StaffordRosenbaum LLP
Attorneys

Member of Geneva Group International
The Leading Global Alliance of Independent Professional Firms

To Brett Hebert, Director of Public Works

From Matthew Dregne, City Attorney
Laura Callan

Date December 18, 2018

Re The City's Public Nuisance Ordinances

Introduction

As you requested, we have reviewed the City's public nuisance ordinances (Chapter 58) to determine whether the ordinances adequately assist the City in the treatment, control and removal of diseased trees. Questions regarding the City's authority arise, in part, in anticipation of Emerald Ash Borer (EAB) infestations.

In our opinion, Chapter 58 does not give the City the legal authority to carry out the management strategies best suited to deal with the threats the City may face from destructive or communicable diseases or other pests that may endanger the good health of trees in the City. Chapter 58 does not deal with diseased or infested trees except to the extent they are a menace to public safety. We recommend that the City revise its nuisance ordinances to specifically declare infested or dead trees a public nuisance and have that nuisance abated on private property. We also recommend using this opportunity to revise Chapter 58 to improve the City's ability to manage noxious weeds (including overgrown grass) and to eliminate a potential challenge to the constitutionality of the ordinance's non-summary abatement procedures on procedural due process grounds.

This memorandum also provides practical advice for investigating violations of the City's revised public nuisance ordinances and for enforcing those ordinances.

Discussion

1. Amendments to the City's Nuisance Ordinance

The City's existing public nuisance ordinance is organized into ten sections. Six of these ten sections declare certain conditions "nuisances." Section 58-6 establishes two types of abatement procedures: summary abatement for code violations that present an imminent threat to

public health and safety ("priority cases") and non-summary abatement for "non-priority" cases. In our opinion, the non-summary abatement procedures (as written) are unconstitutional.

The attachment to this memorandum details the recommended amendments to Chapter 58. The amendments include:

(1) the adoption of a new section to declare diseased or infected plants and trees to be a nuisance and provide an abatement procedure;

(2) the adoption of a new section to clarify the circumstances under which noxious weeds and overgrown grasses are a nuisance;

(3) the repeal and restatement of section 58-6, regarding abatement procedures; and

(4) technical amendments to harmonize the new sections with the old.

Under the proposed amendments:

- The director of public works or his or her designee has authority to inspect trees and shrubs on private premises to determine whether there is a hazard, or whether the trees or shrubs are infected or infested with disease, insects, and the like. The rules and guidelines for entering upon private property to conduct a field investigation are discussed below.

- Diseased or infested trees, or those likely to become so, may now be subject to treatment or abatement under a separate abatement procedure.

- Treatment of noxious and nuisance weeds (including overgrown grass) and natural lawns has been clarified.

- The time-period within which an owner or occupant must remove or abate a nuisance is flexible, rather than fixed. The City may issue a notice of violation demanding corrective action within the time-period that the particular circumstances warrant. In some cases, the time-frame for compliance may be immediate.

- The non-summary abatement procedures have been amended to include appeal rights and thus comply with the constitutional requirement for due process.

- The assessment of costs provisions have been expanded to permit special assessment for tree care and abatement of noxious weeds.

The City's ordinances provide a variety of enforcement tools where voluntary compliance cannot be obtained. By doing so, the ordinance allows a level of enforcement or progression of enforcement that best fits the type and circumstances of the violation. The enforcement tools include:

1. Notice of violation and order for action.

2. Citation and prosecution of violations in Municipal Court.
3. Physical abatement by City employees or agents.
4. Court ordered abatement in accordance with Chapter 823.
5. Assessment of costs of abatement.

These enforcement tools are discussed in the next sections.

2. Guidelines for Investigating Public Nuisance.

Although Chapter 58 empowers the City to address public nuisances, it is important to understand constitutional limitations on municipal authority to enter onto private property to observe public nuisances. Failing to observe these limitations could expose the City to tort claims (such as civil trespass and invasion of privacy) and claims for constitutional violations and more generally upset private citizens affected by municipal action.

The purpose of the field investigation is to verify the existence and severity of a reported or discovered code violation and document code violations by photographs, witness interviews, and other supporting evidence. A field visit to the subject property may be conducted with or without prior notice to the property owner or occupant according to the following guidelines.

