

Statement of John Anthony La Pietra ([homepage](#) • [e-mail](#)) to Marshall City Council April 20, 2009
for Public Hearing on Proposed Amendment to ~~Noxious-Weeds~~ Nuisance Ordinance

Five minutes isn't enough time to tell you what's wrong with this ordinance. But I'll do my best. Of course, I've been doing my best to get the City to do a better job preparing for this hearing. And so far, the City's batting about one for four. So, okay – I'll tell you four things now . . . and as long as you pay attention to at least one of them, you'll do the right thing tonight. **Not adopting this ordinance.**

1. Despite my best efforts, the City's process is still messed up enough that you **can't** legally adopt this ordinance tonight.
 2. If you did adopt this ordinance "as is" tonight anyway, a court could easily hold it **unconstitutional**. Again.
 3. If the ordinance weren't struck down (again), there are still problems with **enforcing it properly – fairly – duly**.
- And 4. **We've got bigger problems than this.** There are better ways to spend Council and staff time – and our tax money.

Tonight's agenda talks about repealing "Sections 92.25 through 92.27 of the former Noxious Weeds and Abatement ordinance (Ordinance #08-07)." So did the agenda last time. They're both **wrong**. And I'm not just talking about the failures of last year's adoption process, which led to this proposed do-over. Even if #08-07 **had** passed last year, it didn't affect Sections 92.25 to 27 at all. Only Sections 92.01 to 11 were in the text proposed last year. I know; I have a copy of that text. So do you. Because it's the **same text again tonight** – except for the introductory sentence at the top . . . and new section 92.12, which **would** repeal 92.25 to 27.

Both tonight's agenda and the previous one also talk about amending and repealing as two **separate** recommendations. So do both staff reports. But that would mean separate **ordinances** – **neither** of which has **separately** been properly introduced or published with proper notice. So we **could** just drop this entirely for tonight on that basis.

In fact, we can anyway . . . because nobody listened when I reminded the City of a requirement in the Charter. Subsection 4.02(a) says **every** ordinance introduced (in writing) must include an "enacting clause": "The City of Marshall ordains. . . ." That clause was missing last year, and it's missing again this year. (Oh, yes, and if you think that can't be important – it may have been part of the "legalese" missing from the public notice for one of the HCHSD zoning ordinances which meant **it** wasn't properly adopted the first time, either.)

At least there **was** a public-hearing notice this year. And that ad in the *Chron-Visor* did give a summary of the proposed new ordinance. Well, it did **after** I pointed out that Subsection 4.02**(b)** of the Charter **required** a summary, not just the bare title in the first draft.

But even the new, improved legal ad failed to mention **another** Charter requirement: 4.02(b) also says "copies of the ordinance **shall** be distributed **without charge** at the office of the city clerk-treasurer." Nothing about **that** in the ad – despite my pointing it out several times. I even offered to fit a mention of free copies into the same space of text, so the ad wouldn't cost the City anything more.

Now, the Charter doesn't require that the availability of free copies be mentioned in the ad. But if the City were interested in comments about the proposed ordinance, wouldn't it make sense to let people know they could get a free copy? Well, maybe the City **isn't** interested in what the people have to say about this proposed ordinance. So you might think if you noticed that – twice in a row – City staff have urged Council to hold a public hearing, hear public comments, **and then go ahead and approve the ordinance amendment.** **As is. Regardless of whatever comments the public may come up with.**

That's a lot of problems already – just in the process of trying to **adopt** a revised ordinance . . . even just in this, the City's **third** attempt. Is it any wonder I lack confidence in the City's ability or willingness to provide due process in **enforcing** the ordinance if it passes?

The old noxious-weeds ordinance didn't provide enough due process – no chance to clarify allegations of violations short of a fine, and no clear path to appeal an enforcement decision. That's why the City couldn't just dismiss Barry Adams. Tonight's draft appears to have more process built in. Well and good. But is it **due** process – enough to withstand legal challenges? To say the least, there are a number of ways to argue that it is not. One of the easiest is to simply point out that the ordinance is vague and overbroad.

In *People v Noble*, 238 Mich App 647; 608 NW2d 123 (1999), [the Michigan Court of Appeals] described the means by which a statute may be challenged as vague and the manner in which we analyze such claims:

A statute may be challenged for vagueness on three grounds: (1) that it is overbroad and impinges on First Amendment freedoms, (2) that it does not provide fair notice of the conduct proscribed, and (3) that it is so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether the law has been violated. . . . To give fair notice, a statute must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited or required. The statute cannot use terms that require persons of ordinary intelligence to guess its meaning and differ about its application. A statute is sufficiently definite if its meaning can fairly be ascertained by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words. [*Id.* at 651-652 (citations omitted).]

