

IN THE COURT OF APPEALS OF IOWA

No. 8-158 / 97-867

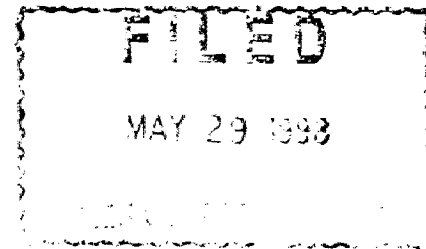
THE CITY OF HASTINGS, IOWA,
a Municipal Corporation,

Plaintiff-Appellee,

vs.

JANET BARNES, ROY BARNES,
GUY BARNES, JR., TERRY WISE,
and BEVERLY WISE,

Defendants-Appellants.



Appeal from the Iowa District Court for Mills County, James S. Heckerman,
Judge.

Defendants appeal a district court order to abate a nuisance. **AFFIRMED.**

Patrick A. Sondag of Root, Tinley & Sondag, Council Bluffs, for appellants.

Bruce E. Swanson of Swanson Law Firm, Red Oak, for appellee.

Heard by Huitink, P.J., Mahan, J., and Peterson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

MAHAN, J.

Janet, Roy, and Guy Barnes, and Terry and Beverly Wise appeal the district court's order to abate a nuisance. They allege: (1) the town of Hastings ("the Town") failed to exhaust its administrative remedies before seeking judicial intervention; (2) the trial court erred in allowing the introduction of evidence; and (3) the trial court erred when it found the Town proved the existence of a nuisance by a preponderance of the evidence. We affirm.

The property in question is used to store cars, semi-trailers, and a camper trailer. The number of cars stored on the property ranges from five to thirty. On August 13, 1992, the Town mailed a letter to Guy giving him notice to abate a nuisance. The letter informed Guy of the location of the nuisance, the ordinance being violated, the type of nuisance, the action required to abate the nuisance, and his right to a hearing if requested within ten days of the receipt of the letter. Guy requested a hearing and the Town sent a letter on August 25 informing Guy the hearing would be held on September 1 and Mayor Art Goodwin would be the hearing officer.

The hearing was held at the September 1 Hastings City Council meeting. The Council voted to give Guy a sixty-day extension to abate the nuisance, which entailed removal of the junked cars, trailer beds, house trailer, and junk. On September 9, Goodwin wrote a letter to Guy informing him the Council found the conditions still existed and he was still in violation of the city ordinances. Goodwin told Guy he had

sixty days from the receipt of the letter to abate the nuisance or legal action would be taken.

On November 10, defendants proposed erecting a fence around the property to conceal the nuisance. On November 13, the Town requested a diagram with detailed information as to where the fence would be placed, the kind of material to be used, and the size of the fencing. On December 1, the Council informed Guy it needed the exact measurements for the fence he proposed to build. No action was taken regarding the alleged nuisance between the December 1, 1992 Council meeting and June 18, 1996, when the Town obtained legal counsel and voted to commence legal action.

The trial court, on its own motion and with the agreement of the parties, suspended the trial proceedings until all the parties could meet at the next regularly scheduled meeting to allow the parties one final opportunity to negotiate the issuance of a junk dealer's permit which complied with the city ordinances. The trial court specified if the parties could not agree it would order:

- 1) the junkyard be enclosed with a six-foot fence to be built of boards or other suitable material approved by the council;
- 2) that any and all items over six feet in height be removed (including all semi-trailers and house trailers).

The trial court also indicated the number of cars would be limited to thirty and the hours of operation would be defined and set. Defendants did not appear at the Council meeting. The day before the meeting, counsel for defendants contacted the

Town's attorney and advised him defendants could not afford a board fence and would not appear if a board fence were required.

