IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

BOROUGH OF BEAVER MEADOWS,	:	
Plaintiff	:	
	:	
vs.	:	**No. 12-2284**
	:	
AMELIA KERSANE,	:	
Defendant	:	

Robert T. Yurchak, Esquire — Counsel for Plaintiff
Amelia Kersane — Pro Se

DECISION & VERDICT

Matika, J. – June , 2014

Plaintiff instituted this action against Defendant seeking of the Court an order declaring Defendant's property a nuisance *per se* and allowing Plaintiff to remove all the cats located on or around Defendant's property, or in the alternative, compel Defendant to abate the alleged nuisance. After a non-jury trial was held in this matter, the Court finds in favor of the Defendant and accordingly **DENIES** the relief sought by Plaintiff for the reasons stated below.

FINDINGS OF FACT

The facts presented to the Court establish that the Defendant, Amelia Kersane (hereinafter "Kersane"), is the real owner of the subject property located at 73 Third Street, Beaver Meadows, Pennsylvania 18216, (hereinafter "Property"). William E. Hines, the former Mayor of Plaintiff, who served as mayor for

eight years ending in December of 2013, testified that on two or three occasions Kersane's next door neighbor came into his office to file a complaint about Kersane's Property. However, the former Mayor did not state the specific nature of the complaints made by the neighbor except to state that the complaints were made in reference to the quantity of cats located on or around the Kersane Property. Additionally, Mr. Hines avowed that while visiting his daughter, whose resides three houses away from the subject Property, he himself noticed numerous cats on and around the Property. The former Mayor went on to affirm that on one occasion, sometime in October of 2013, he observed eighteen (18) cats on the Property.

Lastly, Mr. Hines asserted that other neighbors have raised objections at council meetings about the Property as it relates to the number of cats on or around it; however, no specific individual was named just that "other neighbors" have voiced a complaint. The former Mayor initially stated that these complaints were about the cats being at or around the Property, yet later in his testimony, Mr. Hines declared that the core of such complaints were about the smell of cat urine emitting from the Property. Moreover, and regardless of the nature of the complaints, the former Beaver Meadows Mayor pronounced that he has not noticed any real adverse effect on the neighborhood as a result of the cats being located on the Property.

Supplemental to Mr. Hines's testimony, Councilwoman Mary Rayno's testimony was proffered to the Court, whereby she concurred with the former Mayor. More specifically, Ms. Rayno buttressed the assertion that complaints were made to Plaintiff in regards to the number of cats on or around the Property. Further, and with greater specificity than that of former Mayor Hines, Councilwoman Rayno proclaimed that a Mr. Kistacky spoke to her directly about his inability to have any picnics due to the cats jumping onto a table and going into his yard. It is unclear to the Court however whether these picnics Mr. Kistacky attempted to have were at a public park or at his private residence as no testimony was provided on that point.

In response, Defendant acknowledged and admitted that there are several cats, all of which she claims are not hers, on or around her Property. Defendant avowed that neighbors "dump" these cats at night onto her Property, although she does not know who specifically leaves these cats on her Property. Moreover, Defendant asserts that the smell Plaintiff claimed to be causing the nuisance is not the smell of cat urine, but rather dog dirt created by Defendant's neighbor.

Mr. James Gallagher, Defendant's lone supporting witness and a person who performed certain repairs to Defendant's roof around October and November of 2013, stated that he did not witness thirty cats on the property as proclaimed to be by

Plaintiff in its complaint. Moreover, Mr. Gallagher avowed he did not observe anyone, including the Defendant, feeding the cats at the Property. Mr. Gallagher did affirm that he noticed about five cats under the deck of Defendant's Property while performing work on her roof.

DISCUSSION AND CONCLUSIONS OF LAW

Plaintiff, in filing this action, prays to this Court to declare the Property a nuisance *per se* and allow it, Plaintiff, to remove all the cats on or around the Property. In the alternative, Plaintiff seeks that the Court order Defendant to abate the nuisance on her Property. Based upon the legal insufficiencies of Plaintiff's prayer for relief, this Court denies the requests made by Plaintiff.