People v Beam, 244 Mich App 103, 105; 624 NW2d 764 (2000), lv den 465 Mich 881 (2001).

This ordinance is at grave risk of flunking one or all of these tests. And it's not just me, claiming to be of ordinary intelligence, saying so.

The City first considered amending the 2000 noxious-weeds ordinance in 2005. At that time, City staff paid some attention and respect to a law-review article about weed ordinances posted on EPA's Website. That article pointed out potential First Amendment issues of political, artistic, and religious expression by the medium of native-vegetation gardens. Similar issues could also easily arise under this ordinance from someone objecting to the plant matter grown or brought in to be part of, say, a Scarecrow Festival display as a "harborage" or other nuisance. (Likewise for building materials used in Halloween decorations or an Art in the Eye sculpture, by the way.) And what if you made a political yard sign of your whole yard? (Or your neighbor thought you had and complained?) Any such issues that did arise would subject the ordinance to a much harsher scrutiny in the courts. And the ordinance doesn't provide much of a safeguard against such issues arising.

But that's a less likely problem. The other two tests are much harder for this ordinance to pass. Many of its terms are not defined at all. And many of the definitions that are here are too vague or broad to be of any use.

- * The ordinance's definition of nuisance paints with a broad brush indeed: "**Any** act, omission, defect or condition which annoys, injures or threatens injury, endangers or threatens to endanger, the health, safety, comfort or repose of the public. Nuisance shall include, but not be limited to, whatever is prohibited by any provision in this chapter."
- * Similarly, harborage is defined to cover not only the actual presence of vermin (whatever varmints are meant), not even just visible traces of vermin (visible from where?), but "**any** premises which creates the potential for such habitations." What premises don't meet that definition? In fact, buildings – especially residences – are more likely to draw varmints than nine-inch-high grass.
- * Prohibited vegetation starts as just "[p]oisonous or injurious vegetation". Okay, poisonous or injurious to what or whom? How, and how much? Can a plant's good qualities overcome its bad ones? With apologies to the *Enquirer*, roses and raspberries both have thorns; still, people grow lots of both. There's a much shorter list of named bad plants than in the old ordinance – just the three "poisons": ivy, oak, and sumac. But clarity and focus are defeated again by those magic words: "including but not limited to".
- * The exemptions from this prohibition are unclear, too. Managed landscaping . . . who says this landscape is managed, but that one isn't? How? When? Do you need to file a site plan? Or show the inspector proof that you're working with a licensed landscaper? Exempting "undeveloped parcels which are naturally wooded or consist of perennial grasses or a combination thereof" is just bad syntax. The parallel clause for developed parcels has the same mess of conditions – plus a real doozy. To be safe from the plant police, a developed parcel must be "consistent with the general character of the plant growth and landscaping in the surrounding neighborhood." Who says it is or isn't? On what grounds? And why is the City trying to legislate conformity?

But again, you don't have to believe me that the ordinance is so vague it doesn't provide "fair notice of the conduct proscribed" . . . "so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether the law has been violated." Listen to the very citizens this ordinance would make the judges, the triers of fact – citizens appointed by Council: the Zoning Board of Appeals. This ordinance was presented to ZBA members at a meeting last June 19 – and here, from the official minutes, are some things they said:

The board was displeased that there were no stated standards in the ordinance to weigh the decision on cases. They felt that the decision on whether or not a lawn was in violation would be largely subjective. . . . The board agreed that they would need to think about some standards that may apply in general to cases, although the standards could not be ridged [sic] as each case would need to be heard on its own merit.

Hearing each case on its own merits can work when ZBA is judging whether to grant someone's request to do something not allowed by the zoning ordinance without permission. But there's a lot more explicit detail in the zoning ordinance than there is here. The text the ZBA got last June is the same text you have tonight. This ordinance was too vague to be duly enforceable then. It's too vague now.

There's vagueness and overbreadth again in Section 92.03: "**Any premises** shall be subject to inspection by the Enforcement Officer, and the Enforcement Officer **may collect such samples** for laboratory analysis or other further inspection **as he or she deems necessary** for the enforcement of this chapter." In other words, he or she could take any or all of any particular plant or plants, for any subjective reason. And don't tell me nothing like that could happen – it already did. What do you think Barry Adams was suing **about?**

But even if the ordinance escaped constitutional scrutiny for these things, there are still legal and practical problems with the language.

