

May 2015

PUBLIC HEALTH REMEDIES AT A GLANCE

Injunctions – G.S. 130A-18

Summary

- An injunction is a court order. In the public health context, an injunction orders a person to stop violating public health laws.
- Three terms to know:
 - A “temporary restraining order” (TRO) directs the person to stop the violation immediately. It may be issued without advance notice to the affected person if certain conditions are met.
 - A “preliminary injunction” is a short-term order that directs the person to stop the violation while the case is pending.
 - A “permanent injunction” is the court’s final order to the individual to cease the violation of law.
- Either the state or a local health director may seek an injunction for any violation of a public health statute or rule, or a local board of health rule.
- An action for injunction must be filed in the superior court of the county where the violation occurred.
- A person who fails to comply with an injunction may be held in contempt of court.

Procedure

1. Determine and document that there has been a violation of a public health statute, state rule, or local rule. Be specific about which law was violated and the facts that support the position that there has been a violation.
2. The local health director, in consultation with the EH specialist or supervisor, should consult with the health department’s attorney* and/or Office of the Attorney General to:
 - a. Determine whether injunctive relief is appropriate under the particular circumstances,
 - b. Obtain advice about documentation and/or other evidence that should be assembled before seeking the injunction, and
 - c. Obtain the attorney’s assistance in filing the action in superior court and providing the proper notice to the affected party.
3. Be prepared to provide the following information to the attorney:
 - a. County of residence of the violator (the defendant).
 - b. County where violation was committed.
 - c. Statement or summary of the facts that establish the violation.
 - d. Copy of all applicable statute and rules, including the statute that authorizes the health director to seek an injunction and the statutes or rules that were violated.
4. To get quick action using this remedy, the attorney must request a temporary restraining order (TRO). Otherwise, the case will proceed under normal time frames. A TRO is effective for 10 days. During that time, the attorney may seek a preliminary injunction, which would continue to restrain the person’s action while the case is pending to a final resolution on the request for a permanent injunction.
5. Keep in mind that an injunction may be pursued *in addition to* other remedies, such as permit actions.

* This is likely to be the county attorney. However, a district health department or public health authority may have its own counsel. ***It is essential to engage the health department’s attorney in this process, as this action requires the preparation and filing of legal documents, as well as knowledge of and adherence to the Rules of Civil Procedure.***

Public Health Nuisance – G.S. 130A-19

Summary

- A public health nuisance is a situation on property that affects public health.
- Determining whether a situation is a public health nuisance that is subject to this legal remedy can be difficult. There is no law that clearly explains what constitutes a public health nuisance. However, there are factors public health officials should consider.
- Either the state health director or a local health director may determine that a public health nuisance exists on private property and order the person in charge of the property to abate it. A public health nuisance abatement order directs a person in charge of property to take action to abate the nuisance.
- If the person does not take action pursuant to the order, the state or local health director may file an action in superior court to enforce the order.
- Because the term “public health nuisance” is not clearly defined, the enforcement procedure can be burdensome, and the health department may end up bearing the cost of abatement, it might be desirable to pursue another public health remedy if it is available.

Procedure

1. Determine and document that a public health nuisance exists. There is no statutory definition of “public health nuisance.” To determine whether a particular situation constitutes a public health nuisance, the following factors should be considered:
 - a. Is it public? A matter that is confined solely to private property, with no effect on those outside the property, probably does not qualify.
 - b. Does it affect health? If the situation does not have an impact on human health, it probably is outside the public health nuisance authority.
 - c. Is it a “nuisance” under ordinary legal definitions of that term? A common definition is substantial and unreasonable interference with the enjoyment of real property that causes injury to another. In the health context, consider whether the situation substantially and unreasonably interferes with the health of the public.
2. Local health director or state health director issues abatement order.
 - a. The order may be issued to the owner, lessee, operator, or other person in charge of the property.
 - b. The order may direct the person to take any action necessary to abate the public health nuisance. Depending on the circumstances, the order may outline specific abatement measures.
3. Determine and document whether abatement occurred. If not, the health director may file an action in superior court to enforce the order.
 - a. A local health director who wishes to do this should consult with the health department’s attorney to obtain advice about documentation and/or other evidence that should be assembled, and to obtain the attorney’s assistance in filing the action in and providing the proper notice to the affected party.
 - b. Be prepared to show and explain the applicable statutes or rules to the attorney, who may be unfamiliar with them.
4. The court may:
 - a. Order the property owner to abate the nuisance, or
 - b. Order the health director to abate the nuisance. If this happens, the health department will incur the immediate costs of abatement but will have a lien on the property, which may allow recovery of the costs in the future. The costs of abatement should be documented and retained.