I. EXHAUSTION OF ADMINISTRATIVE REMEDIES. A request for injunctive relief invokes the court's equitable jurisdiction. Iowa R. Civ. P. 320; *In re Luloff*, 569 N.W.2d 118, 122 (Iowa 1997). Therefore, our review is de novo. Iowa R. App. P. 4; *Luloff*, 569 N.W.2d at 122. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

Generally, a party must exhaust administrative remedies before resorting to litigation. *City of Iowa City v. Hagen Electronics, Inc.*, 545 N.W.2d 530, 534 (Iowa 1996). Two conditions must be met before we apply the doctrine: an adequate administrative remedy must exist for the claimed wrong, and the governing statute must expressly or impliedly require the remedy to be exhausted before allowing judicial review. *Riley v. Boxa*, 542 N.W.2d 519, 521 (Iowa 1996).

Section 6.03 of the Hastings City Ordinance requires a notice to abate to contain:

1. An order to abate the nuisance or request a hearing as provided by section 7 within a stated time which shall be reasonable under the circumstances.
2. Location of nuisance if stationary.
3. Description of what constitutes the nuisance.
4. Statement of act or acts necessary to abate the nuisance.

5. Statement that if the nuisance is not abated as directed and no request for hearing is made within the time prescribed, the Town will abate it and assess the cost against such person.

Section 6.05 states:

If the person so notified neglects or fails to abate the nuisance as directed, the mayor, or other officers initiating the notice, may cause the nuisance to be abated, keeping an accurate account of the expense incurred.

The August 13 letter informed Guy he had "10 days upon receipt of this notice to request a hearing or to Abate the Nuisance. If the nuisances are not ABATED, the matter will be turned over to our attorney." The September 9 letter notified Guy "[T]he council by resolution so state they want the nuisance abated within 60 days from the receipt of the letter. If the nuisance is not abated within 60 days from receipt of this letter, legal action will be taken. Abating of the Nuisances -- remove nuisance, within 60 days." Neither of these letters informed Guy the Town could attempt to abate the nuisance if he did not, nor did it inform him that such costs would be assessed against him.

While it is arguable the Town should have given defendants a second notice to abate prior to filing its petition, the trial court's suspension of the proceedings to allow the parties to meet at the council meeting served substantially the same purpose. *See Burnham v. City of West Des Moines*, 568 N.W.2d 808, 811 (Iowa 1997) (substantial compliance exists when the action taken, although not literally satisfying

the statutory requirement, nevertheless fulfills the minimal objectives of the statute). For this reason, we find the Town satisfied its administrative requirements.

II. ADMISSION OF EVIDENCE. Defendants allege the court improperly admitted evidence and the Town failed to meet the burden of proof. We review evidentiary rulings for an abuse of discretion in the trial court's rulings. *Hutchison v. American Family Mut. Ins. Co.*, 514 N.W.2d 882, 885 (Iowa 1994).

A. Council Minutes. Defendants allege the trial court erred when it failed to apply Iowa Code section 622.62(2) (1997) and allowed the Town to introduce uncertified copies of the minutes of the city council meetings. However, the city clerk actually testified at trial. We find the trial court did not abuse its discretion in determining the clerk's testimony satisfied the requirements of section 622.62(2). The clerk testified to essentially the same items called for when certifying under the statute.

B. Pictures. Defendants object to the admissibility of certain pictures for lack of foundation. Upon objection, the trial court asked counsel for the Town if he could give a professional statement establishing foundation. Counsel replied, "Those were all taken this fall, the past summer and this past fall. In the last four pictures, 31 -- I'm sorry were taken March 4, the day of the Council meeting." Defendants renewed their objection as to foundation, but the trial court overruled. Defendants did not present any evidence the photographs did not depict the property in question.

Under Iowa law, professional statements are treated as affidavits and the attorney making the statement may be cross-examined regarding the substance of the statement. *Frunzar v. Allied Property & Casualty Ins. Co.*, 548 N.W.2d 880, 888 (Iowa 1996). Defendants had the opportunity to cross-examine counsel regarding the content of his professional statement, but did not.

We conclude the professional statement of the Town's counsel was admissible and was properly considered by the district court when determining whether foundation had been presented for the admission of the photographs. We also find the trial court did not abuse its discretion in admitting the photographs.

III. EXISTENCE OF A NUISANCE. Defendants contend the Town did not prove a nuisance existed by a preponderance of the evidence. In its ruling, the trial court found defendants operated an illegal junkyard in violation of City Ordinance No. 10. The trial court granted defendants ninety days from the ruling to submit a plan in compliance with the ordinance. The court directed the plan to include a board fence and other restrictions on operation.

