COUNTY OF LOS ANGELES
Public Health

JONATHAN E. FIELDING, M.D., M.P.H.
Director and Health Officer

JONATHAN E. FREEDMAN
Chief Deputy Director

313 North Figueroa Street, Room 806
Los Angeles, California 90012
TEL (213) 240-8117 • FAX (213) 975-1273

www.publichealth.lacounty.gov

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June 19, 2009

TO: Each Supervisor

FROM: Jonathan E. Fielding, MD, M.P.H.
for Director and Health Officer

SUBJECT: **RESPONSE TO MOTION REGARDING GREEN SWIMMING POOLS**

On May 19, 2009, the Board instructed the Department of Public Health (DPH), in conjunction with the Department of Public Works (DPW) and County Counsel, to report back in 30 days with a program that seeks to accomplish the following: (1) define the legal issues involved with entering private property to abate a nuisance at an abandoned property, including whether the Los Angeles County Code needs to be amended in this regard; (2) develop a plan to coordinate the resources of DPH and DPW to remediate green swimming pools at abandoned properties where the owner of record has not taken timely action to correct the problem after notification by the health officer; and (3) develop a mechanism for the County to recover from the property owner the costs of remediation.

DPH has worked with DPW and County Counsel in preparing this memorandum.

1. Legal Issues of Green Swimming Pool Hazard Abatement

A. Definition of Abandoned/Unoccupied Property

Legally, property is considered abandoned when the owner has voluntarily relinquished or disclaimed ownership. There are many single family, residential properties in Los Angeles County that have not been abandoned in the legal sense, but which are not currently occupied either by their owners or by people with a legal right to occupancy. In many cases, these properties have been foreclosed, and are owned by a bank or a party that has purchased the property at a foreclosure sale. Many of these unoccupied properties are not being adequately maintained or supervised, even though the record owner (i.e., a bank) is obligated to maintain the property.

County departments and special districts that are involved in nuisance abatement activities generally use a common sense approach to determining whether a property is unoccupied based upon observations of the property and speaking with neighbors.

B. Legal Right of County to Enter Private Property to Abate a Nuisance

Constitutional principles provide a framework for the County's nuisance abatement laws, and these principles apply even to private property that is unoccupied. The rights of private property and due process generally prevent a government employee from entering private property unless he or she obtains either the consent of the property owner or resident, an order from a quasi-judicial hearing board after a noticed hearing, or a judicial warrant. There is an exception to this rule for emergency situations in which there is imminent danger to human life or extreme property damage.

In addition, the due process clause generally prohibits a governmental entity from taking action to abate a nuisance on private property, unless it affords a hearing to the property owner which satisfies due process. However, a governmental entity may summarily abate a nuisance, without a hearing, if there is an imminent danger to human life or extreme property damage. In such emergencies the private property owner must be afforded as much due process as the situation will allow.

The property owner may recover damages for a nuisance that was summarily abated if a court later determines that the abatement action was not justified by an imminent danger to human life or extreme property damage

Chapter 99 of the Los Angeles County Building Code (Title 26) provides a mechanism for abating public nuisances relating to substandard buildings and structures. Under this process, the property owner is notified of one or more substandard property conditions and/or code violations, which constitute public nuisances and instructed to fix the nuisances. Under this process, the property owner is given the opportunity to challenge the County's determination at a hearing before the Building Rehabilitation Appeals Board (BRAB). If the BRAB determines that there is a nuisance and the Board of Supervisors adopts BRAB's determination and their recommendation of how it should be corrected, and the property owner does not correct the problems within the time specified, then the County can take action to abate the nuisance, and assess the property owner for the cost. If unpaid, this assessment becomes a lien on the property.

Both DPW and DPH have authority to abate nuisances in a more summary fashion where there is an imminent an imminent danger to human life or extreme property damage. For example, Title 11 of the Los Angeles County Code (LACC), Section 11.02.190 provides that DPH can summarily abate a nuisance that endangers public health. DPH is first required to notify the property owner and provide a "reasonable" amount of time to correct the problem. In addition, Title 26, Section 26.9813 of the LACC authorizes DPW to cause unsecured buildings or structures to be secured "forthwith or within less than the designated period" of notice, upon a finding by the Sheriff or Fire Chief that such action is justified by an immediate hazard. However, depending upon the immediacy of the action to be taken, utilizing a notice and hearing procedure is less likely to subject the County to liability.

