

CODE ENFORCEMENT

Yard Decorations (or Why Doesn't This Toilet Flush?)

by David Wesner

I like a nice yard decoration as much as the next guy—a pair of stone lions guarding the entrance to my house would look great. But, it is possible that yard decorations could be classified as rubbish or a nuisance. This debate over yard decorations being either positive or negative has two aspects: the type of decoration, and the number of decorations.

We all have to deal with problem properties on a daily basis. And since neighbors won't stop calling City Hall until the problem is corrected, we can't let it go and hope the problem goes away. Our inspectors and we, as municipal attorneys, have to step in and work on getting the problem resolved. Pursuant to their police power, municipalities have the ability to declare what constitutes a nuisance. Some municipalities draft their own ordinances specifying what qualifies as a nuisance; other municipalities adopt a national code relating to property issues that describes how a property is to be maintained. Whichever direction a municipality chooses, most ordinances contain definitions for garbage, rubbish, and debris and a list of nuisances.

As we all know, we can never truly win the battle between detailed and general ordinances. If you create a detailed definition or list, you run the risk of missing something. If you create a general definition or a non-exhaustive list, you run the risk of a judge determining that's overbroad. Such was the case of the infamous flower-filled toilet yard decoration. (Thank you to Karen Beyke of IMLA's Code Enforcement Workng Group for sharing the story. We love to hear about such stories because they liven up our day.) In the yard toilet case, a judge hearing the matter indicated that the municipality's definition of "rubbish" was so broad that it could be applied to almost every type of container that could be used for flowers or plants. City staff replied that a toilet was not something people wanted to look at. True enough, but I suspect that that view was based on the use to which a toilet is generally put: the toilet gets a bad rap. As we know in code enforcement, a picture is worth a thousand words, and the judge may have taken a different view had the toilet been broken, rusted, or in a state of obvious disrepair. We clean and maintain the toilets in our houses so that they look nice. If we move a toilet outside for another use, does that somehow change it to something that should be declared rubbish or a nuisance?

Personally, I prefer ordinances that are general in nature. I recognize the risk of these being declared overbroad, but I'm willing to accept that risk because I know the ordinances will be able to address virtually any circumstance that needs to be resolved. The other side of that position comes as a question: while the ordinance could be applied, should it? The answer comes from the municipal attorney and the inspectors working together to determine whether a particular circumstance truly qualifies as a violation. One thing to consider is trying to get the neighbors to see the flower-filled toilet for what it is (a yard ornament) rather than rubbish. They may never like that idea, but the alternative is to have a judge give you the "Really? Why do I have this?" look in court.

Some ordinances also provide that items which are made specifically for the interior of a structure are not allowed outside, because of the real likelihood that items made for interior use will not be able to withstand the weather, and deteriorate rapidly. However, we need to recognize that some interior items are capable of being maintained outdoors, such as a toilet. As long as they are maintained, who's to say they won't look better than a rusted chain-link fence?

An additional concept on whether an item may be considered rubbish or a nuisance is "Going Green." As the recycling of a myriad of items becomes the norm, items will be put to different uses than those they were originally designed for. Now is the time for municipalities to decide how they are going to treat recycled items that may end up outdoors. If a recycled item can be a yard decoration, not a nuisance, what happens when an individual accumulates several? Is it possible that at some point, a certain number of yard decorations will cross the line? Is one toilet okay, but not ten? What about 20 decorations of different types?

I am not so willing to debate that 20 yard decorations (toilets or otherwise) are okay, and think that too many could be an issue. The problem will be the difficulty of defining why it's a nuisance and defending it. If the yard is otherwise maintained (and all of the decorations are maintained as well), can it truly be said that the number is the nuisance because the sheer clutter makes the yard unsightly? I'm not so sure.

A friend of mine regaled our lunch group with a story about her college days. After a good winter snow, some creative individuals made a snow-toilet. Obviously in a college town, students are known to indulge in a drink (or twelve) and then hope to make it home. Snow toilet to the rescue! One individual decided to take full advantage of the snow-toilet, and a little boom-boom was discovered the following morning So, fellow municipal attorneys, be prepared to continue to be drawn in to the debate over recycled items being used as yard decorations. Should you allow a flower-filled toilet to stand as a yard decoration, be prepared to prosecute your most interesting illegal dumping case to date. ML