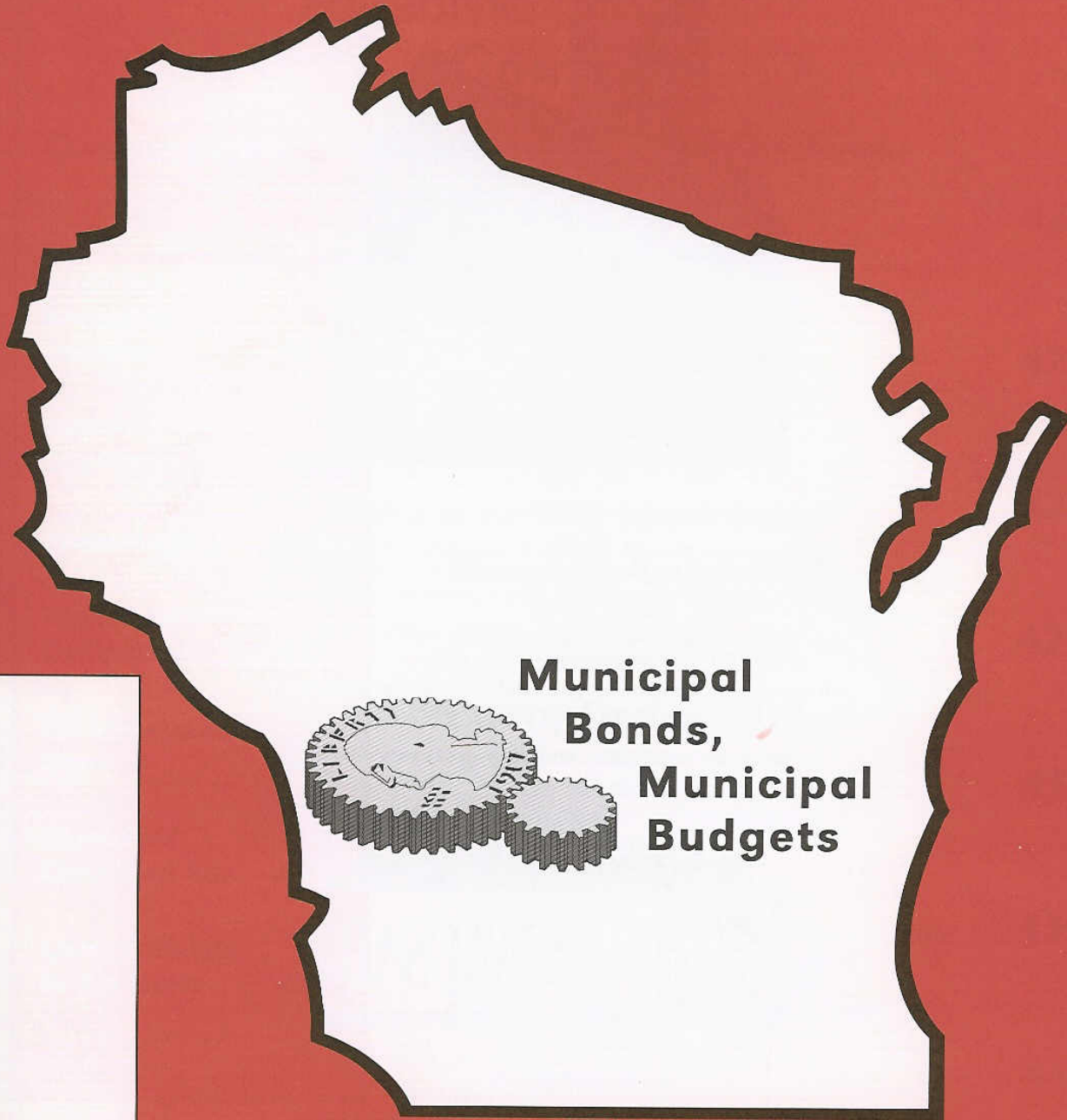


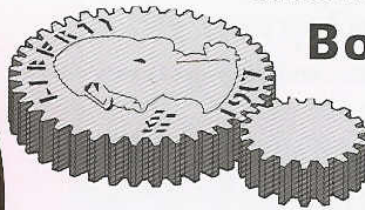
# The Municipality

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**Municipal  
Bonds,  
Municipal  
Budgets**



*Municipal Authority to:***Abate Public Nuisances Existing Before Ordinance Enacted**

By: E. Joseph Kershek

Recently, the Wisconsin Court of Appeals decided a case involving the right of a municipality to enforce its local zoning and nuisance ordinances against land owners who claimed that the use of their respective properties pre-existed the ordinances sought to be enforced.