C. Codes Addressing Hazards Associated with Swimming Pools at Unoccupied Properties

C.1 Lack of Adequate Fencing

LACC Section 11.50.010 requires that all swimming pools be surrounded by a fence that is at least five feet high. Lack of adequate fencing poses a drowning hazard to children. This hazard may be increased where the swimming pool is "green" (i.e., where there is algae growing in the swimming pool), because it may be difficult to see a person who is drowning, which could impede a rescue. DPW typically remediates unfenced swimming

pools at unoccupied properties pursuant to LACC Section 26.9813 (above). When DPW receives a report of, or observes, an unfenced swimming pool, they will have a fence erected around the swimming pool in accordance with this provision.

C.2 Mosquito Hazard

When a swimming pool's recirculation and purification system is not operated or maintained properly, algae starts to grow, and the water turns green and can become a breeding ground for mosquitoes. Mosquitoes, in turn pose a public health hazard because they can spread disease. Vector Control Districts (VCD) are empowered by statute (Health & Safety Code Section 2000 *et seq.*) to abate mosquitoes in Los Angeles County. DPH is also empowered to enforce LACC Section 11.30.010, which prohibits any property owner from harboring mosquitoes. VCD and DPH are authorized to cooperate and work together in abating the mosquito hazard.

If a property owner fails to abate a mosquito hazard when ordered to do so by VCD or DPH, then VCD and/or DPH can abate the hazard by placing insecticide into the swimming pool. The insecticide acts to kill the mosquito larvae that coat the surface of the water, preventing new mosquitoes from breeding in the swimming pool.

C.3 Potential of an Ongoing Hazard Posed by Green Swimming Pools

Securing unfenced swimming pools and killing mosquitoes will abate the most imminent hazards posed by swimming pools at unoccupied properties. However, some concern has been expressed that, although the drowning hazard is significantly reduced when a swimming pool is adequately fenced, there is still the possibility that a child could climb the fence and drown in the swimming pool. A green swimming pool could further impair rescue efforts. Additionally, even after a pool is abated, mosquitoes can eventually return to a green swimming pool, which triggers the need for further mosquito abatement. Therefore, a green swimming pool may still be a nuisance, even if properly fenced and even if the mosquitoes have previously been abated.

Currently, the only ordinance that addresses the problems brought about by green swimming pools is LACC Section 11.30.010, which prohibits any condition that permits the harborage of mosquitoes In order to more directly target the other problems associated with green swimming pools, the Board could consider amending Chapter 50 of Title 11 of the LACC, pertaining to swimming pools, to add a provision requiring that the water be kept "clean and of reasonable clarity" so that the drain is visible from the deck around the swimming pool, and declaring that swimming pools in which the main drain is not visible are a public health and safety hazard and a nuisance. This amendment will enhance the County's ability to require homeowners (including banks) to remediate green swimming pools through the normal code enforcement process.

Generally, the remediation of a green swimming pool involves either repairing the swimming pool's recirculation and purification system, maintaining the proper chemical balance and acid content of the swimming pools water, or draining the swimming pool. Draining a swimming pool can be problematic and can pose a risk of damage to the swimming pool, including degradation of the plaster, cracks in the swimming pool, and groundwater incursion. In addition, the water from the drained swimming pool may need to go into the sanitary sewer.

If the Board considers adopting an ordinance requiring swimming pools to be kept clear, it should keep in mind that similar issues may be raised with respect to swimming pools that are painted a dark color and decorative fixtures such as fish ponds and fountains.

2. Coordination of Abatement of Unfenced and Green Swimming Pools

When a report is received of a swimming pool hazard at an unoccupied property, it is important that the appropriate department or departments are notified.

If a County department observes, or receives a report of, a swimming pool that is unfenced or that there is a concern that the swimming pool is not properly fenced, that department should notify DPW, the Sheriff's Department, and the Fire Department immediately. The Sheriff's and/or Fire departments will determine if the swimming pool is unfenced such that it constitutes an immediate hazard that needs to be secured "forthwith." If so, the departments will notify, DPW in writing, which will cause a fence to be erected around the swimming pool in accordance with LACC Section 26.9813. In these situations, DPW attempts to notify the property owner by phone, and posting a notice at the property. However, because of the immediate hazard posed by an unfenced swimming pool, DPW will cause the swimming pool to be secured even if no contact is made with the property owner.

