

## **Advisory Notice**

### **Subject: Nuisance Abatement Cases**

#### **Overview of Nuisance Abatement**

The Nuisance Abatement Law is a powerful tool that allows the police to use civil remedies to fight crime. It allows the police acting under designation of the New York City Corporation Counsel, to bring actions in State Supreme Court seeking the judicial closing of locations where criminal activities occur.<sup>1</sup> The NYPD uses these actions to combat drug dealing, prostitution, and other illegal activity.

The New York City Administrative Code defines a public nuisance as, among other things, a building where there have been three or more violations of the Penal Law related to controlled substance offenses, marijuana offenses, and gambling offenses in the course of a year.<sup>2</sup> Nuisance abatement actions do not need to be predicated upon arrests and convictions. The statute allows actions to be commenced upon a showing that a public nuisance exists.<sup>3</sup>

Typically, after observing three or more violations under the Penal Law (P.L. 220, 221, 225), the police commence a nuisance abatement action by submitting a summons and verified complaint. The law permits the police to commence such an action with an *ex parte* motion for a preliminary injunction, temporary closing order, or temporary restraining order.<sup>4</sup> Once the judge signs the order to show cause, the parties are directed to appear within days for a hearing regarding why the premises should not be closed. Oftentimes, the defendants do not appear and do not answer the complaint. The City may then file a motion for summary judgment, and once closure of the premises is granted, the sheriff may remove all the occupants from the premises. In other instances, defendants may reach a settlement with the City.

#### **Concerns Related to Nuisance Abatement Actions**

Recently, there has been public concern that nuisance abatement actions have created unintended consequences, as individuals who are not involved in criminal activity are evicted from their homes. While nuisance abatement actions may target bodegas, groceries, restaurants, and other premises, the actions that have targeted apartments as drug sale locations have elicited the most concern. Some of the concerns that have arisen include:

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1 William J. Bratton, New York City Police Department's Civil Enforcement of Quality-of-Life Crimes, 3 J.L. & Pol'y 447, 452 (1995).

2 N.Y. Admin. Code 7-703 (g).

3 William J. Bratton, New York City Police Department's Civil Enforcement of Quality-of-Life Crimes, 3 J.L. & Pol'y 447, 453 (1995).

4 *Id.*, N.Y. Admin. Code 7-707, 7-709, 7-710.

- Due to the *ex parte* nature of the proceeding, the occupants of the apartments and homes do not have notice that their dwelling place is being closed.
- The complaints attached to the Order to Show Cause are based on the personal knowledge of confidential informants. The CIs rarely identify the individuals from whom they bought controlled substances. The affidavits are very general and do not reference an individual defendant.
- Many cases are commenced against John Doe, so there are virtually no claims in the affidavit of merit against individuals.
- Named defendants are the occupants of the property, and very few cases involve any direct criminal allegations against the named defendants.
- Service of the summons, complaint and order to show cause often is not verified. The affidavit of service is based on nail-and-mail, so there is no proof that defendants receive actual notice. The NYPD acts as the affiant of service, which may pose a conflict of interest.
- If the named defendants do not reside on the property, the hearing date may have passed before they receive actual notice of it.
- On the rare occasions when a defendant appears on the hearing date, virtually every time there is a stipulation of settlement where the defendants waive all of their rights, defendants hold NYPD harmless for any claims that they may have against it, and defendants sign the stipulations without the benefit of counsel.

Due to these fairness concerns, it is beneficial to look at the courtroom procedures that some judges have implemented when handling these matters.

### **Principles Governing a Measured Approach to Nuisance Abatement Actions**

- Limit the grant of *ex parte* closures and TROs of homes - When a closure involves an apartment or other dwelling place, be careful when ordering closure because there may be other family members or residents who are innocent of any crime who will suffer the consequences of the closure.
- Limit the grant of *ex parte* relief when evidence is old - In cases where apartments are claimed to be drug sale locations and the evidence may be stale, some judges do not issue Temporary Restraining Orders or order closure. The individuals responsible for the drug violations may no longer be residing at the address, and closure may affect innocent parties.
- It is not necessarily beneficial to enjoin legal activity without ordering closure - In those cases, the City may still post notices on the premises, saying that the premises is now enjoined. Some judges also refrain from ordering the enjoinder of illegal activity on an *ex parte* motion.
- Grant closures where the evidence of criminal activity is based on firsthand knowledge - Many of the affidavits submitted by the police are based on statements with multiple layers of hearsay and with unidentified confidential informants. When the evidence of criminal activity can be recounted by a person with direct knowledge, it is considered much more reliable. Look for an ongoing criminal enterprise with recent activity and where the evidence is "clear and convincing."
- When negotiating a settlement in court, put it on the record before a court reporter and hold an allocution. Sometimes stipulations of settlement are

negotiated outside of court, without court input. In those instances, all efforts should be made to bring the parties before the court.

- When allocuting on a stipulation of settlement it is advised that the minimum that should be ascertained by the judge is the following:
  1. The Identity of any unrepresented person and the person's connection to the property in question.
  2. The unrepresented person's authority to sign the stipulation of settlement
  3. If the unrepresented litigant has read and understands the stipulation of settlement. It is important to insure if an individual requires an interpreter and to obtain the services of an interpreter if required.
  4. If the unrepresented litigant understands the effect of the terms of the stipulation and any effects of non-compliance with the stipulation.
  5. If any unrepresented litigant's claims or defenses are discerned and understood.
  6. If the unrepresented litigant understands all options available in light of their alleged claims and defenses.
  7. If the unrepresented litigant has the capacity and/or ability to understand the proceedings and to assert any claims or defenses.

The judge should also ascertain whether any unrepresented litigant's claims and defenses are adequately addressed prior to so ordering any stipulation.

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