The land owners argued that they had valid and legal nonconforming uses. The Court of Appeals held that a public nuisance can always be abated by a municipality as a valid exercise of its police power. The Court's decision helps clarify the rights of land owners and municipalities in the context of junk yards.

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**FACTUAL AND PROCEDURAL HISTORY**

The case of *Town of Delafield v. Sharpley*<sup>1</sup> involved a civil action brought by the Town of Delafield against a father and son who owned adjacent properties in the town (the Sharpleys). The father's land consisted of approximately eight and one-half acres. The son's property consisted of approximately one acre of land. Numerous vehicles, car parts, equipment and assorted pieces of junk were located on each property. The history between the town and the Sharpleys dates back to the early 1980s, when the town made repeated attempts to motivate the Sharpleys to clean up their respective properties without the need for any enforcement action. Despite the town's efforts, the Sharpleys made very little, if any, progress towards remedying the condition of the property.

In July 1993, after receiving many complaints from local residents and real estate developers concerning the large accumulation of vehicles and junk on both of the Sharpleys' properties, the town served each Sharpley with a notice informing them that there existed numerous violations of the town ordinances and state statutes concerning the condition of their respective properties. The Sharpleys were given thirty days to correct the violations.

The Sharpleys failed to correct the violations so the town sued them. The town's lawsuit consisted of four causes of

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1. *Town of Delafield v. Sharpley*, 212 Wis. 2d 332, 568 N.W.2d 779 (Ct. App. 1997) (Petition for Review to the Wisconsin Supreme Court denied September 2, 1997.)



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action. The first cause of action alleged that the Sharpleys violated state statute and town ordinances regarding the storage of abandoned, disassembled, unlicensed, inoperable, disabled, junked or wrecked motor vehicles on private property.<sup>2</sup> The second alleged numerous violations of the town of Delafield Zoning Code. The third alleged that the Sharpleys violated the town's ordinances prohibiting the operation of a business from a residential dwelling without the necessary conditional use permits.<sup>3</sup> The fourth alleged a violation of the town's nuisance ordinances.<sup>4</sup> As part of its complaint, the town requested an order:

- (1) finding that the Sharpleys had violated the statutes and ordinances;
- (2) permitting the town to go onto the Sharpleys' properties to abate the nuisance;
- (3) imposing a forfeiture on the Sharpleys as allowed by the town ordinances.<sup>5</sup>

The Sharpleys defended against the town's lawsuit by claiming that they had obtained a valid and legal nonconforming

use of the properties because their accumulation of the junked vehicles predated the town's ordinances. The Sharpleys also filed a counterclaim against the town alleging that the town ordinances violated the Sharpleys' constitutional rights and that the lawsuit constituted harassment and abuse by the town.

After commencement of the lawsuit, and under court supervision, town personnel and law enforcement officers inspected both of the Sharpleys' properties. The inspection revealed that on the father's property, there were at least forty-seven vehicles consisting of twenty-five cars, one van, eleven snowmobiles, five motorcycles, one truck, one boat, one school bus, one pick-up truck and one trailer. Of the forty-seven vehicles, there were no ignition keys for nineteen of them and thirty of them were not registered with the Wisconsin Department of Transportation. A grandson was living in the school bus on the father's property.

On the son's property, the inspection revealed that there were forty vehicles consisting of twelve cars, eleven vans, five trucks, four semi trailers, two semi tractors, one farm tractor, one ambulance, one boat and three pick-up trucks. Of the forty vehicles, there were two vehicles without keys. Twelve of the forty vehicles

were not registered with the Wisconsin Department of Transportation.