A. Observations from Public Vantage Points and Knock and Talk Rules

City code enforcement staff, just like any member of the public, may observe nuisance violations from anywhere they have a right to be such as a public street, sidewalk, or neighboring property (provided the neighboring property owner granted permission to be there). Such observations do not require search warrants.[1]

Similarly, code enforcement staff may approach a home (or commercial building) by the front path, knock promptly, wait briefly to be received, and then (absent invitation to remain longer) leave. This "knock and talk" doctrine does not, however, permit City staff to approach the back door of a residence or explore the back or side yards or take samples. While the posting of a "no trespassing" sign or unlocked gate does not necessarily revoke the implied invitation to approach the house, the City may decide as a matter of policy not to enter a posted property to seek permission to investigate the premises. Such a policy may decrease the risk of a confrontation or injury to staff.

B. Consent or Permission to Enter Upon Property

Code enforcement staff may search private property and take samples without a warrant when they have first obtained consent from the property owner or tenants. One reason for conducting a field visit with prior notice to the owner or occupant is to obtain prior consent to conduct the investigation. Consent may also be obtained as part of a "knock and talk" exchange.

---

[1] Enforcement officers may also make observations and take samples from "open areas," that is, areas outside the "curtilage" of private property. The concept of curtilage is imprecise. The curtilage generally includes the yards but not an open area far from a home or structure on the property. Given the size of City lots, the distinction between curtilage and open areas will not be relevant except in a minority of cases.

C. Property Inspections Warrants

If the City does not have consent from the property owner or occupant, it must obtain an administrative search warrant from the Stoughton Municipal Court judge before entering a residential or commercial property to investigate a nuisance unless an emergency exists. The special inspection warrant process is straight-forward and in most cases is issued upon presentation of an affidavit setting forth: (1) the purpose of the search is to investigate an ordinance violation; (2) that the premises to be searched are not a public building; and (3) that consent to enter for inspection purposes has been refused or cannot be obtained.

3. Property Inspections and Abatement in the Event of an Emergency (Priority Cases)

The emergency doctrine permits City staff to enter onto private property without a warrant or consent when they believe the condition of the property presents an imminent threat to the public's safety, health or welfare. The emergency doctrine allows City staff to enter onto private property to investigate and abate the nuisance without consent or a warrant. Chapter 58's summary abatement procedures are consistent with the emergency doctrine.

4. Guidelines for Enforcement Procedures and the Abatement of Public Nuisances (Non-priority Cases)

A. Notice of Violation and Order to Abate

Chapter 58 contemplates that when City staff determine there are reasonable grounds to believe a violation did occur or is occurring, notice shall be sent to the violator and to the property owner. The date in the notice for corrective action may vary depending upon the type of violation. Recent research found that it generally takes less time for most property owners to abate a code violation than the length of time allowed in their particular jurisdictions. In one municipality, 97% of code violations were abated within 14 days, as opposed to the 30 days given.

The notice should inform the violator and property owner of the right to apply, by the abatement deadline, to the circuit court for an order addressing the reasonableness of the abatement order and other relief.[2] The commencement of a circuit court action alone does not delay the right of the City to abate the nuisance as set forth in the ordinance.

After the deadline for the filing of an application to the circuit court, if City staff determines the required corrections have not been made, the City may take the following actions: (a) issue a citation for the alleged violation and/or (b) initiate abatement action by City employees or City contractors.

---

[2] We have seen ordinances that reduce the time to appeal an abatement order to as short as 5 days. Wisconsin courts have expressly held that a 30-day opportunity comports with procedural due process requirements.

B. Citation

Chapter 58 expressly permits enforcement by citation. One benefit of issuing a citation is to allow the person cited another opportunity (with incentives) to voluntarily comply with the notice to abate. In addition, the citation process affords the violator with additional procedural due process before the City abates the violation.

If the Municipal Court finds that a defendant violated the City's public nuisance ordinance, it must order forfeitures of not less than the minimum daily amount set forth in the ordinance (here $50.00). Municipal judges do not, however, have authority to issue injunctions.

C. Physical Abatement by the City Under Chapter 58

When voluntary compliance cannot be obtained within the timelines established by an order to abate, Chapter 58 (as proposed to be amended) authorizes City employees or agents to enter upon private property to abate a nuisance. The City may proceed to abate the nuisance without the violator or property owner's consent and without a court order so long as the violator and property owner has been provided a right to apply for a circuit court order.

D. Physical Abatement by the City Under Chapter 823

Chapter 823 of the Wisconsin Statutes authorizes the City to file a circuit court action to recover damages or abate a nuisance on private property. Wis. Stat. §§ 823.01 and 823.02. In such actions, when the City prevails, the City shall, in addition to judgment for damages and costs, also have a judgment that the nuisance be abated (and warrants to assist in enforcing the abatement judgment).