Imminent Hazard – G.S. 130A-20

Summary

- An imminent hazard is a situation that, if no immediate action is taken, is likely to cause:
 - An immediate threat to human life, or
 - An immediate threat of serious physical injury, or
 - An immediate threat of serious adverse health effects, or
 - A serious risk of irreparable damage to the environment.
- After determining that an imminent hazard exists, a health director may either issue an abatement order, or take direct action to abate the hazard.
- If the director elects to abate rather than order abatement, the health department will incur the costs. Ordinarily the department will have a lien on the property for the costs, but the lien may be defeated in some circumstances.
- In considering this remedy, it is important to keep in mind the key word **immediate**. The remedy should be used only if immediate action is necessary to protect human life, safety, or health, or to avoid irreparable damage to the environment.

Procedure

1. Determine and document that an imminent hazard exists, referring to the statutory definition of “imminent hazard”: a situation that, if no immediate action is taken, is likely to cause:
 - a. An immediate threat to human life, or
 - b. An immediate threat of serious physical injury, or
 - c. An immediate threat of serious adverse health effects, or
 - d. A serious risk of irreparable damage to the environment.
2. Local health director or state health director decides whether to issue an abatement order or directly abate the imminent hazard.
 - a. **Order:** The order may be issued to the owner, lessee, operator, or other person in charge of the property, and may direct the owner to take the action(s) necessary to abate the hazard.
 - b. **Abate:** If the director chooses to abate instead, he or she must first notify (or make a reasonable attempt to notify) the owner, lessee, operator, or other person in charge of the property. After the notification (or reasonable attempt) is made, the director is authorized to enter the property and take any action necessary to abate the imminent hazard.
3. All actions by the health director should be documented with the date and time noted. If the director chooses to abate, the costs of abatement should be documented.
4. If the health director elects to abate the imminent hazard, rather than ordering abatement, the health department will incur the costs of abatement but ordinarily will have a lien on the property for recovery of the costs. However, the lien may be defeated in either of two circumstances:
 - a. If it is shown that an imminent hazard did not exist at the time of the abatement, or
 - b. Even if an imminent hazard did exist, if the owner, lessee, operator, or any other person against whose property the lien has been filed can demonstrate that he or she was not culpable in the creation of the imminent hazard.

Embargo – G.S. 130A-21

Summary

- The purpose of embargo authority is to prevent adulterated or misbranded foods or drinks from being served to the public.
- Embargo means tagging the suspect food or drink and warning all persons not to remove or dispose of it. The embargoed item(s) may not be destroyed without a court order.
- The state Department of Agriculture and Consumer Services (DACs) has primary embargo authority in North Carolina. Public health's authority extends only to establishments that are regulated by state public health laws or that are the subject of a communicable disease investigation.
- When public health has the authority to order embargo, the only officials who may order it are the state EH agency or a local health director (who must consult with a regional EH specialist or the state).
- Public health must notify DACs when the public health embargo authority is exercised.

Procedure

1. Ensure public health has authority to order embargo:
 - a. Sanitation of food or drink in the establishment is regulated by state public health laws, or
 - b. The establishment is the subject of a communicable disease investigation under G.S. 130A-144.Public health authority does not extend to parts of an establishment regulated by DACs or USDA.
2. Determine that the food or drink is adulterated or misbranded. G.S. 106-129 describes foods deemed to be adulterated. G.S. 106-130 describes foods deemed to be misbranded. The General Statutes are available on-line at www.ncleg.net.
3. Notify a person who has the authority to order embargo:
 - a. Local health director, in consultation with a regional EH specialist or the state, or
 - b. The state EH agency.
4. That person decides whether to order embargo. If embargo is ordered:
 - a. DACs must be notified immediately.
 - b. The following steps must be taken (see G.S. 106-125):
 - i. Affix a tag to the embargoed item(s).
 - ii. Warn all persons not to remove or dispose of the item(s) by sale or otherwise without the permission of either the person who ordered the embargo or a court.
 - iii. Petition a court for a condemnation order. If the item is misbranded (not adulterated), the court may allow the person to fix the problem rather than destroy the item.
5. When an embargo is terminated—whether by voluntary disposal, court order, or otherwise—a termination of embargo form should be completed.