On both properties, many of the vehicles were missing engine and body parts, such as batteries, air cleaners, radiators and transmissions. In addition, there were numerous batteries, radiators, junk and other car parts strewn around both properties. Some of the junk included a refrigerator with its door still on, an icemaker on top of a stove and a plastic mold injection machine.

Based upon the information obtained by the town as a result of the inspection, the town requested the court grant summary judgment on its complaint and dismiss the Sharpleys' counterclaims. With one exception, the court granted the town's request for summary judgment on all four causes of action set forth in the town's complaint. The court further granted the town's motion for summary judgment dismissing the Sharpleys' counterclaims. The court ruled that the only issue remaining for trial was whether the Sharpleys had acquired a valid and legal nonconforming use of their respective properties which pre-dated the ordinances of the town.

A jury trial was held solely on the issue of whether the Sharpleys had a valid and legal nonconforming use of their respective properties which predated the

2. Section 342.40(3) Wis. Stats. and Section 7.15, Town of Delafield Ordinances.
3. Sections 17.05, 17.09 and 17.10 of the Town of Delafield Ordinances.
4. The relevant portions of the Town of Delafield Public Nuisance Ordinance are as follows:

10.1 **PUBLIC NUISANCES PROHIBITED.** No person shall erect, contrive, cause, continue, maintain or permit to exist public nuisance within the Town.

10.2 **PUBLIC NUISANCE DEFINED.** A public nuisance is a thing, act, occupation, condition or use of property which continues for such length of time as to:

- (1) Substantially annoy, injure or endanger the comfort, health, repose or safety of the public.
- (2) In any way render the public nuisance insecure in life or in use of property.
- (3) Greatly offend the public morals or decency.
- (4) Unlawfully and substantially interfere with, obstruct or tend to obstruct or render dangerous for passage any street, alley, highway, navigable body of water or other public way or the use of public property.

10.5 **PUBLIC NUISANCES AFFECTING PEACE AND SAFETY.** The following acts, omissions, places, conditions and things are declared to be public nuisances affecting peace and safety; but such enumeration shall not be construed to exclude other nuisances affecting public peace of safety coming within the definition of 10.02:

- (13) **BLIGHTED BUILDINGS AND PREMISES.** Premises existing within the Town which are blighted because of faulty design or construction, failure to maintain them in a proper state of repair, improper management or due to the accumulation thereon of junk or other unsightly debris, structurally unsound fences and other items which depreciate property values and jeopardize or are detrimental to the health, safety, morals or welfare of the people of the Town.

5. Section 25.04, Town of Delafield Ordinances.



town's ordinances. At the conclusion of the trial, the jury returned its verdict in favor of the father and partially in favor of the son finding, in essence, that both land owners had an active and actual use of their property commencing before the relevant town ordinances were enacted and therefore had acquired a valid and legal nonconforming use of their property.

The town brought post-trial motions requesting, among other things, that the trial court change the jury verdict answers. The trial court granted the town's request changing the jury verdict answers, thereby finding that neither Sharpley had acquired a valid and legal nonconforming use of their property which predated the town's ordinances. Thereafter, the town filed a separate motion requesting an order from the trial court adopting a remediation plan to clean up the properties of the Sharpleys, along with a request for a per diem fine if they failed to comply with the plan adopted by the court. The trial court adopted the remediation plan filed by the town, imposed forfeitures on the Sharpleys for their past violations and imposed future forfeitures upon their respective failure to comply with the court-ordered cleanup. The Sharpleys appealed, alleging that the trial court erroneously granted the town's request for summary judgment and also improperly granted the town's motions after the verdict.