Subsection 92.05(a) says the written notice the Enforcement Officer "shall give . . . to one or more owners" must state (among other things) "the time limit for abatement, which shall be a time which does not exceed fifteen (15) days from the time notice is served." But the time for abatement could be shorter than 15 days – or even shorter than 10 days. And that's important – because, under Subsection 92.07(a), the person served is supposed to have 10 days to appeal. In other words, **the ordinance doesn't protect you against the City cutting down or pulling up your alleged nuisance while you're trying to appeal.** Maybe while you're at City Hall paying a fee and getting the "claim of appeal form" Subsection 92.07(b) requires. (Does that form exist yet? It wasn't in the packet at the library.) You could be billed – and on your way to a tax lien on your property – for the cost of abatement work you haven't yet gotten to challenge the City's right or need to do. And you don't have to be an attorney to know how people get when they believe government is depriving them of their property without a fair hearing.

(By the way, other required contents of the notice include "the nature of the violation" and "the corrective action to be taken". But the notice needn't say when the violation was allegedly found, any samples taken, or who complained – to name a few other relevant facts.)

And again, don't try to tell me, "It couldn't happen here." Last year, I asked why the ordinance didn't require that the City start by simply notifying the citizen(s) concerned that the City believed there **might** be a violation, and trying to resolve the situation peacefully. Then-City Manager Olson said it was the City's policy (or procedure) to do so. But when I submitted a FOIA request to see that policy (or procedure), he told me there was nothing in writing. I responded with an analogy I hope will make the problem with that clear to you.

You don't send police officers out to enforce traffic ordinances without a radar gun and training in how to use it – and a handy copy or summary of the ordinances themselves. Nor would you think it was fair to charge citizens with dangerous driving if there were no clear road signs posted to let them know how they could drive without getting stopped, ticketed, or even hauled in. But that's the situation the pending new ordinance would arguably put the people of Marshall in – at least, as its text reads now.

I believe the City has been advised and/or shown before that an unwritten policy or procedure can turn out to be worth even less than the paper it's not printed on. (The City's alleged parade-permit policy comes to mind as an example.) And I could wish not to have to say it again – but this may be especially true for a city in the middle of trying to correct past problems with due process. Besides, if the City is trying to reform its practices, why would it not want to find best practices and put them down in writing?

Again, tonight's proposed ordinance has the same text as last year. So there is **still nothing in writing** about any alleged friendlier policy or procedure. The ordinance still makes noxious weeds a "**strict liability**" violation. Strict liability means you're **presumed to know better** than to grow – or leave growing – or fail to find and pull up yourself – **anything** an Enforcement Officer decides is a noxious weed. Based on his or her discretion, limited only by those vague, overbroad definitions. You can appeal – to the ZBA, where **they** know there aren't any usable standards in the ordinance. If your plants haven't been cut down or pulled up by the time you appeal, the appeal **will** block the City from acting. But you have to pay to appeal – and you may not get the appeal fee back even if you win, much less recover any other costs. And if you lose at the ZBA and want to appeal to the circuit court, will abatement be stayed then?

To stretch my analogy – a bit – it's as if you're driving along . . . and a cop stops you and says: "I'm giving you a ticket – because **I think** you were going too fast. If you want to fight the ticket, then **you** have to prove you **weren't** going too fast. No, you didn't miss a sign; there's no posted speed limit here. There is on a few streets in town, but not everywhere. Mostly, they leave it to me to decide.

"How did I decide **you** were speeding? Well, sometimes I judge for myself, but in your case somebody told me you were going too fast. Who? I don't have to tell you who. They talked to me, and that's enough to give me the power to stop you.

"You still want to fight the ticket anyway? Then you need to go to City Hall, get the proper form, fill it out and turn it in, and pay the fee for the privilege of appealing my decision. No, refunds are **not** guaranteed. And no, the jury you'll face there doesn't have any standards or rules, either. Oh, yeah – if you lose, you can appeal to a higher court . . . but there's no rule says I can't impound your car while you do."

Administrative searches get their validity, their probable cause, from the standards in the code being administered. If City Council doesn't make sure the standards in City ordinances are objective and reasonable, you are abdicating your policy-making authority. You'll be giving that Enforcement Officer – well – almost “unstructured and unlimited discretion”. And one more thing. If you want to give up so much of your discretionary policy-making power, how are you going to train Enforcement Officers to act with due discretion? Who's going to get trained? How? And how much are we going to pay for it?