If a defendant is ordered by a Chapter 823 judgment to abate the nuisance, the defendant may be held in contempt for failing to comply. The use of contempt can prove effective in convincing the defendant to comply with an abatement judgment. Alternatively, the Chapter 823 judgment should include an order that if the City shows by affidavit that the defendant failed to remove the nuisance, the court will issue a warrant to abate nuisance directing the sheriff to remove and allowing the City to specially charge the property for any of its costs incurred in the abatement.

5. Assessment of Costs.

Section 66.0627 authorizes the City to specially assess property for tree care and noxious weed elimination. The expenses may not, however, include legal expenses. Section 58-7 authorizes the City to assess the costs of abatement as a debt and if notice is given, as an assessment against the real estate.

Section 823.06 authorizes the expense of abating a nuisance to be collected by a civil action against the defendant as provided in Wis. Stat. § 74.53.

Conclusion

You also asked for answers to a number of questions. The answers are as follows:

- The City has the legal authority to enter private property to either assess or remove a private tree, subject to the requirements discussed in this memo. We recommend, however, that the City amend Chapter 58 to avoid a due process challenge to abatement procedures in non-priority cases.

- Under the proposed amendments, any department head (including but not limited to the building inspector or the director of public works) may investigate public nuisances and initiate enforcement actions. The director of public work has enforcement responsibility over the new tree and plant provisions.

- Abatement of public nuisances is not governed by the Emergency Work Order rule of s. 10-316(g). Abatement of nuisances is governed by either Chapter 58 of the City's Code or Chapter 823 of the Wisconsin Statutes.

- If the property owner refuses to remove a tree, the City may contract to have it removed. The contractor may enter onto private property to remove the tree without a warrant or court order so long as an order to abate in the form described in Chapter 58 has been served upon the violator or property owner and such person has had a reasonable opportunity to appeal the abatement notice. Where the City anticipates a confrontation with a property owner, the City may wish to obtain a warrant to abate from a circuit court under Chapter 823.

- The City has discretion in cases where old age, infirmity or financial hardship hampers the violator's ability to make corrections. There are several approaches to obtaining compliance when these conditions are present. These include a referral to private or nonprofit sources of assistance, the provision of volunteer labor and/or the provision of direct financial assistance.

Attachment
cc: Tim Swadley, Mayor
Rodney Scheel, Planning Director

CITY OF STOUGHTON, 381 E. Main Street, Stoughton, WI 53589

ORDINANCE OF THE COMMON COUNCIL	
Repealing and recreating Section 58-6 and 58-8 and creating Sections 58-12 and 58-13 of the City of Stoughton Municipal Code relating to Public Nuisances Action: Fiscal Impact: None	
File Number: O -XX - 2019	**Date Introduced:** _____ __, 2019

The Common Council of the City of Stoughton do ordain as follows:

1. Section 58-6 of the City of Stoughton Code of Ordinances is repealed and recreated as follows:

   Sec. 58-6 Abatement – generally.

   (a) *Responsibility for enforcement; inspections.* It shall be the duty of each department head to enforce those provisions of this chapter that come within the jurisdiction of their respective offices, and each department head shall make or cause to be made periodic inspections and inspections upon complaint to ensure such provisions are not violated. No action shall be taken under this section to abate a public nuisance unless the officer has inspected or caused to be inspected the premises where the nuisance is alleged to exist and has satisfied himself or herself that a nuisance does in fact exist.

   (b) *Summary abatement.*

   (1) *Order of abatement.* If the inspecting officer determines that a public nuisance exists within the city and that there is imminent danger to the public health, safety, peace, morals or decency, the officer may, without notice or hearing, issue an order reciting the existence of a public nuisance constituting imminent danger to the public and requiring immediate action be taken as the officer deems necessary to abate the nuisance. Notwithstanding any other provisions of this chapter, the order shall be effective immediately. Any person to whom such order is directed shall comply with the order immediately.

   (2) *Abatement by City.* Whenever the owner or occupant shall refuse or neglect to remove or abate the condition described in the order, the inspecting officer shall, in his or her discretion, enter upon the premises and cause the nuisance to be removed or abated and the City shall recover the expenses incurred thereby from

the owner or occupant of the premises or from the person who has caused or permitted the nuisance.