If defendants submitted a plan within the allotted ninety days, the trial court ordered the city council to review and act upon the plan within a reasonable time. However, if defendants failed to submit a plan, the trial court ordered defendants to "abate the nuisance/illegal junkyard by removing all of the items and vehicles depicted in Exhibits 14 through 33, as well as any other vehicles that do not have a current registration and proper title."

Paragraphs eight and nine of the Town's petition allege defendants are operating a junkyard in violation of city ordinances.

8. City of Hastings Ordinance No. 10 is an ordinance which, among other things, requires junk dealers to obtain a license and regulates same. Said ordinance defines "junk dealers" as:

Any person engaged in collecting, storing, buying or selling junk. "Junk" means articles or materials that, because of age, deterioration, or use, have lost their original utility or desirability, but that by alteration, restoration, or salvage may furnish an item or items of value.

Said ordinance also requires all junkyards to be enclosed with a six-foot fence that hides the contents of the yard from public view. Said fence to be built of boards or other suitable material approved by the Council.

9. Said junkyard is not properly licensed and not appropriately fenced.

An injunction based solely on the existence of a junkyard in violation of the city ordinance is proper, even without a finding it constitutes a nuisance. *See Incorporated Town of Carter Lake v. Anderson Excavating & Wrecking Co.*, 241 N.W.2d 896, 903-04 (Iowa 1976) (agreed with trial court's ruling plaintiffs failed to prove a nuisance but remanded the case in order to frame an injunction requiring defendant to take such measures as the trial court, in its discretion, finds reasonable to bring the present condition of the landfill into compliance with the ordinance). Clearly, the Town's petition put defendants on notice of the claim defendants were operating an illegal junkyard in violation of the city ordinance. *See Dudley v. GMT Corp.*, 541 N.W.2d 259, 261 (Iowa 1995) (our notice pleading rule requires only a short and plain statement of the claim; it does not require a pleading of the facts).

In *Carter Lake*, the supreme court found it was not necessary to enjoin the defendants' use of the premises as a landfill and chose to order the trial court to draft an injunction to ensure the landfill followed the applicable ordinances. *Carter Lake*, 241 N.W.2d at 903. In this instance, the trial court classified the use as a “nuisance/illegal junkyard.” The trial court’s ruling gives defendants the option of submitting a plan to comply with the Town’s ordinances and permanently enjoins the use only if defendants do not comply.

We find the trial court correctly determined the use was an illegal junkyard. The evidence presented by the Town and properly admitted by the trial court proved by a preponderance of the evidence defendants were operating an illegal junkyard. We also find the trial court’s ruling properly gave defendants the option of attempting to comply with the Town’s ordinances prior to permanently enjoining the use of the property as a junkyard.

For these reasons, we affirm the decision as entered by the trial court.

AFFIRMED.

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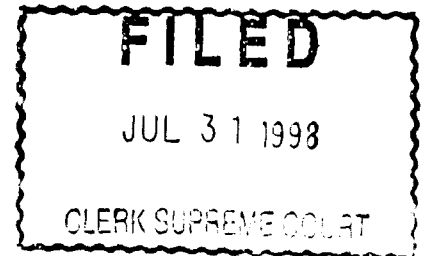
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*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

000105

MAHAN, J.

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The property in question is used to store cars, semi-trailers, and a camper trailer. The property is owned by the Wises. The number of cars stored on the property ranges from five to thirty. On August 13, 1992, the Town mailed a letter to Guy Barnes (the father of Guy Jr., and not a party to this action) giving him notice to abate a nuisance. The letter informed Guy of the location of the nuisance, the ordinance being violated, the type of nuisance, the action required to abate the nuisance, and his right to a hearing if requested within ten days of the receipt of the letter. Guy requested a hearing and the Town sent a letter on August 25 informing Guy the hearing would be held on September 1 and Mayor Art Goodwin would be the hearing officer.