If a County department observes, or receives a report of, a swimming pool that may be harboring mosquitoes, that department should notify the Department of Public Health – Environmental Health Division (EH) as well as the appropriate VCD, if that information is available. EH will work with VCD to investigate the report the same day the report is received.

If it is determined that the swimming pool is a likely breeding ground for mosquitoes, EH will notify the property owner and legal resident (i.e., tenant) that the conditions constitute an imminent threat to public health and that they are required to immediately correct the hazard. EH will verify compliance within 48 hours, and if the hazard is not abated, EH will schedule an administrative hearing for the property owner to occur within 72 hours from the date that non-compliance is verified. If the property owner does not appear at the administrative hearing, EH will make a second notification to VCD and will work with VCD to treat the swimming pool to eliminate mosquito breeding.

As discussed, the Board may also consider adopting an ordinance requiring "reasonable clarity" in swimming pools, in order to address the hazard posed by green swimming pools once the more imminent hazards posed by lack of fencing and mosquitoes are corrected. In this event, DPH will also take the lead to enforce this provision against property owners, including owners of unoccupied properties.

3. Cost Recovery and Other Remedial Actions

The County currently has the ability to, and generally does, recover costs incurred in abating a nuisance by recording a lien against the property. The County also has the ability to file a civil action seeking an injunction requiring the property owner to correct a code violation.

In addition, violations of most County ordinances, including those contained in Title 11, Chapter 50 pertaining to swimming pools, are considered a misdemeanor, and can be referred to the District Attorney.

The California Legislature also recently passed a law requiring banks who acquire residential property through mortgage foreclosure and parties who purchase such property at a foreclosure sale to maintain the property. This bill also empowers local governments to fine such banks and other parties as much as

$1,000 per day for violations, provided that they are given adequate notice and an opportunity to remedy the violation. In order to impose this fine, the bank or other party must be given at least 30 days' notice to remedy the violation, unless the government entity determines that "a specific condition of the property threatens public health and safety," in which a shorter compliance period may be given. Therefore, the Board may consider adopting an ordinance imposing such a fine and defining the conditions under which the fine would be imposed.

A situation that could also pose difficulties happens when a distressed property has not yet been foreclosed by the bank, but where the record owner either cannot be located or cannot afford to maintain the property. In this situation, the County can use the procedures outlined above to immediately fence any unfenced swimming pool and treat the swimming pool for mosquito breeding. Further code enforcement activity to remediate a green swimming pool may be difficult in this situation, however, where the record owner either cannot be located or does not comply with the County's demands for remediation, and the bank is not yet owner of the property. In the event of this situation, it is recommend that, where possible, the mortgage holder be notified in these circumstances that there is a green swimming pool on the property that constitutes a potential health hazard. Putting the mortgage holder on notice of the condition could place the onus on the mortgage holder to move more quickly in foreclosing on the property and then remediating the condition, and may make it easier for the County to pursue a code enforcement action against any purchaser at a trustee's sale. DPH, however, does not have the manpower to undertake this task, which can be complex and time-consuming. To carry this out, DPH would need assistance from either another County department or a private contractor.

The City of Indio recently passed an ordinance that requires mortgage holders to inspect all properties prior to recording a Notice of Default, and if the property is vacant, require the mortgage holder to register the property with the police department. The ordinance further requires any person or legal entity who owns, leases, occupies, controls, or manages any property subject to the registration requirement to maintain the property. Specifically, swimming pools must be properly fenced and must either be maintained in working order so that the water remains clear or be drained and kept dry. The ordinance further provides that the failure to properly maintain a property is declared a nuisance and it provides for criminal penalties and fines.

In analyzing this approach, it remains to be determined whether this proactive model set forth in Indio's ordinance would be workable in a jurisdiction as large as Los Angeles County and would further improve the County's ability to force mortgage lenders to maintain vacant properties. Because this approach would also add an additional administrative layer to the process, it is also necessary to determine whether the benefits outweigh the administrative costs. Therefore, further analysis of this approach is recommended to determine whether it would provide a significant benefit.

JEF:ajb
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c: Chief Executive Officer
Acting County Counsel
Executive Officer, Board of Supervisors
Director of Public Works