ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

CHRIS KOSTER
ATTORNEY GENERAL

P.O. Box 899
(573) 751-3321

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Mr. John M. Huff, Director
Department of Insurance, Financial Institutions
& Professional Registration
3605 Missouri Boulevard
P.O. Box 1335
Jefferson City, MO 65102-1335

Re: Opinion Request Regarding Action on Public Nuisance

Dear Mr. Huff:

The Attorney General has asked me to respond to your inquiry, made in connection with the Board for Architects, Professional Engineers, Professional Land Surveyors and Landscape Architects, concerning the possibility of a public nuisance action against an owner of a business that operates from a structure greater than 20,000 cubic feet that accommodates more than nine people, constructed without use of an architect or professional engineer, and has identified life safety problems that have not been corrected. In providing this response, we do not mean to suggest that we are giving you legal advice or otherwise treating you as a client of the Attorney General or any of his assistants. We merely wish to assist you in performing your official duties as Director of the Department of Insurance, Financial Institutions and Professional Registration.

The Supreme Court of Missouri has embraced the definition of common law public nuisance set forth in Section 821B of the Restatement (Second) of Torts: "A public nuisance is an unreasonable interference with a right common to the general public." *State ex rel. Dresser Industries, Inc. v. Ruddy*, 592 S.W.2d 789, 792 (Mo. banc 1980).

In his dissent in *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. banc 2007), then Chief Justice Wolff quoted the following language from in the Restatement (Second) of Torts:

> Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following: (a) whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

226 S.W. 3d at 118.

Traditionally, an act involving use of private property was considered a public nuisance if it had some effect reaching beyond the boundaries of the property to affect the interests of the public at large. The Missouri courts have quoted the following language from Joyce, *Treatise on the Law Governing Nuisances,* Section 5, at 10 (1906):

> Another factor in defining a nuisance is that consideration should be given to places where the public have the legal right to go or congregate, or where they are likely to come within the sphere of its influence. A nuisance is not public though it may injure a great many persons, the injury being to the individual property of each. A nuisance is public when it affects the rights enjoyed by citizens as part of the public, as the right of navigating a river, or traveling a public highway; rights to which every citizen is entitled.

State ex rel. Attorney General v. Canty, 207 Mo. 439, 105 S.W. 1078, 1080-81 (1907); *State by Major ex rel. Hopkins v. Excelsior Powder Mfg. Co.*, 259 Mo.

254, 169 S.W. 267, 273 (1914); *City of St. Louis v. Varahi, Inc.*, 39 S.W.3d 531, 536 (Mo. App. E.D. 2001).

In *Varahi*, the Court of Appeals held that a hotel's practice of offering rooms in three-hour increments did not render the hotel's operation a public nuisance, where the conduct shown – solicitation by prostitutes in the neighborhood of the hotel – was not occurring in the hotel itself.

In *City of Kansas City v. New York-Kansas Bldg. Associates, L.P.*, 96 S.W.3d 846 (Mo. App. W.D. 2002), the Court of Appeals, Western District, held that a building whose interior condition was admittedly unsafe was not a public nuisance, where the building was not accessible to the public and there was no evidence that its deterioration posed any threat or harm to the vicinity of the building.

Those holdings are consistent with the concept that a nuisance exists only when there is interference with a public, rather than a private right. That limitation suggests that the nuisance concept cannot be applied to a building if the building is not accessible to the public and the problems at or with the building do not affect the public elsewhere.

"Nuisance" is no longer purely a common law concept in Missouri. Various Missouri statutes now define "public nuisances," sometimes by identifying certain conditions as public nuisances, or by empowering municipalities to do so. Examples include: derelict vehicles (§ 82.291.3); places used for the illegal use, keeping, or selling of controlled substances (§ 195.130); Johnson grass (§ 263.262) and noxious weeds (§ 263.460); properties operated in violation of liquor laws (§ 311.480.4); places used for prostitution (§ 567.080.1); and places used by a criminal street gang (§ 578.430.1).