That leads us into perhaps the ultimate issue. We all know there's never been a big problem with noxious weeds in this City. Unless you count the mess City Hall got itself into with Barry Adams. That cost us a chunk of money – and invalidated our old ordinance. Remember, your real choice tonight is not between the old noxious-weeds ordinance and this proposed amendment. It's between a new local ordinance on noxious weeds – one we can hope will pass constitutional muster – and no local ordinance on noxious weeds.

What if you don't adopt the amendment? The City will still have a number of tools available. The state has a noxious-weed statute. The state has a body of nuisance caselaw. (Though using it carries what City Hall may feel is an unfair disadvantage: plants or other alleged nuisances would typically be presumed innocent until proven guilty, not the other way around.) If City officials believe a search for noxious weeds is necessary, they can ask the owner's permission. Or, if they can't get that, they can get a warrant if they have probable cause. (And yes, Federal and state caselaw is clear: even administrative or regulatory searches generally need some probable cause.) Or they can argue “exigent circumstances” justify searches and seizures from our homes and yards – if we ever actually have such an emergency.

But running around trying to enforce an ordinance based on subjective impressions of what is or isn't a weed, or noxious, has probably already cost us more than we'll ever take in in fines . . . more than it's ever likely to benefit the City. And that was from one mistake. Before you set us up to make another mistake like that, you'd better make damn sure you've got the rules right. And you'd do better yet to work with citizens – both here and now, in designing the rules . . . and from now on, in resolving any problems with minimum friction.

But that sounds like a lot of work, you say. (Yes, and some of it is work the City's already been dodging.) Is this worth that much effort? Don't City Council and City Hall have a few more urgent problems to address? To spend your time – and our money – on? I think you do. And I urge you to consider that possibility, too – and not adopt the proposed ordinance in front of you tonight

If you insist on going ahead with it, I'll keep trying to get you to do it right. One key is to stop presuming plants and gardeners are guilty. That kind of strict liability could only work with conditions everyone knows and agrees are bad. Named prohibited plants might qualify for that – but even then only if we all know how to identify and eradicate them. (Does that mean the City needs to pay to train its citizens, too?)

As I mentioned earlier, the first time the City tried to amend the noxious-weeds ordinance was in 2005 – close onto the Adams affair. The amendment and staff report brought to Council then paid attention to that law-review article posted on EPA's Website. I include an 18-page compilation of that article, its table of contents, and its appendices among the attachments to this statement. The appendices include two examples of better ordinances, a state statute, and a leading court case from Wisconsin. The 2005 proposal wasn't perfect, either . . . but it tried to apply some of the ideas in the article and its “extras”. I encourage you to consider making those ideas work for Marshall.

My hope is still the same one I wrote to former City Manager Olson last year. I hope we can work together to help Marshall find the best possible solution to its noxious-weeds and/or nuisance problems. Whether that means another new ordinance . . . or none at all.

attachments (in roughly the order in which the statement covers the issues – hey, it's as close as the ordinance is to alphabetized definitions!)

- [1a / 1b / 1c](#) draft ordinance amendment (2008 & 2009) . . . plus related staff reports for the April 6 & 20, 2009 Council meetings
- [att2](#) April 1, 2009 letter from Paul Beardslee to Natalie Dean on the “status” of “Ordinance #08-07” (problems with its “adoption”)
- [3a / 3b / 3c](#) initial and final drafts of the public-hearing notice ad . . . plus the ad as published in the *Chronicle & Ad-Visor* April 11, 2009
- [att4](#) 2003 *John Marshall Law Review* article on legal issues & other approaches to weed ordinances . . . [article on EPA Website](#)
- [att5](#) official minutes of the June 19, 2008 meeting of the Zoning Board of Appeals . . . [link to minutes on City's Website](#)
- [att6](#) staff report and draft ordinance amendment from 2005, marked up with my handwritten notes (sorry; it's the only copy I have)
- 7 selections from *jalp*'s correspondence with the City on subjects related to the proposed ordinance amendment:
 - [7a](#) questions/comments about the content of the amendment proposed in 2005
 - [7b](#) questions about “adoption” of the ordinance in 2008
 - [7c](#) the City's policy/procedure for enforcing the noxious-weeds ordinance (or the lack of any written policy/procedure)
 - [7d](#) problems with this year's public-hearing notice (and related issues)