MERCERTRIGIANI

NUISANCE

Two types of nuisance are recognized in the law: ***private nuisance*** and ***public nuisance***.

Private Nuisance. Private Nuisance is generally anything that, by its continuous use or existence, works annoyance, harm, unreasonable interference, inconvenience or damage to another landowner in the enjoyment of property. Private nuisance is also defined as any thing or activity that *substantially and unreasonably interferes* with the *use or enjoyment* of land.

To constitute a private nuisance, the interference must be *intentional, negligent, reckless* or the result of *abnormally dangerous conduct*. A *substantial interference* may include conduct that is offensive, inconvenient, or annoying to a **reasonable** person in the community. An *unreasonable interference* is an activity or conduct that causes injury that outweighs the usefulness of the activity or conduct.

Public Nuisance. Public Nuisance is an *unreasonable interference* with a *right common to the general public*. The key element to support a claim for public nuisance is that the plaintiff must suffer a harm that is *different in kind* from that suffered by members of the general public. Examples of public nuisance include air pollution, pollution of navigable waterways, interference with use of public highways, and interference with public use of parks or public property. Public nuisance does ***not*** have to include real property.

Nuisance vs. Trespass. A private nuisance does not require a trespass to land. Trespass requires a physical invasion to land; private nuisance does not. Nevertheless, physical invasion can constitute a nuisance. In addition, private nuisance is continuous whereas trespass may constitute a one-time event.

Who can bring a claim for Nuisance? Anyone with *possessory* rights in real property may bring a claim for private nuisance. Nuisance generally only affects community associations if the nuisance language is established in the recorded covenants.

Although subjective elements may apply – particularly involving claims between individual owners and residents – determining the existence of a nuisance is generally based on an objective *reasonable person* standard. A person with unique sensitivities can successfully claim nuisance only if the average person would be offended, inconvenienced or annoyed. Conversely, a "thick-skinned" plaintiff who is not offended, inconvenienced or annoyed is nevertheless entitled to recover if an average reasonable person would be, although the amount of damages may be affected.

Defenses to Nuisance. Defenses to private nuisance turn on whether the defendant's conduct is intentional, reckless, negligent or abnormally dangerous. One defense includes challenging the elements of private nuisance (substantial or unreasonable interference with use or enjoyment of land). Another defense may include demonstrating the plaintiff's negligence or assumption of the risk.

Compliance with the law is not a complete defense to a claim of private nuisance. It is also generally not a defense that the plaintiff "came to the nuisance" by purchasing property in the vicinity of the defendant's property *with knowledge* of the nuisance operated by the defendant. While coming to the nuisance does not entitle the defendant to judgment as a matter of law, it may affect an award of damages.

Remedies to Nuisance. The remedies for private and public nuisance include monetary damages (particularly if the nuisance is continuous or permanent), abatement or injunction (if monetary damages are inadequate) or perhaps criminal prosecution. All resulting harm is recoverable – including damages for reduction in the value of property and personal injury.

NUISANCE IN COMMUNITY ASSOCIATIONS

Standard Nuisance Provisions. Language in recorded, restrictive covenants (Declaration, Master Deed, Bylaws) can address and define nuisance and prohibit or restrict conduct that qualifies as nuisance. Whether an association is authorized or obligated to act on a nuisance allegation depends, in large part, on what the documents provide. Examples of nuisance language found in recorded governing documents include:

- No noxious or offensive activity shall be carried on upon any Lot or any part of the Property, nor shall anything be done thereupon which may be, or may become, an annoyance or nuisance to the neighborhood, or which shall in any way unreasonably interfere with the quiet enjoyment of each of the Owners of his respective dwelling unit, or which shall in any way increase insurance.
- No person shall permit or engage in any activity, practice or behavior for the purpose of causing annoyance, discomfort or disturbance to any person lawfully present on the Property.
- No improper, offensive or unlawful use shall be made of the Property or any part thereof (including lots or unit).
- There shall be no emissions of dust, sweepings, dirt, cinders, odors, gases or other substances into the atmosphere, except for normal residential chimney emissions, and no production, storage or discharge of hazardous wastes, liquid, solid wastes or other harmful matter into the ground or body of water.
- No person shall cause any unreasonably loud noise anywhere on the Property.

Nuisance Examples. Common nuisance examples found in community associations include: smoke (tobacco, other smoking materials or wood burning devices), lighting, noise, barking dogs, odors, discharge of waste.

Recorded governing documents often establish authority to take action to abate or remove certain conditions that are inconsistent with established covenants – including action to address a nuisance related to the examples above. If the documents do not include nuisance provisions, the association *may* lack authority to act. Further limitations may apply if the nuisance dispute is between owners. It is important that any action taken on behalf of the association is based on authority established in the recorded governing documents.