#### COURT OF APPEALS DECISION

Upon review, the Wisconsin Court of Appeals found that the town's original motion for summary judgment was actually dispositive of the entire case. The court of appeals held that it was not necessary for the trial court to reach the issue of whether the Sharpleys had acquired a

valid nonconforming use of their property. The court of appeals reasoned that once the trial court concluded that the Sharpley properties constituted a public nuisance, it was unnecessary to analyze whether the Sharpleys' use of their property constituted a legal nonconforming use. The court of appeals stated that "a valid nonconforming use irrespective of duration, can be prohibited or restricted when it constitutes a public nuisance, or is harmful to the public health, safety or welfare."<sup>6</sup>

The court reaffirmed the basic legal principle that a nonconforming use existing at the time a zoning ordinance takes effect cannot be prohibited or restricted by statute or ordinance where it is a lawful business or constitutes a lawful use of property.<sup>7</sup> However, the court emphasized that a nonconforming use existing at the time a zoning ordinance goes into effect can, in fact, be prohibited or restricted by statute or ordinance where it is a public nuisance or harmful in any way to the public health, safety, morals or welfare.<sup>8</sup> The court reiterated prior case law stating that a property constitutes a public nuisance if it causes substantial "hurt, inconvenience or damage to the public generally, or such part of the public as necessarily comes in contact with it in the exercise of the public or common right."<sup>9</sup> The court explained that it is not the legitimacy of the business, nor the length of time the business has been in existence, that is controlling in determining whether a public nuisance exists.<sup>10</sup> The court held that a public nuisance can always be abated by a municipality<sup>11</sup> and that declaring certain acts or conditions to be a public nuisance is, in fact, a legitimate exercise of a municipality's police power.<sup>12</sup>

#### CONCLUSION

Although the Town of Delafield had set forth four different causes of action in its complaint against the Sharpleys, the court of appeals felt that the dispositive issue was the cause of action relating to a violation of the town's public nuisance ordinance. This is despite the fact that the first three causes of action alleged very specific violations of town ordinances. At times, it can be difficult for a municipality to meet its burden of proof in convincing a judge or jury that conduct or a condition of a property constitutes a public nuisance due to the subjective nature surrounding the use of one's property. What may be a junkyard to one land owner may be a gold mine to another. It is, therefore, important that municipalities adopt public nuisance ordinances and that such ordinances clearly define what constitutes public nuisance conditions or conduct. To have such an ordinance gives a municipality an opportunity to successfully restrict or prohibit a public nuisance condition without having to concern itself with the enforceability of zoning ordinances and the possibility of land owners raising the issue of a grandfathered-in nonconforming use of the land.

It is clear under *Town of Delafield v. Sharpley* that a public nuisance can always be abated as a valid exercise of police power, despite the legitimacy of the business or the length of time the business or condition has been in existence. A strong public nuisance ordinance can be an effective means of prohibiting or restricting harmful conduct or conditions of a property.

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6. *Sharpley* at 337.

7. *Id.* at 337-338 citing *Des Jardin v. Town of Greenfield* 262 Wis. 43, 47-48, 53 N.W. 2d 784, (1952) (quoted source omitted).

8. *Sharpley* at 338, citing *State v. H. Samuels Co., Inc.* 60 Wis. 2d 631, 635, 211 N.W.2d 417, 419 (1973); *Madison Metro. Sewerage Dist. v. Committee on Water Pollution*, 260 Wis. 229, 251, 50 N.W. 2d 424, 436 (1951).

9. *Sharpley* at 340, citing *State v. Quality Egg Farm, Inc.* 104 Wis. 2d 506, 517-18, 311 N.W.2d 650, 656 (1981) (quoted source omitted).

10. *Sharpley* at 338, citing *State v. H. Samuels Co., Inc.*, *supra*.

11. *Sharpley* at 338, citing *Madison Metro Sewerage Dist. v. Committee on Water Pollution*, *supra*.

12. *Sharpley* at 338, citing *Hartung v. Milwaukee County* 2 Wis. 2d 269, 286, 86 N.W.2d 475, 485 (1957); *Wilke v. City of Appleton* 197 Wis. 2d 717, 727, 541 N.W.2d 198, 202 (Ct. App. 1995). In *Wilke* the court of appeals upheld the constitutionality of Appleton's nonsummary nuisance abatement ordinance permitting municipal seizure and removal of nuisances.