Administrative Penalties – G.S. 130A-22

Summary

- An administrative penalty is a monetary fine.
- Administrative penalties may be imposed on a person who violates laws related to lead certification, OSWW, or smoking.
- Penalties may be imposed by:
 - The state, for violations of *state* statutes or rules regarding lead certification or OSWW.
 - The local health director, for violations of *local* OSWW rules.
 - The local health director, for violation of *state or local* smoking statutes or rules.
- The amount of the penalty is set by state laws.
- Penalties may be appealed:
 - To the Office of Administrative Hearings, if the penalty was imposed by the state.
 - To the local board of health, if the penalty was imposed by the local health director.
- If a person fails to pay, the imposer of the penalty (state or local health director) may file an action in Superior Court.
- The proceeds of administrative penalties are not retained by the agency that imposes them. By law, they must be remitted to the Civil Penalty and Forfeiture Fund.

Procedure

OSWW – State G.S. 130A-22(c)

1. Determine if there is a willful violation of state OSWW statutes or rules or a condition placed on a permit under those laws.
2. State law determines amount of penalty:
 - a. Must consider degree and extent of harm caused by violation and cost of rectifying damage.
 - b. No penalty may be imposed if person demonstrates impossibility of compliance.
 - c. Maximum penalties:
 - i. If system designed to support a daily flow < 480 gallons, or if it serves single one-family dwelling, up to \$50/day
 - ii. Other systems, up to \$300/day
3. State agency imposes penalty. Person affected may appeal to Office of Administrative Hearings.

OSWW – Local G.S. 130A-22(h)

1. Determine if there is willful violation of local OSWW rules or a condition placed on a permit under those rules.
2. State law determines amount of penalty:
 - a. Must consider degree and extent of harm caused by violation and cost of rectifying damage.
 - b. No penalty may be imposed if person demonstrates impossibility of compliance with *state* standards (not necessarily local rules).
 - c. Maximum penalties:
 - i. If system designed to support a daily flow < 480 gallons, or if it serves single one-family dwelling, up to \$50/day
 - ii. Other systems, up to \$300/day
3. Local health director imposes penalty. Person affected may appeal to local board of health.

**Administrative Penalties – G.S. 130A-22
(continued)**

Procedure	
Lead G.S. 130A-22(b3)	<ol style="list-style-type: none">1. Determine if there is a violation of laws establishing certification requirements for individuals who inspect, assess and remediate lead hazards (Art. 19A), or laws regarding certification of individuals or firms that perform renovations, cleaning verification, and clearance sampling under the lead program (Art. 19B).2. State law sets the maximum amount of the penalty at \$5000/day.3. State agency imposes penalty. Person affected may appeal to Office of Administrative Hearings.
Smoking G.S. 130A-22(h1)	<ol style="list-style-type: none">1. Determine if there is a violation. The law prohibiting smoking in restaurants, bars, & lodging establishments permitted for food services is violated if an owner or operator fails to do any of the following:<ol style="list-style-type: none">a. Post signs stating that smoking is prohibited.b. Remove all indoor ashtrays and other smoking receptacles.c. Direct a person who is smoking to stop.Violation of a local ordinance or rule regarding smoking in public places <i>may</i> trigger administrative penalties. Refer to the local ordinance or rule to determine what constitutes a violation and whether penalties may be imposed.<ol style="list-style-type: none">1. First and second violations: local health director gives written notice of the violation.2. Third violation: local health director gives written notice of violation and assesses a penalty of up to \$200 per day.3. Local health director imposes penalty. Person affected may appeal to the local board of health.

