City Laws, Nuisances, and the Fourth Amendment

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Hoarding may be in the eye of the beholder, but nuisance is against the law. Where one property owner's natural yard is another's weed infested mosquito factory, a court may have to decide.

Nuisance is a word with many meanings. Most people think of it as a bother, an annoyance, a little brother. In law, it has a distinct meaning: a condition that interferes with someone's use or enjoyment of their property. Municipal ordinances typically include a definition of "nuisance" to authorize the city to take action when those conditions occur.

State Laws on Nuisance

Alabama state law authorizes municipalities to take matters in their own hands upon finding a nuisance.[1] According to that provision, once a municipality has made a determination that a nuisance exists, and the owner fails or refuses to "abate the nuisance" (i.e., fix it), "then the municipality may enter upon the property and abate the nuisance using its own forces, or it may provide by contract for the abatement" (in other words, hire someone else to fix it).

Rather than using the term nuisance to describe messes on private lands, Mississippi state law authorizes municipalities to clean private property after determining the land is a "menace."[2] The law describes a menace as being in "such a state of uncleanliness" that it poses a risk to "public health, safety and welfare of a community." The law requires a public hearing which can be brought by the governing authority of a municipality or by a petition of the majority of landowners within 400 feet of the offending property. As is consistent with due process, the owner of the menace must receive notice of the hearing describing the offenses and the opportunity to challenge the violations.

Municipal Laws on Nuisance

Municipalities likely have their own rules regarding nuisances on private property in exercise of their general authority to protect the public health and safety of the community. Many of the rules focus on overgrown weeds and junked cars. In Starkville, Mississippi the city may declare a public nuisance when a property has an excessive accumulation of overgrown or dead plants, stagnant water, or junk/trash/debris which may form a breeding ground for animals and mosquitos or "or adversely affect and impair the economic welfare of adjacent property."[3] Additionally, it is unlawful for "junk, scrap or salvage material to be on any land" except where it is "screened from ordinary public view."[4] Center Point, Alabama may declare a nuisance when it finds an inoperable vehicle left in public view in violation of local law.[5] Upon notice of the violation and opportunity for a hearing, the city council can arrange for its removal and disposal.[6]

Underlying these rights to declare a nuisance and to force abatement is the right to identify the nuisance in the first place. Specifically, the city's right to identify nuisances on private property. Municipalities typically authorize code enforcement officials to inspect, document, and charge instances of violating city ordinances. Think of violations such as selling liquor at the wrong time, or blocking a ramp with a dumpster, rather than criminal violations. Code enforcement officers will be authorized to enter property "at reasonable times, to investigate conditions."[7]

Problems with Enforcement

Courts in both Alabama and Mississippi have found that code enforcement officers were trespassing and violated the rights of the landowner when property inspections led to charges regarding property maintenance.[8] The claims in both cases involved the portion of the Fourth Amendment of the U.S. Constitution that protects "[t]he right of the people to be secure in their persons, houses, papers, and

effects, against unreasonable searches and seizures." Typically, this provision is associated with criminal law; and, as any regular viewer of Law & Order knows, the police need a warrant for searches.

However, it's an interesting question whether the Fourth Amendment applies to *civil* searches where those searches are authorized under municipal ordinances. Those ordinances, it could be argued, provide the same general rationale as a warrant for the search – reasonable cause. In 1967 the U.S. Supreme Court described such a search as "a routine inspection of the physical condition of private property [which] is a less hostile intrusion than the typical policeman's search for the fruits and instrumentalities of crime."[9] However, municipalities' use of warrantless administrative searches, according to the Court, "cannot be justified on the grounds that the searches make minimal demands on occupants." Those subject to the searches have more at risk than just a clean-up order or a civil violation, and they may not know the "reasonable grounds" for the search or why a city official is at at their door.

The U.S. Supreme Court in *Camara v. Municipal Court*, for example, noted that administrative inspections for public health and safety can lead to a criminal complaint and that refusing to comply may be a criminal offense.[10] In *Camara*, the authorized city employees were attempting to verify whether an occupant was illegally using commercial premises as a residence. After multiple refusals to allow access, the occupant was arrested.

The arguments made in support of municipalities' right to make warrantless inspections is that the authorized searches must be based on reasonable grounds. Also, because the factors to show a civil nuisance are quite broad – impacting health or human safety – if forced to get a warrant first, the warrants also could be broad, providing little protection to the property owner. And communities depend on civil enforcement to curb the behavior of unlawful neighbors. Nonetheless, the Supreme Court rejected the notion that routine inspection was the only effective way to enforce minimum health and public safety standards. The inspections need to be made but must be made with a warrant, according to the Court.

It might not be hard to get the warrant. According to the Court, the standards to obtain a warrant for health purposes may be lesser than to grab the fruits of a crime. Probable cause is flexible, said the Court, and is based on the nature of the search, for example "the passage of a certain period without inspection might of itself be sufficient in a given situation to justify the issuance of the warrant."[11] Or a citizen complaint could form the basis for the warrant. Thus, the Supreme Court did not think requiring a warrant would hamper the ability of municipalities to enforce their civil codes.

Inspections for Nuisances in Mississippi and Alabama

Some 55 years later, Alabama and Mississippi courts found that warrantless searches by city officials for the purpose of identifying a nuisance violated the law, but the courts relied on different arguments to reach that conclusion.