A number of provisions specifically concern unsafe buildings and the authority of municipalities to deal with them. Sections 67.400-67.450 set forth procedures by which first class counties may adopt ordinances or orders requiring vacation, demolition, or repair and maintenance of buildings or structures that are detrimental to the health, safety or welfare of the county residents and declared to be a public nuisance. Section 71.780 grants cities the power to adopt charters or ordinances to suppress nuisances inside or within one-half mile of the city's boundaries. Section 82.1025.1 provides that

properties that adversely affect the property values of neighborhoods will be considered public nuisances in certain larger counties, and provides a remedy for owners of neighboring properties. Section 447.622 allows nonprofit organizations to petition to take over abandoned properties that have become a nuisance for purposes of rehabilitation. And §§ 441.500-441.643 establish procedures for legal action in situations in which buildings used as dwelling units that deteriorate to the point of violating a housing code.

These statutes identify certain kinds of property uses as a public nuisance and provide remedies, often available only in certain localities and often involving the intermediate step of adoption of a local ordinance. As to a building, the statutes may extend the concept of a nuisance beyond the common law definition, eliminating or reducing the requirement that there be an impact outside of the building itself. But each one contemplates action by local officials, not by a state licensing board or other state official.

Whether under the common law a property owner's failure to employ proper professional design services results in a life safety issue in a building constituting "interference with the public health, the public safety, the public peace, the public comfort or the public convenience" sufficient to support a finding of public nuisance has not been specifically addressed by Missouri courts. So long as the building is open to be public, there may be a foundation in the language of the case law for a nuisance theory. Indeed, we see no reason that the analysis would be different from instances in which the safety problem arises from other causes, such as lack of maintenance. We note, however, that the decisions we found that addressed this issue arose in cases brought by local authorities, seeking to ameliorate conditions of buildings within their jurisdiction.

Nuisance suits brought by local prosecutors have also included suits attacking the unlicensed practice of professions – but they are personal actions brought against individuals, not *in rem* actions regarding a building or property. In the cases of *State ex rel. Collet v. Scopel*, 316 S.W.2d 515 (Mo. 1958) and *State ex rel. Collet v. Errington*, 317 S.W.2d 326 (Mo. 1958), the prosecuting attorney of Jackson County brought suit against individuals offering services as naturopathic physicians, who were not licensed as physicians under the Medical Practice Act, to enjoin the unlicensed practice of medicine, on ground that such practice constituted a public nuisance. In both cases the Supreme Court found that the unlicensed practice of medicine

was a public nuisance that could be enjoined. But again, those actions were brought by a county prosecutor, not by a state licensing board.

It is not clear whether the Board of Registration for the Healing Arts could have sought an injunction against the unlicensed practice of medicine at the time the Jackson County prosecutor acted. The first version of what is now Section 334.230, RSMo, granting the Board authority to seek injunctions, was adopted in 1959 – the year after *Scopel* and *Errington* were decided. The earlier application of the nuisance doctrine may have been a prosecutorial and judicial response to a need for which there was no statutory authority.

In the intervening years, other licensing boards received authority to seek injunctions to prevent the unauthorized performance of acts which require licensure. That grant gives boards an alternative to the prosecutors' nuisance theory to address unlicensed practice. The board you mention, the Missouri Board for Architects, Professional Engineers, Professional Land Surveyors, and Landscape Architects, was authorized to pursue injunctions by the adoption in 1981 of § 327.075, RSMo.

That Missouri courts have permitted nuisance actions by prosecutors to enforce licensing laws against individuals does not mean that licensing boards have authority to bring similar nuisance actions. Agencies such as licensing boards must find authority in statutes, not in the common law: "An administrative agency enjoys no more authority than that granted by statute." *Termini v. Mo. Gaming Comm'n*, 921 S.W.2d 159, 161 (Mo. App. W.D. 1996), quoted with approval, *Gee v. Department of Social Services, Family Support Division*, 207 S.W.3d 715, 719 (Mo. App. W.D. 2006). And the statutory authority given to the Board for Architects, Professional Engineers, Professional Land Surveyors, and Landscape Architects to pursue the unauthorized practice of architecture or engineering is for injunctive, not common-law nuisance relief.

We conclude, then, that it may be possible for a prosecuting attorney or another local official (or perhaps even a private party) to bring a nuisance action with regard to a structure greater than 20,000 cubic feet that accommodates more than nine people and has identified life safety problems that have not been corrected, at least if the structure is open to the public or otherwise threatens public health or safety, regardless of whether the

structure was built with or without use of a licensed architect or professional engineer.

Very truly yours,

JAMES R. LAYTON
Solicitor General

JRL/kkb