Permit Actions – G.S. 130A-23

Summary

- A permit action is the process of suspending or revoking a permit.
- A permit may be suspended or revoked if the agency finds:
 - A violation of a provision of a state statute or rule that applies to the permit, or a condition placed on the permit; or
 - That the permit was issued based upon incorrect or inadequate information that materially affected the decision to issue the permit.
- Suspension or revocation may be immediate if the violation presents an imminent hazard (as specified in applicable law). Otherwise, suspension or revocation requires notice of intent to suspend or revoke.
- The law does not prescribe when to suspend versus revoke, but in most situations it is advisable to consider *suspension* if the problem is one that can be fixed.

Procedure

Intent to suspend or revoke EHS 4009A	<ol style="list-style-type: none"> 1. Send notice of intent to suspend or revoke permit . 2. Upon request of permit holder, an administrative hearing will be held.
Immediate revocation or suspension EHS 4009B	<ol style="list-style-type: none"> 1. Determine that the violation presents an imminent hazard warranting immediate revocation or suspension: <ol style="list-style-type: none"> a. Food & lodging: Failure by a food or lodging establish to maintain a minimum grade of C → <i>immediately revoke.</i> b. Public swimming pools: <ol style="list-style-type: none"> i. Failure to maintain minimum water quality standards or minimum safety standards → <i>immediately suspend.</i> ii. Design and construction standards pertaining to the abatement of suction hazards result in an unsafe condition → <i>immediately suspend.</i> c. Any other imminent hazard → <i>immediately suspend or revoke.</i> An imminent hazard is a situation that, if no immediate action is taken, is likely to cause one of the following: <ol style="list-style-type: none"> i. Immediate threat to human life ii. Immediate threat of serious physical injury iii. Immediate threat of serious adverse health effects iv. Serious risk of irreparable damage to the environment. 2. Give notice of immediate revocation or suspension. 3. Permit holder may appeal, in which case an administrative hearing will be held.

Misdemeanor – G.S. 130A-25

Summary

- A person may be charged with a misdemeanor for violating any state or local public health statute or rule except those pertaining to smoking.
- The violation is a class 1 misdemeanor under G.S. 14-3.
- When a person is convicted of a misdemeanor for violating public health laws, he or she ordinarily is sentenced in accordance with North Carolina's Structured Sentencing laws. There is an exception: if the conviction is for a violation of the communicable disease laws, the person may be sentenced for up to two years.
- If the case goes to trial and the defendant is found guilty, he or she may appeal to superior court by giving notice of appeal within 10 days of conviction. When this occurs, the superior court holds a new trial with a jury.

Procedure

1. Determine and document that there has been a violation of a public health statute or rule (other than those pertaining to smoking).
2. If at all possible, discuss the situation with the health department's attorney and a local prosecutor (likely an assistant district attorney) before seeking a criminal charge. Be prepared with specific information about:
 - a. Which statute(s) or rule(s) were violated.
 - b. Where the violation occurred.
 - c. Statement or summary of the facts establishing the violation.
3. To initiate the charge:
 - a. Appear before a judicial official (usually a magistrate) in the county where the violation occurred.
 - b. Bring a copy of applicable statutes or rules.
 - c. Have one or more witnesses available to testify under oath before the judicial official.
 - d. Bring documentary or other evidence of the violation if available.
4. If the defendant is charged, the judicial official will likely issue either a criminal summons or an arrest warrant.
 - a. A criminal summons orders the defendant to appear in court on a specified date, but the defendant is not arrested.
 - b. An arrest warrant requires law enforcement to arrest and detain the defendant until conditions for pretrial release are set.
5. Prepare for trial in district court. Cases in district court are decided by the judge alone—there is no jury.
 - a. If possible, discuss the case with the prosecutor.
 - b. Identify and assemble documents that may be needed for evidence.
 - c. Appear in court at the appropriate date and time, prepared to testify and to produce documents.
6. If the case goes to trial and the defendant is found guilty, he or she may appeal to superior court by giving notice of appeal within 10 days of conviction. The superior court holds a new trial with a jury. If this occurs, repeat the steps for preparing for trial.