The hearing was held at the September 1 Hastings City Council meeting. Guy Jr. attended the hearing. The Council voted to give Guy a sixty-day extension to abate the nuisance, which entailed removal of the junked cars, trailer beds, house

trailer, and junk. On September 9, Goodwin wrote a letter to Guy informing him the Council found the conditions still existed and he was still in violation of the city ordinances. Goodwin told Guy he had sixty days from the receipt of the letter to abate the nuisance or legal action would be taken.

On November 10, Guy, *Guy Jr.*, Roy, and Janet Barnes proposed erecting a fence around the property to conceal the nuisance. On November 13, the Town requested a diagram with detailed information as to where the fence would be placed, the kind of material to be used, and the size of the fencing. On December 1, the Council informed Guy it needed the exact measurements for the fence he proposed to build. No action was taken regarding the alleged nuisance between the December 1, 1992 Council meeting and June 18, 1996, when the Town obtained legal counsel and voted to commence legal action.

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hours of operation would be defined and set. Defendants did not appear at the Council meeting. The day before the meeting, counsel for defendants contacted the Town's attorney and advised him defendants could not afford a board fence and would not appear if a board fence were required.

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Section 6.02 of the Hastings City Ordinance states:

[The mayor or such other officers as provided by law] shall cause to be served upon the owner, agent or occupant of the property on which the nuisance is located, or upon the person causing or maintaining the nuisance, a written notice to abate or to request a hearing as provided in 7.

Section 6.03 requires a notice to abate to contain:

1. An order to abate the nuisance or request a hearing as provided by section 7 within a stated time which shall be reasonable under the circumstances.
2. Location of nuisance if stationary.
3. Description of what constitutes the nuisance.
4. Statement of act or acts necessary to abate the nuisance.
5. Statement that if the nuisance is not abated as directed and no request for hearing is made within the time prescribed, the Town will abate it and assess the cost against such person.

Section 6.04 states:

The notice to abate, may be in the form of an ordinance or sent by certified mail, to the property owner, with a domestic return receipt sent back to the Town of Hastings.

Section 6.05 provides:

If the person so notified neglects or fails to abate the nuisance as directed, the mayor, or other officers initiating the notice, may cause the nuisance to be abated, keeping an accurate account of the expense incurred.

The August 13 letter informed Guy he had "10 days upon receipt of this notice to request a hearing or to Abate the Nuisance. If the nuisances are not ABATED, the matter will be turned over to our attorney." The Town also sent a copy of the letter to the Wises. The September 9 letter notified Guy "[T]he council by resolution so state they want the nuisance abated within 60 days from the receipt of the letter. If the nuisance is not abated within 60 days from receipt of this letter, legal action will be taken. Abating of the Nuisances -- remove nuisance, within 60 days." A copy of this letter was also sent to the Wises. Neither of these letters informed Guy the Town

could attempt to abate the nuisance if he did not, nor did it inform him that such costs would be assessed against him.

Guy Jr. also argues the Town did not inform the defendants of their right to appeal the decision of the hearing officer. Section 6.07 states:

At the conclusion of the hearing, the hearing officer shall render a written decision as to whether a nuisance exists. If he finds that a nuisance exists, he must order it abated within an additional time which must be reasonable under the circumstances. *An appeal from this decision may be had by immediately filing a writ with the hearing officer.*

(Emphasis added.) There is nothing in the ordinance requiring notice of the right to appeal and neither Guy nor the Wises requested such an appeal.

The Town gave the property owners, the Wises, notice at the same time as Guy. Further, Guy Jr. attended the hearing and city council meeting. While it is arguable the Town should have given defendants a second notice to abate prior to filing its petition, the trial court's suspension of the proceedings to allow the parties to meet at the council meeting served substantially the same purpose. *See Burnham v. City of West Des Moines*, 568 N.W.2d 808, 811 (Iowa 1997) (substantial compliance exists when the action taken, although not literally satisfying the statutory requirement, nevertheless fulfills the minimal objectives of the statute). For this reason, we find the Town satisfied its administrative requirements.

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For these reasons, we affirm the decision as entered by the trial court.

AFFIRMED.