The Court, most importantly, finds the action brought forth by Plaintiff to be more of a private nuisance action rather than one of a public nuisance. Accordingly, Plaintiff lacks the necessary threshold of standing to bring forth such legal action against the Defendant.

The distinction between a private and public nuisance does not necessarily depend upon the nature of the action or interference taking place, but rather the pertinent question is whether the alleged nuisance affects the general public or merely a private individual or individuals. *Groff v. Borough of*

Sellersville, 314 A.2d 328 (Pa. Cmwlth. Ct. 1974). A private nuisance is the invasion of another's interest in the private use and enjoyment of his or her land causing significant harm. *Kembel v. Schlegel*, 478 A.2d 11 (Pa. Super. Ct. 1984)(citing Restatement (Second) of Torts § 822(1979)). A public nuisance, conversely, is an inconvenience or troublesome offense that annoys a whole community in general, not merely some particular person, and produces no greater injury to one person than to another. *Philadelphia Electric Co. v. Hercules, Inc.*, 762 F.2d 303, 313 (3d Cir. 1985). A public nuisance does not exist unless a private nuisance exists and affects the community at large and not merely the complaining parties. *Karpiak v. Russo*, 676 A.2d 270 (Pa. Super. Ct. 1996).

Accordingly, the Commonwealth Court has set forth certain circumstances that would necessitate a finding that an interference with a public right was unreasonable and thus constitutes a public nuisance. These situations are: 1) whether the conduct encompasses a significant interference with the public health, the public safety, the public peace, the public comfort, or the public convenience; 2) whether the conduct is prohibited by a statute, ordinance, or administrative regulation; or 3) "whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon

the public right. *See*, *Commonwealth v. Ebaugh*, 783 A.2d 846 (Pa. Cmwlth. Ct. 2001); *Commonwealth ex rel. Preate v. Danny's New Adam & Eve Bookstore*, 625 A.2d 119 (Pa. Cmwlth. Ct. 1993).

Notwithstanding such, this Court acknowledges that the line of distinction between a private and a public nuisance is faint. For example, an individual can bring forth a private nuisance action based upon a public nuisance so long as the injury complained of is greater than that of the general public. *See*, *Duquesne Light Co. v. Pennsylvania American Water Co.*, 850 A.2d 701 (Pa. Super. Ct. 2004). Thus, this Court directs its attention to other cases for guidance to determine what is necessary for a party to establish a public nuisance.

In *Feeley v. Borough of Ridley Park*, 551 A.2d 373 (Pa. Cmwlth. Ct. 1988), the Commonwealth Court, based upon the testimony from a veterinarian medical doctor and various neighbors of the community, upheld the trial court's ruling that the noxious odors emanating from the subject property, in conjunction with the deplorable conditions of the same, constituted a public nuisance. *Id.* at 375. In *Feeley*, the veterinarian doctor observed, firsthand, feces and urine on the floors of multiple rooms in the subject property, as well as a strong ammonia odor originating from several rooms of the home. *Id.* Accordingly, the doctor opined that the subject home was unfit for both feline and human habitation. *Id.* Moreover, the

Borough presented the next door neighbors, as well as others who lived down the block and around the corner from the subject property who were as well bothered by the noxious odors deriving from the home. *Id.* Based upon such overwhelming evidence, the *Feeley* Court upheld the trial court's finding that the Borough demonstrated that the conditions of the subject home constituted a public nuisance. *Id.*

Additionally, in *Muehlieb v. City of Philadelphia*, 574 A.2d 1208 (Pa. Cmwlth. Ct. 1990), more than just hearsay testimony was tendered to the trial court in declaring the subject property, where the property owner housed and maintained numerous dogs as part of her kennel business, a public nuisance. In *Muehlieb*, the Philadelphia City presented the City's inspector from the Department of Licenses and Inspections who personally sensed a strong urine smell that he described as "an intolerable stench in the area." *Id.* at 1209. Likewise, the next door neighbor as well as four other neighbors, including the pastor of a nearby church, testified as to the overall negative affect the dogs had on the general welfare of the community. *Id.* The Appellate Court, based on the vast evidence presented, upheld the trial court's finding that the smell emanating from the home along with the amount of noise the dogs produced posed a significant threat to the public health and thus constituted a public nuisance. *Id.* at 1211.