(c) *Nonsummary abatement by City.*

(1) *Order to abate nuisance.* If the inspecting officer determines that a public nuisance exists on private premises but that the nature of such nuisance is not such as to threaten imminent danger to the public health, safety, peace, morals or decency, the officer shall issue an order reciting the existence of a public nuisance and requiring the person causing, permitting or maintaining the public nuisance or the owner of the premises where the public nuisance is located to remove or abate the condition described in the order by a date specified therein (the abatement date). The order shall be served personally on such person and the owner if different, and, at the option of the inspecting officer, the order may be mailed to the last known address of the person(s) to be served. If the owner or the occupant cannot be served, the order may be served by posting it on the main entrance of the property or by publishing as a Class 3 notice under W.S.A. Chapter 985. The time limit specified in the order runs from the earlier of the date of posting, service or publication.

(2) *Abatement by City.* If the owner or occupant fails or refuses to comply within the time period prescribed, the inspecting officer shall enter upon the premises and cause the nuisance to be removed or abated and the City shall recover the expenses incurred thereby from the owner or occupant of the premises or from the person who has caused or permitted the nuisance.

(3) *Remedy from abatement order.* Any person affected by an order under this section shall, prior to the abatement date, apply to the circuit court for an order restraining the City from entering on the premises and abating or removing the nuisance, or be forever barred.

(d) *Authority to assess costs.* The cost of the abatement or removal of a nuisance under this section shall be collected from the owner, occupant or person causing, permitting or maintaining the nuisance and, if notice to abate the nuisance, if applicable, has been given to the owner, such cost shall be assessed against the real estate as a special charge.

(e) *Abatement in accordance with state law.* Nothing in this section shall be construed as prohibiting the abatement of public nuisances by the City or its officials in accordance with the laws of the State. The city reserves all rights to commence an action for abatement of the public nuisance, damages and costs under chapter 823, Wis. Stat. and to enforce any judgment entered in such action.

(f) *Other action.* If the inspecting officer determines that a public nuisance exists within the city, the officer may cause to be issued and served a citation for violation of this section upon the person causing, permitting or maintaining the public nuisance and the owner of the premises where the public nuisance is located.

2. Section 58-8(6) of the City of Stoughton Code of Ordinances is repealed and replaced with the following:

(6) *Noxious weeds and wild growth.* All noxious weeds and other rank growth of vegetation.

(a) *Required.* The owner of any land within the city shall destroy all noxious weeds and keep mowed all grasses, as defined in subsection (b) of this section, which grow on owner's property and on any terraces and ditches abutting such property.

(b) *Defined.* The term "noxious weed" or "weeds" as used in this section are defined by Wis. Stat. §23.235 and §66.0407, respectively, as amended, and also include those weeds set forth is § 58.11 and shall also include common ragweed (Ambrosia atemisiifolia), giant ragweed (Ambrosia trifida) and burdock (Actrium spp.); all other plants defined as noxious by the Wisconsin Department of Natural Resources; and all other grasses over twelve (12) inches in height.

(c) *Managed natural landscape areas.* Planned natural and native landscape areas grown in a managed landscape plan will be allowed and shall not be subject to this section if the areas meet and are maintained as per the following criteria: All natural landscape areas shall comply with all Wisconsin law and may include native and naturalized plants including, but not necessarily limited to, ferns, wildflowers, grasses, shrubs and trees. These areas are to be kept free of all "noxious weed" or "weeds" as defined in this section at all times. Natural landscape areas shall be set back a minimum of ten (10) feet from all property lines and driveways unless the property is abutted by a roadway, fence or similar barrier separating it from adjoining residential properties, then the natural landscaping may be planted up to the property line (inside the sidewalk).

(d) *Enforcement.* Failure to correct a violation of this section may result in nuisance abatement as defined in section §58-6 of this ordinance and penalties as provided in § 58-3 and § 1-3.

(e) *Authority to assess costs.* The cost of the abatement or removal of a nuisance under this section shall be collected from the owner, occupant or person causing, permitting or maintaining the nuisance and, if notice to abate the nuisance, if applicable, has been given to the owner, such cost shall be assessed against the real estate as a special charge.

(f) *Abatement in accordance with state law.* Nothing in this section shall be construed as prohibiting the abatement of public nuisances by the City or its officials in accordance with the laws of the State. The city

reserves all rights to commence an action for abatement of the public nuisance, damages and costs under chapter 823, Wis. Stat. and to enforce any judgment entered in such action.

(g) *Other action.* If the director of public work determines that a public nuisance exists within the city under this section, the director may cause to be issued and served a citation for violation of this section upon the person causing, permitting or maintaining the public nuisance and the owner or occupant of the premises where the public nuisance is located.

3. Section 58-12 of the Stoughton Code of Ordinances is created to read:

Sec. 58-12. Tree or plant diseases or infestations a nuisance.

