

OPINION NO. 68-130

Syllabus:

1. A municipality may determine that water drainage from an abandoned mine constitutes a public nuisance. Upon such determination it may be abated by a municipal corporation acting pursuant to Section 715.44 of the Revised Code.

2. The manner in which the public nuisance is to be abated is not specified but the use of city employees and/or independent contractors in carrying out this operation is reasonable and permissible.

To: John J. Malik, Belmont County Pros. Atty., St. Clairsville, Ohio
 By: William B. Saxbe, Attorney General, August 27, 1968

I have before me your request for my opinion on whether a municipal corporation may legally undertake, through the use of its own employees and/or independent contractors, to drain a water-filled abandoned mine from which mine drainage is presently entering basements, entering the sanitary sewer system, saturating terrace soil, and threatening major flooding and hill slides in the City of Martins Ferry.

Section 715.44 of the Ohio Revised Code reads in pertinent part:

"A municipal corporation may:

"(A) Abate any nuisance and prosecute in any court of competent jurisdiction, any person who creates, continues, contributes to or suffers such nuisance to exist;

* * * * *

"(C) Prevent injury and annoyance from any nuisance;

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This section must be interpreted as though the word "public" appeared before the word "nuisance". Akron v. Klein, 171 Ohio St. 207, 168 N.E. (2d) 564. If a whole community is annoyed or inconvenienced by an offensive act, a public or common nuisance exists. Cardington v. Fredericks, 46 Ohio St. 442, 446, 21 N.E. 766. What amount of annoyance or inconvenience will constitute a nuisance is a question of degree dependent upon varying circumstances and cannot be precisely defined. Columbus Gas, Light and Coke Co. v. Freeland, 12 Ohio St. 392. In one recent case, a nuisance was defined as "the thing or act complained of as constituting such nuisance must either cause injury to the property of another, obstruct the reasonable use of enjoyment of such property or cause physical discomfort to such other person". State ex rel., Chalfin 113 Ohio App. 23, 177 N.E. (2d) 293. In addition, there is evidence that a statute authorizing a municipality to abate a nuisance confers upon municipalities a reasonable exercise of discretion to determine what is offensive, dangerous, or unwholesome and whether it is or may become an injury or annoyance to the public, and to prohibit it insofar as is reasonable and necessary to prevent injury or annoyance. Schreier v. St. Bernard, 6 O.L.R. 598, 19 OD (NP) 476.

Dean Prosser states:

"The privilege of abatement extends to entry upon the land of another, and to the use of all reasonable force in a reasonable manner which is necessary to terminate the nuisance. * * * Most courts have held that before one is privileged to abate a nuisance he must notify the wrong doer of its existence and demand its removal, but obviously this will not be required in an emergency where there is no time for it or where it is apparent

that he is already aware of the nuisance and that such a demand would be futile." Prosser, William, Law of Torts, 2d ed. (1955) P. 420.

Without even considering the owner of the land's liability for water drainage, if the premises on which the mine is located is indeed privately owned, a municipal corporation has the authority to deem water drainage a nuisance and subsequently take action to abate it in any reasonable manner. The use of either municipal employees or independent contractors would be reasonable.

It is therefore my opinion and you are accordingly advised:

1. A municipality may determine that water drainage from an abandoned mine constitutes a public nuisance. Upon such determination it may be abated by a municipal corporation acting pursuant to Section 715.44 of the Revised Code.
2. The manner in which the public nuisance is to be abated is not specified but the use of city employees and/or independent contractors in carrying out this operation is reasonable and permissible.