Conversely, in the case *sub judice*, Plaintiff's evidence falls vastly short of establishing that Defendant's conduct created a substantial and unreasonable interference with the general welfare or poses a significant harm to the general public. The facts proffered suggest that the core of the complaints lodged in regards to Defendant's Property centered on the number of cats on Kersane's Property. The Court first notes that former Mayor Hines, in his hearsay laden testimony, only specifically named two neighbors of Defendant's as individuals coming forth with a grievance about the cats on or around Defendant's Property. These two individuals were identified as the Mayor's daughter who resides three houses from Defendant, and Defendant's next door neighbor. The remainder of the community as described by Mr. Hines was classified as surrounding neighbors with no specific identity or concrete complaint. Again, the nucleus of the complaints voiced to Mr. Hines about Defendant's Property concentrated on the quantity of cats on or around the Property. Mr. Hines did not attest to any annoyance or negative impact these cats have to the individual property owner's use and enjoyment of their property.

The former Beaver Meadows Mayor did state, albeit briefly, that some of the complaints steamed from the smell cat urine, presumably, although not conclusively, emanating from Defendant's Property. However, Defendant refuted such

contention by asserting that the smell the neighbors were protesting was actually "dog dirt." Besides the fact that the former Mayor's assertion is founded upon hearsay, the Court finds such fact that the former Mayor himself did not assert that he too detected the smell of cat urine emanating from Defendant's Property when he observed the Property, a telling and revealing fact. If the odor originating from Defendant's Property was of such a burdensome nature, the Court surely believes that Mr. Hines would have stated so based upon his personal examination of the Property.

Rather, the only specific example proffered to the Court of how these cats potentially interfered with a neighbor was Councilwoman Rayno's testimony with respect to Mr. Kistacky's inability to partake in a picnic. However, it was not presented to the Court whether the area Mr. Kistacky tried to have a picnic at was at his home or a community park that was available for the entire community's use and enjoyment. *See*, *Brunner v. Schaffer*, 1892 WL 2905 (C.P. Leigh Cty. 1892)("[A] public nuisance is a nuisance that is common to all the neighborhood where it is committed, as well as those of the public who may be traveling in that vicinity.")

Accordingly, but not for the former Mayor's single hearsay statement that was contradicted by Defendant, Plaintiff in this matter has failed to produce any such evidence as it relates to

the smell of urine and it having an unreasonable and substantial impact on the public safety and health. Further, the record is devoid of evidence, preferably firsthand testimony and not testimony derived from hearsay complaints, as to how harboring these cats on or around Defendant's Property poses a significant threat to the general community. As the former Mayor stated he himself has not observed any real effect on the community as a result of Defendant's conduct, just a plethora of complaints from neighbors about the quantity of cats in the neighborhood. Nevertheless, the quantity of cats in and of itself does not create a public nuisance; rather the quantity of cats must have a nexus to a substantial impact on the public health and safety or cause a significant and unreasonable interference or annoyance to the general public.

Additionally, Plaintiff was unsuccessful in sustaining its burden that Defendant's conduct, that being caring for the cats on or around her Property, violated any statute, ordinance, or administrative regulation. In *Ebaugh*, the Commonwealth Court held that "owning, possessing or controlling a noisy animal is classified as a nuisance by the Township's ordinance, and excessive barking obviously interferes with the public peace. Therefore, the conduct here involves a public nuisance . . . ." *Ebaugh*, 783 A.2d at 850. In the case at bar, the record is devoid of any reference to any local ordinance that Defendant

might have violated as a result of her conduct. Presumably the reason for such is because there is no local ordinance that Defendant has violated. Had this matter be brought in such a fashion, the outcome may have been different.

