

LOCAL LAW FILING

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TOWN OF HERKIMER
LOCAL LAW NO. 7 OF 2019
PUBLIC NUISANCE ABATEMENT LAW OF
THE TOWN OF HERKIMER

BE IT ENACTED by the Herkimer Town Board as follows:

§1. Title

This Local Law may be cited as the "Public Nuisance Abatement Law of the Town of Herkimer."

§2. Definitions

The following words, terms and phrase, when used in this chapter, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

- A. Criminal Conviction – means the entry of a plea of guilty to or a verdict of guilty for one (1) or more counts set forth in an accusatory instrument.
- B. Illegal Drug Activity – means use or possession of a controlled substance or marihuana (marijuana) as defined by the New York State Penal Law.
- C. Premises – means a building or structure, or any part thereof.
- D. Public Nuisance includes, but shall not be limited to:
 - 1. Any building, structure or real property used for the purpose of illegal use, possession or distribution of a controlled substance or marihuana (marijuana) as defined by the New York State Penal Law.
 - 2. Any building, structure or real property used for the purposes of prostitution as defined by the New York State Penal Law.
 - 3. Any building, structure or real property used for purposes of indecency, obscene performances and/or promotion of obscene material as defined by the New York State Penal Law and this Code.
 - 4. Any building, structure or real property used for purposes of illegal gambling activity as defined in the New York State Penal Law.
 - 5. Any building, structure or real property used for the purpose of the commission of illegal possession, use or sale of firearms or weapons as defined by the New York State Penal Law.
 - 6. Any building, structure or real property used for the purpose of illegal sale, manufacture or consumption of alcohol beverages as defined by the New York State Alcohol Beverage Control Law.

7. Any building, structure or real property wherein there exists or has occurred a criminal nuisance as defined by the New York State Penal Law.
8. Any building, structure or real property used for the purpose of loitering as defined by the New York State Penal Law.
9. Any building, structure or real property wherein there exists or has occurred a violation of this Code
10. Any building, structure or real property wherein an occupant, guest or business invitee commits criminal activities, including but not limited to, assault, harassment or disorderly conduct, as said criminal activities are defined by the New York State Penal Law.
11. Any building, structure or real property wherein an occupant, guest or business invitee conducts or performs activities or behaves in a manner that detrimentally effects the quiet and reasonable use and enjoyment of adjacent or neighboring property as such conduct and activities are defined by the New York State Penal Law.

E. **Owner** – means the owner or landlord of premises, including his/her agent.

F. **Tenants** – means the lessee or occupant of a premises. For purposes of this Code, the term “tenant”, in addition to its ordinary meaning, shall include an occupant of one (1) or more rooms in a hotel who has been in possession for thirty (30) consecutive days or longer.

§3. Nuisance Forbidden.

No owner, operator, manager, agent in control, tenant, lessee or other occupier of a building, structure or real property shall knowingly conduct, maintain, permit or allow the existence of a public nuisance at the building, structure or real property.

§4. Presumption of Knowledge.

Notice by first class mail, or personal service, of activities entailing a public nuisance to the property owner, operator, manager, agent in control, tenant, lessee or other occupier of a building, structure or real property shall be *prima facie* evidence of knowledge of the public nuisance.

§5. Criminal Convictions as Presumption of the Existence of a Public Nuisance.

The existence of two (2) or more criminal convictions for any of the activities set forth in the definition of a public nuisance in Section 2 at any building, structure or real property within a two-year period prior to the commencement of a civil action shall be *prima facie* evidence of the existence of a public nuisance. A criminal conviction shall be defined as the entry of a plea of guilty to or a verdict of guilty for one (1) or more counts set forth in an accusatory instrument.

§6. Other Evidence of Prohibited Conduct as Presumption of the Existence of a Public Nuisance.

The existence of two (2) or more incidents of the following activities at any building, structure or real property within a one-year period prior to the commencement of a civil action shall be *prima facie* evidence of the existence of a public nuisance.

- A. Conviction for any of the activities set forth in the definition of a public nuisance in Section 2 occurring on or near the property.
- B. Arrest for any of the activities set forth in the definition of a public nuisance in Section 2 occurring on or near the property.

- C. Service of an accusatory instrument charging any of the activities set forth in the definition of a public nuisance in Section 2 occurring on or near the property.
- D. Service of a search warrant on the building, structure or real property where controlled substances, marihuana (marijuana) and/or weapons are seized.
- E. Finding of illegal controlled substances or illegal firearms or weapons on the building, structure or real property.
- F. Investigative purchases of illegal controlled substances on the building, structure or real property by law enforcement agencies or their agents.

§7. Summons and Complaint for Civil Action.