In a 2022 Mississippi Court of Appeals case, *Okhuysen v. City of Starkville*, a city code inspector came onto what is known as the curtilage of a home – property surrounding the structure – and found "an abandoned truck and various other debris, junk, scrap materials, and construction materials" and took photos. The landowner was charged with violating the provisions related to excessive junk, high weeds, and abandoned vehicles.[12] After a trial, the landowner was found guilty and fined $1,000. The municipality then sought to charge him under Miss. Code § 21-19-11, for keeping property that posed a menace. At the Board of Aldermen hearing to determine whether a violation occurred, the landowner's attorney said, among other things, that the inspector had trespassed and violated the Mississippi Constitution, Art. 3, § 23. The Board gave the landowner approximately 60 days to clean up the property. The landowner appealed all the way to the Court of Appeals.

The Court of Appeals agreed with the landowner's attorney that Art. 3, § 23 of the Mississippi Constitution protected all of the landowner's property from an unreasonable search and seizure, even those parts in plain view. That constitutional provision is worded nearly identically to the Fourth Amendment of the U.S. Constitution, with one significant change. The Mississippi Constitution states "The people shall be secure in their persons, houses, and *possessions*, from unreasonable seizure or search …" whereas the U.S. Constitution refers to "persons, houses, *papers, and effects*." The Mississippi Supreme Court has held that the difference means Mississippi requires a warrant for searches for more things, notably "practically everything which may be owned, and

over which a person may exercise control."[13] Accordingly, the City of Starkville "should not have been able to use that evidence" (the photos and testimony) gathered without a warrant, and the court in *Okhuysen* ordered dismissal of the claim against the landowner.

Alabama's Civil Court of Appeals also found Fourth Amendment violations related to finding inoperable vehicles at a home. A code enforcement official spotted two vehicles from the road, entered the curtilage to verify, and issued a notice of violation and an order to comply.[14] After a few weeks, the city arranged towing, and eventually the towing company sold the two cars. The owner of the vehicles sought $100,000 in compensation for the sale of the inoperable 2002 Chevrolet Camaro and 1984 Buick Regal,[15] $300,000 in punitive damages, and unspecified damages for violations of her constitutional and civil rights.

The Alabama court described municipal inspections as being more broadly authorized than did its Mississippi counterpart, finding that there is no consensus as to whether a warrant is required for a properly-conducted administrative inspection:

> it is important to note that, in the context of the enforcement of nuisance ordinances, a prescribed administrative process may provide a constitutionally adequate substitute for a warrant. Indeed, a number of federal circuit courts have held that the *warrantless abatement of a public nuisance was nonetheless reasonable under the Fourth Amendment* when it was accompanied by an adequate administrative procedure.[16]

However, according to the court, the City of Center Point did not provide a process for challenging a notice of violation, time to abate the violation, or an opportunity for a hearing.[17] Accordingly, the court held the landowner's Fourth Amendment rights were violated.

Conclusion

The difference between the *Okhuysen* case in Mississippi, and the *McDonald* case in Alabama, is that the municipal ordinance itself was faulted by the court in *McDonald*:

> there was no adequate procedure administrative or judicial process that might, under the facts of this case, have rendered the seizure of McDonald's vehicles reasonable under the Fourth Amendment.[18]

Whereas in Okhuysen, the state constitution was the basis to deny the legitimacy of the search. This gives the Alabama decision a limited application in comparison. A properly drafted municipal ordinance – providing notice and an opportunity for a hearing – may authorize a warrantless search for a nuisance violation under Alabama law, but it won't make a difference in Mississippi.

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Endnotes

1. Ala. Code § 11-67-145.
2. Miss. Code § 21-19-11 (the fine may be $1,500 or 50% of the actual costs for cleaning the property, whichever is higher, not to exceed $20,000 for multiple cleanups occurring in a 12-month period).
3. Starkville (MS) Ord. § 8.1.01.D.
4. Starkville (MS) Ord. § 8.1.12.D.
5. Center Point (AL) Ord. § 46-68.
6. Center Point (AL) Ord. § 46-70 (as modified Sept. 16, 2019).
7. *See, e.g.* Starkville (MS) Ord. § 8.1.02.E.
8. McDonald v. Keahey, 301 So.3d 823 (Ala. Civ. App. 2019); Okhuysen v. City of Starkville, 333 So.3d 573 (Miss. Ct. App. 2022)
9. Camara v. Municipal Court, 387 U.S. 523 (1967).
10. *Camara*, at 531.
11. *Camara* at 358.
12. The ordinances which the landowner was charged with § 94-27, § 54-107, respectively, have been revised and renumbered since the charges were brought.
13. Falkner v. State, 134 Miss. 253, 257, 98 So.691, 692 (1924).
14. McDonald v. Keahey, 301 So.3d 823 (Ala. Ct. Civ. App. 2019).
15. Edmunds estimates the value of the Chevy Camaro as $865-$7,317, and J.D. Power assesses the Buick Regal as $950 - $2,925.
16. *McDonald*, 301 So.3d at 836 (emphasis added).
17. *McDonald*, 301 So.3d at 837. Based on a review of the ordinances, it appears the ordinances were amended in September 2019 and provide an opportunity for a hearing.
18. *McDonald*, 301 So.3d at 837.