

OPINION  
66-88

September 12, 1966 (OPINION)

Mr. Roger D. Schell

Assistant State's Attorney

Bottineau County

RE: Health Districts - Nuisances - Abatement

This is in response to your letter in which you recite some of the procedure taken thus far with reference to an alleged health nuisance. You state that a notice by certified mail was served upon the owner, which notice states that the building is to be removed. You then inquire if this service is correct or should personal service have been made on the party.

Your question anticipates a summary type removal of the building after the notice has been given and the owner fails to abide by the notice.

In examining the provisions of the boards of health, we do not find that any specific procedure is set out. Basically the district health officers have the same powers and duties as the local health boards (see Section 23-14-07, of the North Dakota Century Code). The pertinent provisions pertaining to abatement of nuisances are found in Section 23-05-04 and subsequent sections. These sections seem to imply that if the nuisance is matter that is located on property it may be removed and the cost charged against the owner. It is quite apparent that the statute does not have in mind the removal of buildings under such procedure. This pertains more to matter which can be easily removed as distinguished from a building which is part of the land.

We must at all times keep in mind that the Constitution provides that no property shall be taken without due process of law. The abatement of a nuisance must be in accordance with due process of law to be legal. As an example, the Legislature as pertaining to fire hazards set out extensive detailed procedures to be followed in abating such fire hazards (see Chapter 18-01, of the North Dakota Century Code). Such procedure, however, cannot be applied to the nuisances you described, unless the nuisance is also a fire hazard which would bring it within the provisions of Chapter 18-01.

It is our opinion that where there is an allegation of a building being a nuisance and that where notice has been given to the owner but he fails or declines to comply with the notice to remove such building, an action must be initiated in a court of competent jurisdiction to compel the abatement of the nuisance. The abatement of a nuisance can be accomplished either in a civil action under Chapter 42-02, or if the facts so warrant a criminal action can be instituted to compel the abatement. However, in either instance due process must be followed.

It also appears to us that the notice must be served on the property owner in such a manner that it constitutes legal service so that it may be used as a basis for the institution of a legal action.

In instances involving a building, the board of health cannot summarily remove same. If the building has any value whatsoever or if the building can be renovated to eliminate the nuisance, such factor should be considered and in all probability will be considered in any legal action. If the building in which a nuisance is being maintained or if it constitutes a health hazard, the public health officers may quarantine the building or take some other similar action to protect the public, but this would not include the destruction or removal of the building without due process.

HELGI JOHANNESON

Attorney General