- A. The Town Attorney (or designated counsel to the Town) may bring and maintain a civil action in the name of the Town to abate a public nuisance and shall commence the civil action by the filing of a Summons and Complaint in the manner required by New York State Civil Practice Laws and Rules; or by any other applicable law.
- B. The Summons and Complaint or Petition shall name as defendants the building, structure or real property by describing it by tax map number and/or street address and shall name as defendants at least one (1) of the owners of some portion of, or having some interest in the property.
- C. Any owner, operator, manager, tenant, lessee or other occupier of the building, structure or real property may also be named as defendant.
- D. The Complaint shall allege the facts constituting the public nuisance.
- E. The Complaint shall be accompanied by affidavits for purposes of showing that the owner or his agent had notice of the nuisance and had an opportunity to abate the nuisance.
- F. The venue of the action shall be in the county where the public nuisance is being conducted, maintained, permitted or allowed.
- G. In the case of a Summons and Complaint, in rem jurisdiction over the building, structure or real property shall be completed by affixing the Summons to the building, structure or real property and by mailing the Summons and Complaint by Certified or Registered Mail, Return Receipt Requested, to the person in whose name the real property is recorded at the Office of the Herkimer County Clerk.
- H. Defendants, other than the building, structure or real property, shall be served with the Summons and Complaint in the manner required by the New York State Civil Practice Laws and Rules.
- I. With respect to any action commenced or to be commenced, the Town Attorney (or designated counsel to the Town) may file a Notice of Pendency pursuant to the New York State Civil Practice Laws and Rules.

§8. Civil Penalty.

If, upon the trial of an action for a public nuisance or upon a motion for summary judgment, a finding is made that the defendant(s) have conducted, maintained, permitted or allowed a public nuisance, a penalty may be awarded in an amount not to exceed one thousand dollars (\$1,000.00) for each day it is found that defendant(s) conducted, maintained, permitted or allowed the public nuisance after notice to abate had been given by the Town. Upon recovery, such penalty shall be paid into the general fund of the Town.

§9. Permanent Injunction.

- A. If, upon the trial of an action for a public nuisance or upon a motion for summary judgment, a finding is made that defendant(s) have conducted, maintained, permitted or allowed a public nuisance, a Permanent Injunction may be granted.
- B. A Permanent Injunction may prohibit defendant(s) from conducting, maintaining, permitting or allowing the public nuisance.
- C. A Permanent Injunction may authorize agents of the Town to remove and correct any conditions in violation of this Code. The Judgment may further order that the costs of removing and correction the violations, plus a charge of fifty percent (50%) as compensation to the Town for administering, supervising and handling such work, shall be charged against defendant(s) and awarded to the Town. The Judgment may further order that the costs of removing and correcting the violations, plus a charge of fifty percent (50%) as compensation to the Town for administering, supervising and handling such work, shall constitute a lien against the real property and shall be collected in the same manner provided by law for the collection of real property taxes within the Town.
- D. A Judgment ordering a Permanent Injunction may direct the closing of the building, structure or real property by any New York State Peace Officer having jurisdiction within the Town of Herkimer, to the extent necessary to abate the nuisance.
- E. A Judgment awarding the Permanent Injunction shall provide for all costs and disbursements allowed by the New York State Civil Practice Laws and Rules and for the actual costs, expenses and disbursements of the Town in investigating, bringing and maintaining the action.

§10. Closing of the Building, Structure or Real Property.

- A. If the judgment directs the closing of the building, structure or real property, the any New York State Peace Officer having jurisdiction within the Town of Herkimer shall serve the Judgment upon the defendant(s) in the manner required by the New York State Civil Practice Laws and Rules and shall post a copy of the Judgment upon one (1) or more of the doors at entrances of the building, structure or real property or in another conspicuous place on the building, structure or real property.
- B. In addition, any New York State Peace Officer having jurisdiction within the Town of Herkimer shall affix upon one (1) or more of the doors at entrances of the building, structure or real property or in another conspicuous place on the building, structure or real property, a printed notice stating "CLOSED BY COURT ORDER" in block lettering of sufficient size to be observed by anyone intending to enter the premises.
- C. Mutilation or removal of such posted Judgment or notice while it remains in force will be considered a separate violation and shall be punishable according to Section 8 of this Code.
- D. any New York State Peace Officer having jurisdiction within the Town of Herkimer may then command all persons present in the building, structure or real property to vacate the property forthwith. After the building, structure or real property has been vacated any New York State Peace Officer having jurisdiction within the Town of Herkimer may secure the premises.
- E. The closing directed by the Judgment shall be for such period as the Court may direct, but in no event shall the closing be for a period of more than one (1) year from the posting of the Judgment.
- F. A closing by any New York State Peace Officer having jurisdiction within the Town of Herkimer shall not constitute an act of possession, ownership or control by the Town.

§11. Preliminary Injunction.

Upon a motion or order to show cause from the Town Attorney (or designated counsel to the Town) and pending an action for a Permanent Injunction, a Preliminary Injunction enjoining the public nuisance may be granted for any of the relief obtainable by a Permanent Injunction.

§12. Temporary Restraining Order.

Pending a motion or order to show cause for a Preliminary Injunction, a Temporary Restraining Order or a Temporary Closing Order may be granted, without notice to defendant(s), for any of the relief obtainable by a Permanent Injunction.

§13. Administrative Hearing.

