.3d 47, 52 n. 4 (Mo. 2009).
- Certified mail is good, but need to get signature to establish that notice was in fact received.
- First class, regular mail also good, if it is not returned
  - Presumption that it is received, if it is not returned.
- Posted notice generally works when accompanied by other notice
  - "… posted service accompanied by mail service is constitutionally preferable to posted service alone." *Arbogast*, 285 S.W.3d at 801; quoting *Greene*, 456 U.S. at 455 n. 9.
- Public notice is last ditch effort. *See Mennoite Bd. Of Missions v. Adams*, 462 U.S. 791 (1983).

Application to Key Statutes

- Section 71.285, RSMo – weeds and trash
  - "**personally** or by **United States mail** to the owner or owners, or the owner's agents, or by **posting** such notice on the premises"
- Section 67.398, RSMo – broad nuisance
  - "**personal service** or by **first-class mail** to both the occupant of the property at the property address and the owner at the last known address of the owner, if not the same."
- Section 67.410, RSMo – dangerous building
  - Declaration of Nuisance - "notice be served either by personal service or by certified mail, return receipt requested, but if service cannot be had by either of these modes of service, then service may be had by publication."
  - Notice of Hearing - "affected parties at least ten days written notice of the hearing."

Hearings

- "Due process is provided by affording parties to an administrative proceeding the opportunity to be heard at a meaningful time and in a meaningful manner." *Graves v. City of Joplin*, 48 S.W.3d 121,124 (Mo. App. S.D. 2001)
- "Due process requires that administrative hearings afford the parties a fair hearing and contain rudimentary elements of fair play." *Greater Garden Ave. Area Ass'n v. City of Webster Groves*, 655 S.W.2d 760, 765 (Mo. App. E.D. 1983).

Hearing Issues

- Ability to request a hearing is not sufficient – *Goe v. City of Mexico,* 64 S.W.3d 836 (Mo. App. E.D. 2001).
- Defective Findings and Conclusions – *Woodson v. City of Kansas City*, 80 S.W.3d 6 (Mo. App. W.D. 2002) (court ruling that FF/CL/Order were insufficient because they only listed code provisions that were violated and those were mere conclusions).

Application to Key Statutes

- Section 71.285.1, RSMo – weeds or trash
  - "The marshal or other city official as designated in such ordinance shall give a hearing…"
- Section 67.410.1(4), RSMo – dangerous building
  - "full and adequate hearing"
  - "[M]ay be represented by counsel, and all parties shall an opportunity to be heard."

Miscellaneous

- Zoning Code Enforcement under Section 89.120, RSMo.
- 4th Class Cities Attorney's Fees under Section 79.383, RSMo.
  - "If any fourth class city shall enact an ordinance allowing for a civil cause of action for abatement of nuisances created by the accumulation of **unsightly, dangerous, or noxious personal property** within the borders of such city, the city may, upon successful prosecution of such cause of action, be awarded by the court reasonable attorney's fees incurred in such action."
- Declaratory Judgment and Injunction for Public Nuisance.
  - If all else fails and violations are on going and threaten health, safety, and/or welfare of the public
  - Court should make the determination that the violations threaten health safety, welfare and that they could result in: (1) irreparable injury; and (2) no adequate legal remedy at law
- Administrative Warrants
- Selective Enforcement

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