Trespass, "authorized person"

Number: INFORMAL

Date: December 04, 2000

Mr. Timothy J. Sloan
Parker City Attorney
Post Office Box 2327
Panama City, Florida 32402-2327

RE: MUNICIPALITIES--TRESPASS--meaning of "authorized person" in trespass law. s. 810.09, Fla. Stat. (2000 Supp.).

Dear Mr. Sloan:

On behalf of the Parker City Council, you ask whether an independent contractor, hired by the city to clean up private property that poses public health, safety, and welfare problems, constitute an "authorized person" as defined in section 810.09(3), Florida Statutes.

As more fully discussed below, the provisions of section 810.09, Florida Statutes, do not appear to be applicable to the factual situation you describe. Rather a municipality may utilize various statutory provisions or adopt an ordinance providing for the city to abate nuisances that pose a threat to the public health, safety, and welfare, and may use an independent contractor to actually make the repairs.

You state that the City of Parker on two separate occasions has cited one of its residents for conditions that were considered public health, safety, and welfare problems in violation of the nuisance provisions of the city code. Each citation resulted in a fine being levied against the resident and a direction to correct the nuisance. In each case, the fines were not paid and the situations were not remedied. Liens have been placed against the property, but the resident continues to maintain such conditions on his property. Therefore, the city is considering instructing a third party contractor to clean up the property. The resident has placed "no trespass" signs on his property.

Initially, I would note that section 810.12, Florida Statutes, which provides generally for unauthorized entry on land and prima facie evidence of trespass, states in subsection (5) that the statute "shall not apply to any official or employee of the state or a county, municipality, or other governmental agency now authorized by law to enter upon lands[.]" Various statutes authorize a governing body to take measures to abate nuisances that pose a threat to the public health, safety, and welfare. For example, section 162.09(1), Florida Statutes, provides in part that if the code violation poses a serious threat to the public health, safety, and welfare, or if the violation is irreparable or irreversible in nature, the enforcement board shall

"notify the local governing body, which may make all reasonable repairs which are required to bring the property into compliance and charge the violator with the reasonable cost of the repairs along with the fine imposed pursuant to this section. Making such repairs does not create a

continuing obligation on the part of the local governing body to make further repairs or to maintain the property and does not create any liability against the local governing body for any damages to the property if such repairs were completed in good faith."

Sections 60.05 and 60.06, Florida Statutes, also provide for abatement of nuisances.[1]

In addition, the First District Court of Appeal in *City of Jacksonville v. Sohn*[2] recognized:

"The general rule is that municipalities may, under their police powers, regulate, restrain, and *abate* activities or conditions which are dangerous to the public, health, safety, or welfare. . . . However, any action taken by a municipality must be in conformity to the ordinances of the municipality." (citations omitted) (e.s.)

In *Sohn,* the court considered the application of a city ordinance authorizing the city to enter private land for the purpose of abating a nuisance. Under the ordinance, the total expense, including administrative costs, incurred by the city in causing a public nuisance to be terminated constituted a lien on the property. The court concluded that while the ordinance authorized a lien against the property, it did not create a right for the city to enforce nuisance abatement liens against landowners personally and that nuisances of noxious vegetation and garbage or debris did not constitute "emergencies" for which the city was entitled to recover the expenses of abatement under implied contract theory.[3]

Thus, there are various statutes authorizing a governing body to take measures to abate nuisances that pose a threat to the public health, safety, or welfare as well as the courts' recognition of the authority of municipalities, under their police powers, to abate activities or conditions which are dangerous to the public, health, safety, or welfare.

You have not advised this office whether the city, in making the repairs, is operating pursuant to a city ordinance or section 162.09(1), Florida Statutes. Whether operating pursuant to statute or ordinance providing for the abatement of nuisances, the determination that a nuisance threatens the public health, safety, and welfare exists and must be abated is a determination that must be made by the city. I am not aware, however, of any statutory prohibition that would preclude the city from utilizing an independent contractor to actually make the repairs. In carrying out such function as authorized by statute or ordinance, the independent contractor would not appear to constitute a trespasser within the contemplation of Chapter 810, Florida Statutes.

You refer to the term "authorized person" as used in section 810.09, Florida Statutes. Section 810.09(1)(a), Florida Statutes, provides:

"A person who, without being authorized, licensed, or invited, willfully enters upon or remains in any property other than a structure or conveyance: . . . [a]s to which notice against entering or remaining is given . . . commits the offense of trespass on property other than a structure or conveyance."

The term "authorized person," however, is used in section 810.09(2)(b), Florida Statutes, which states:

"If the offender defies an order to leave, personally communicated to the offender by the owner of the premises or by an authorized person . . . the offender commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083."

Thus, the statute permits an "authorized person" to "stand in the shoes of" the owner and order a trespasser to leave.

In considering the interpretation of the term "authorized person" for purposes of section 810.09, Florida Statutes, the Supreme Court of Florida in *State v. Dye*[4] stated:

"'Common understanding' dictates that the phrase 'other authorized person' is to be read in light of the preceding phrase 'owner of the premises' . . . . In regard to private land, an 'authorized person' is one who receives either express or implied authorization from the owner."

During the 2000 legislative session, section 810.09, Florida Statutes, was amended to provide a statutory definition of the term "authorized person." Section 810.09(3), Florida Statutes, as amended by section 5, Chapter 2000-369, Laws of Florida, provides:

"As used in this section, the term "authorized person" or "person authorized" means any owner, or his or her agent, or any law enforcement officer whose department has received written authorization from the owner, or his or her agent, to communicate an order to leave the property in the case of a threat to public safety or welfare."[5]

Therefore, while an independent contractor, on behalf of the city, may be authorized by statute or by ordinance to clean up private property that poses public health or safety problems, such a person does not appear to constitute an "authorized person" as defined in section 810.09(3), Florida Statutes.

Sincerely,

Joslyn Wilson
Assistant Attorney General

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[1] *See also* s. 386.02, Fla. Stat., setting forth the duty of the Department of Health, upon request of the proper authorities, to ascertain the existence of any sanitary nuisance and to serve notice upon the proper party or parties to remove or abate the nuisance or, if necessary, proceed to remove or abate the said nuisance in the manner provided in s. 823.01, Fla. Stat. *Cf.* McQuillin *Municipal Corporations* ss. 24.71-24.75 (1997) regarding summary abatement of a nuisance by a public body.

[2] 616 So. 2d 1173 (Fla. 1st DCA 1993).

[3] *Cf. Brandon Township v. Jerome Builders, Inc*., 263 N.W.2d 326 (Mich. App. 1977) (township

to recover from landowners personally the cost of abating a nuisance in the absence of enabling legislation since township request that owners repair the dam was not answered and township feared a catastrophic rupture of the dam and flood in the event of a heavy rainfall).

[4] 346 So. 2d 538, 541-542 (Fla. 1977).

[5] An examination of the legislative history indicates that the definition was added to address a 1990 opinion of this office that stated there was no authority to pre-authorize on-duty police officers to act as a private landowner's agent in warning individuals to leave the private landowner's property. *See* Op. Att'y Gen. Op. 90-08 (1990) (on-duty police officers may not be pre-authorized to act as the agents of a private landowner for the purpose of communicating to an alleged trespasser an order to leave the private property pursuant to s. 810.09[2][b] although there may be instances where there is a threat to public safety and welfare and it is in the public's interest to permit a law enforcement officer to order, on behalf of a landowner, an alleged trespasser to leave the property).