Whenever there is *prima facie* evidence of a public nuisance at any building, structure or real property within the Town; the Town Attorney (or designated counsel to the Town) may initiate an administrative hearing.

- A. Service of Notice: A notice of the hearing shall be served on all owners of the building, structure or real property and may also be served on any known tenants or lessees or other occupiers of the building. The notice shall be served in the manner required by the New York State Civil Practice Laws and Rules.
- B. Content of Notice: The notice shall allege the facts constituting the public nuisance. The notice shall further contain a time and place for a hearing to be held before a panel.
- C. Hearing Panel: The panel shall consist of a member to be appointed by the Codes Enforcement Officer, a member to be appointed by the Town Supervisor, and a member to be appointed by the Fire Chief of the East Herkimer Volunteer Fire Department. Each appointing authority shall be authorized to appoint himself/herself or any member of his/her staff to the hearing panel.
- D. Hearing: At the time and place designated in the notice, the Town Attorney (or designated counsel to the Town) shall present all relevant evidence as to the existence of a public nuisance at the building, structure or real property, and as to appropriate remedies. The owners of the building, structure or real property or their representatives, shall have the right to cross-examine any witnesses presented by the Town Attorney (or the designated counsel to the Town). The owners of the building, structure or real property, or their representatives, may present any relevant evidence in their defense. The Town Attorney (or the designated counsel to the Town), shall have the right to cross-examine any witnesses, presented by the owners of the building, structure or real property, or their representatives.
- E. Panels Finding and Recommendation: Within five (5) days of the hearing, the panel shall provide a finding of fact to the Commissioner of Public Safety, or, if there is not Commissioner of Public Safety, to the Town Supervisor or the Town Supervisor's designee. The finding of fact shall state whether there is *prima facie* evidence of the existence of a public nuisance at the building, structure or real property. The panel shall further provide a written recommendation of the remedies to abate the public nuisance.

§14. Administrative Remedies.

The Commissioner of Public Safety, or if there is no Commissioner of Public Safety, the Town Supervisor or the Town Supervisor's designee, upon receipt of a finding of fact and recommendation from the panel, shall have the following powers in regards to the abatement of public nuisances:

- A. To suspend or revoke, for a period not to exceed one (1) year, the certificate of occupancy for the building, structure or real property.
- B. To order the closing of the building, structure or real property by any New York State Peace Officer having jurisdiction within the Town of Herkimer, to the extent necessary to abate the nuisance, pursuant to the procedures set forth above in Section 10.

§15. Lease Void When Premises Used or Occupied for Illegal Drug Activity.

Whenever a Tenant shall use or occupy a premises, or allow said premises to be used or occupied, for the purpose of illegal drug activity, the lease or agreement for the letting or occupancy of such premises shall become void, and the owner may enter upon such premises.

§16. Eviction for Use or Occupation of Premises for Illegal Drug Activity.

- A. An owner may maintain a special proceeding to evict a tenant from the leased premises upon the ground that the premises have been used or occupied for the purposes of illegal drug activity.
- B. The procedures applicable to summary proceedings to recover possession of real property under New York State Real Property Actions and Proceedings Law shall be applicable to any proceeding brought under this chapter.

§17. Severability

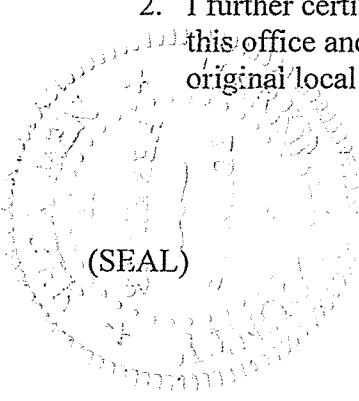
Should any provision of this Local Law be declared by the courts to be unconstitutional or invalid, such decision shall not affect the validity of this Local Law as a whole or any part thereof other than the part so decided to be unconstitutional or invalid.

§18. Effective Date

This Local Law shall be effective upon its filing with the Secretary of State in accordance with the Municipal Home Rule Law.

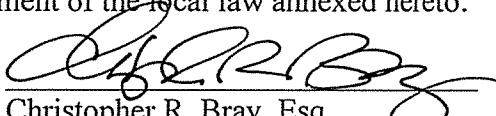
1. I hereby certify that the local law annexed hereto, designated as Local Law No. 7 of 2019 of the Town of Herkimer, was duly passed by the Town Board on October 21, 2019 in accordance with the applicable provisions of law.
2. I further certify that I have compared the preceding local law with the original on file in this office and that the same is a correct transcript therefrom and of the whole of such original local law, and was finally adopted in the manner indicated in paragraph 1 above.

(SEAL)


Jennifer DeMetro
Dated: 11-6-19

STATE OF NEW YORK
COUNTY OF HERKIMER

I, the undersigned, hereby certify that the foregoing local law contains the correct text and that all proper proceedings have been had or taken for the enactment of the local law annexed hereto.


Christopher R. Bray, Esq.
Town Attorney
Town of Herkimer
Dated: Nov. 6 2019