(a) *Public nuisances declared.* The continued existence of injured or diseased or infested trees or other plantings, and the failure to properly treat or control the same which is likely to cause the spread of disease or infestation or endanger persons because of the deteriorated condition, is hereby declared to be a public nuisance requiring abatement.

(b) *Abatement*

(1) *Order.* Whenever the director of public works shall find on examination that any tree or shrub or part thereof growing or located upon private premises is a public nuisance as defined in this section, he or she shall notify the owner, or if the owner is unknown and there is a tenant or operator occupying said property then to such tenant or operator, in writing that the nuisance must be sprayed, removed, or otherwise abated as directed in the order within the time specified, which shall not be less than 14 days unless the director of public works shall determine that immediate action is necessary for public safety or health. The order shall be served personally on the owner, or if the owner is unknown and there is a tenant or operator occupying said property then to such tenant or operator, and, at the option of the director of public works may be mailed to the last known address of the person(s) to be served. If the owner or the occupant cannot be served, the order may be served by posting it on the main entrance of the property or by publishing as a Class 3 notice under W.S.A. Chapter 985. The time limit specified in the order runs from the earlier of the date of posting, service or publication.

(2) *Abatement by city.* If the owner of such premises or occupant if different from owner refuses or neglects to comply with the notice to abate a nuisance under this section within the time specified, the director of public works shall cause the nuisance to be sprayed, removed or otherwise abated and shall report the expense thereof to the city treasurer, who shall enter it as a charge against the property upon which the tree or shrub is located.

(3) *Appeals.* Any person affected by an order under this section shall, prior to the abatement date, apply to the circuit court for an order restraining the City from

entering on the premises and abating or removing the nuisance, or be forever barred.

(4) *Abatement in accordance with state law.* Nothing in this article shall be construed as prohibiting the abatement of public nuisances by the City or its officials in accordance with the laws of the State. The city reserves all rights to commence an action for abatement of the public nuisance, damages and costs under chapter 823, Wis. Stat. and to enforce any judgment entered in such action.

(5) *Other action.* If the director of public works determines that a public nuisance exists within the city, the director may cause to be issued and served a citation for violation of this section upon the person causing, permitting or maintaining the public nuisance and the owner or occupant of the premises where the public nuisance is located.

(c) *Dangerous Trees*

(1) *Definition.* "Dangerous tree" means any tree which, in the opinion of the director of public works, is so decayed or injured, or which for any other reason is likely to fall upon any sidewalk or street.

(2) *Notice to remove.* Whenever the director of public works shall have notice of a dangerous tree which is likely to fall, it shall give notice in writing to the owner of the land where such tree is located, requiring the owner to remove the tree within 14 days after receiving the notice. The notice may be served personally on the owner or agent thereof or by registered mail addressed to the owner or agent.

(3) *Appeals.* Any person affected by an order under this section shall, prior to the abatement date, apply to the circuit court for an order restraining the City from entering on the premises and abating or removing the nuisance, or be forever barred.

(4) *Abatement in accordance with state law.* Nothing in this article shall be construed as prohibiting the *abatement* of public nuisances by the City or its officials in accordance with the laws of the State. The city reserves all rights to commence an action for abatement of the public nuisance, damages and costs under chapter 823, Wis. Stat. and to enforce any judgment entered in such action.

(5) *Other action.* If the director of public works determines that a public nuisance exists within the city, the *director* may cause to be issued and served a citation for violation of this section upon the person causing, permitting or maintaining the public nuisance and the owner or occupant of the premises where the public nuisance is located.

(6) *Authority to assess costs.* The cost of the abatement or removal of a nuisance under this section shall be *collected* from the owner, occupant or person causing,

permitting or maintaining the nuisance and, if notice to abate the nuisance, if applicable, has been given to the owner, such cost shall be assessed against the real estate as a special charge.

4. Section 58-13 of the City of Stoughton Code of Ordinances is created as follows:

Section 58-13. *Interference Prohibited.* No person shall prevent, delay or interfere with the director of public works, or designee, or any of his/her agents or employees while they are engaged in the performance of duties imposed by this chapter. No person shall refuse to permit the director or employees of the department of public works to enter upon his premises at reasonable times to exercise the duties imposed by this section or permit any public nuisance to remain on any premises owned or controlled by him when ordered by the director of public works to abate such nuisance.

5. This ordinance shall be effective upon passage and publication pursuant to law.

Dates

Council Adopted:_____

Mayor Approved: _____

Published:_____

Attest:_____

_____
Tim Swadley, Mayor

_____
Holly Licht, City Clerk