Thus, the Court finds that the nuisance that Plaintiff seeks to abate is a private nuisance concerning certain neighbors' use and enjoyment of their property, respectively. Without any evidence to illustrate that Defendant's conduct presents a significant risk to the public health, welfare, or safety, the Court must accordingly consider Plaintiff's cause of action as one based upon a private nuisance.

Accordingly, a private nuisance is redressed by a private action since a private nuisance claim is inherently a private right of action. *Pennsylvania Society for Prevention of Cruelty of Animals v. Bravo Enterprises, Inc.*, 237 A.2d 342 (Pa. 1968). The Pennsylvania Supreme Court in *Waschak v. Moffat*, 109 A.2d 310 (Pa. 1954), adopted the rule of the Restatement of Torts with respect to an action for damages for a non-trespassory invasion of another's interest in the private use and enjoyment of land. The *Waschak* Court, in quoting the Restatement of Torts proclaimed that an actor, in a private nuisance claim, is liable to those individuals who have property rights and privileges with respect to the use and enjoyment interfered with. *Id.* at

314. Thus, an action for private nuisance generally may not be maintained by the State.

Additionally, Plaintiff has not demonstrated that it has any property rights or interest in any of the property the cats might have interfered with. Therefore, this Court does not find that Plaintiff has the requisite standing to bring the private nuisance claim that is before the Court.

Lastly, Plaintiff requests the Court to declare Defendant's property a nuisance *per se* based upon the quantity of cats present on or around her Property. The Court, pursuant to its equity power has the right to declare a certain act a nuisance *per se*. *Nesbit v. Riesenman*, 148 A. 695, 697 (Pa. 1930). A nuisance *per se*, as relating to private persons, is an act or use of property of a continuing nature offensive to, and legally injurious to, health and property, or both. *City of Erie v. Gulf Oil Corp.*, 150 A.2d 351, 353 (Pa. 1959). Thus, an individual's use of his or her property can be declared a nuisance *per se* if such use is generally recognized as injurious to the health or welfare of the community. *Hostetter v. Sterner's Grocery, Inc.*, 134 A.2d 884 (Pa. 1957).

As stated above, Plaintiff has failed to proffer any evidence that Defendant's conduct, that being harboring an excessive number of cats, has jeopardized the health or safety of the general public, or such conduct violates a local

ordinance. The Court, based upon the testimony of former Mayor Hines, is only able to glean that the quantity of cats on or around Defendant's Property has led to an influx of complaints at council meetings; however, without illustrating that the excessive number of cats is injurious to the health or safety of the general public, the Court cannot declare such conduct by Defendant a nuisance *per se*. The owning or caring for several cats, albeit in the teens, in and of itself is not conclusive to establish that the health or safety of the community or even the adjacent neighbors is threaten. Plaintiff was required to provide more and has not done so.

Moreover, the Court regards Plaintiff's request to declare Defendant's use of her property a nuisance *per se* and limit the number of cats she may care for at her residence, and for that matter all residence of Beaver Meadows at two cats per household to be arbitrary and capricious, especially in the light of the fact that no evidence was presented that this limitation would abate the perceived nuisance.[1]

Accordingly, the Court enters the following order:

[1] The Court also finds there are more appropriate means than declaring Defendant's Property a nuisance *per se* in an attempt to limit the number of household animals a property owner may possess. *See* 53 P.S. § 46202.

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VERDICT

AND NOW, to wit, this _____ day of June, 2014, this matter having come before the Court for a Non-Jury Trial, the Court finds **IN FAVOR** of Defendant Amelia Kersane, and **AGAINST** Plaintiff Borough of Beaver Meadows, and therefore **DENIES** all relief requested by Plaintiff. Pursuant to Pa. R.C.P. No. 227.4, the Prothonotary shall, upon praecipe, enter judgment on the verdict if no motion for post-trial relief has been filed under Pa. R.C.P. No. 227.1 within ten (10) days after the filing of this verdict.

BY THE COURT:

_____
Joseph J. Matika, J