

# **WEST VIRGINIA LEGISLATURE**

**2023 REGULAR SESSION**

**Introduced**

## **Senate Bill 572**

By Senators Maynard, Deeds, Stover, Trump, and

Maroney

[Introduced February 06, 2023; referred  
to the Committee on the Judiciary]

1 A BILL to amend and reenact §8-12-5 of the Code of West Virginia, 1931, as amended; and to  
 2 amend said code by adding thereto a new section, designated §55-7-32, all relating to  
 3 codifying the common law cause of action of public nuisance in a manner consistent with  
 4 its originally intended and historical applications.

*Be it enacted by the Legislature of West Virginia:*

**CHAPTER 8. MUNICIPAL CORPORATIONS.**

**ARTICLE 12. GENERAL AND SPECIFIC POWERS, DUTIES AND ALLIED  
 RELATIONS OF MUNICIPALITIES, GOVERNING BODIES AND MUNICIPAL  
 OFFICERS AND EMPLOYEES; SUITS AGAINST MUNICIPALITIES.**

**§8-12-5. General powers of every municipality and the governing body thereof.**

1 In addition to the powers and authority granted by: (i) The Constitution of this state; (ii)  
 2 other provisions of this chapter; (iii) other general law; and (iv) any charter, and to the extent not  
 3 inconsistent or in conflict with any of the foregoing except special legislative charters, every  
 4 municipality and the governing body thereof shall have plenary power and authority therein by  
 5 ordinance or resolution, as the case may require, and by appropriate action based thereon:

6 (1) To lay off, establish, construct, open, alter, curb, recurb, pave or repave and keep in  
 7 good repair, or vacate, discontinue and close, streets, avenues, roads, alleys, ways, sidewalks,  
 8 drains and gutters, for the use of the public, and to improve and light the same, and have them kept  
 9 free from obstructions on or over them which have not been authorized pursuant to the succeeding  
 10 provisions of this subdivision; and, subject to such terms and conditions as the governing body  
 11 shall prescribe, to permit, without in any way limiting the power and authority granted by the  
 12 provisions of article sixteen of this chapter, any person to construct and maintain a passageway,  
 13 building or other structure overhanging or crossing the airspace above a public street, avenue,  
 14 road, alley, way, sidewalk or crosswalk, but before any permission for any person to construct and  
 15 maintain a passageway, building or other structure overhanging or crossing any airspace is

16 granted, a public hearing thereon shall be held by the governing body after publication of a notice  
17 of the date, time, place and purpose of the public hearing has been published as a Class I legal  
18 advertisement in compliance with the provisions of article three, chapter fifty-nine of this code and  
19 the publication area for the publication shall be the municipality: *Provided*, That any permit so  
20 granted shall automatically cease and terminate in the event of abandonment and nonuse thereof  
21 for the purposes intended for a period of ninety days, and all rights therein or thereto shall revert to  
22 the municipality for its use and benefit;

23 (2) To provide for the opening and excavation of streets, avenues, roads, alleys, ways,  
24 sidewalks, crosswalks and public places belonging to the municipality and regulate the conditions  
25 under which any such opening may be made;

26 (3) To prevent by proper penalties the throwing, depositing or permitting to remain on any  
27 street, avenue, road, alley, way, sidewalk, square or other public place any glass, scrap iron, nails,  
28 tacks, wire, other litter or any offensive matter or anything likely to injure the feet of individuals or  
29 animals or the tires of vehicles;

30 (4) To regulate the use of streets, avenues, roads, alleys, ways, sidewalks, crosswalks and  
31 public places belonging to the municipality, including the naming or renaming thereof, and to  
32 consult with local postal authorities, the Division of Highways and the directors of county  
33 emergency communications centers to assure uniform, nonduplicative addressing on a  
34 permanent basis;

35 (5) To regulate the width of streets, avenues and roads, and, subject to the provisions of  
36 article eighteen of this chapter, to order the sidewalks, footways and crosswalks to be paved,  
37 repaved, curbed or recurbed and kept in good order, free and clean, by the owners or occupants  
38 thereof or of the real property next adjacent thereto;

39 (6) To establish, construct, alter, operate and maintain, or discontinue, bridges, tunnels and  
40 ferries and approaches thereto;

41 (7) To provide for the construction and maintenance of water drains, the drainage of

42 swamps or marshlands and drainage systems;

43 (8) To provide for the construction, maintenance and covering over of watercourses;

44 (9) To control and administer the waterfront and waterways of the municipality and to  
45 acquire, establish, construct, operate and maintain and regulate flood control works, wharves and  
46 public landings, warehouses and all adjuncts and facilities for navigation and commerce and the  
47 utilization of the waterfront and waterways and adjacent property;

48 (10) To prohibit the accumulation and require the disposal of garbage, refuse, debris,  
49 wastes, ashes, trash and other similar accumulations whether on private or public property:  
50 *Provided, That, in the event the municipality annexes an area which has been receiving solid*  
51 *waste collection services from a certificated solid waste motor carrier, the municipality and the*  
52 *solid waste motor carrier may negotiate an agreement for continuation of the private solid waste*  
53 *motor carrier services for a period of time, not to exceed three years, during which time the*  
54 *certificated solid waste motor carrier may continue to provide exclusive solid waste collection*  
55 *services in the annexed territory;*

56 (11) To construct, establish, acquire, equip, maintain and operate incinerator plants and  
57 equipment and all other facilities for the efficient removal and destruction of garbage, refuse,  
58 wastes, ashes, trash and other similar matters;

59 (12) To regulate or prohibit the purchase or sale of articles intended for human use or  
60 consumption which are unfit for use or consumption, or which may be contaminated or otherwise  
61 unsanitary;

62 (13) To prevent injury or annoyance to the public or individuals from anything dangerous,  
63 offensive or unwholesome;

64 (14) To regulate the keeping of gunpowder and other combustibles;

65 (15) To make regulations guarding against danger or damage by fire;

66 (16) To arrest, convict and punish any individual for carrying about his or her person any  
67 revolver or other pistol, dirk, bowie knife, razor, slingshot, billy, metallic or other false knuckles or

68 any other dangerous or other deadly weapon of like kind or character: *Provided*, That with respect  
69 to any firearm a municipality may only arrest, convict and punish someone if they are in violation of  
70 an ordinance authorized by subsection five-a of this article, a state law proscribing certain conduct  
71 with a firearm or applicable federal law;

72 (17) To arrest, convict and punish any person for importing, printing, publishing, selling or  
73 distributing any pornographic publications;

74 (18) To arrest, convict and punish any person for keeping a house of ill fame, or for letting to  
75 another person any house or other building for the purpose of being used or kept as a house of ill  
76 fame, or for knowingly permitting any house owned by him or her or under his or her control to be  
77 kept or used as a house of ill fame, or for loafing, boarding or loitering in a house of ill fame, or  
78 frequenting same;

79 (19) To prevent and suppress conduct and practices which are immoral, disorderly, lewd,  
80 obscene and indecent;

81 (20) To prevent the illegal sale of intoxicating liquors, drinks, mixtures and preparations;

82 (21) To arrest, convict and punish any individual for driving or operating a motor vehicle  
83 while intoxicated or under the influence of liquor, drugs or narcotics;

84 (22) To arrest, convict and punish any person for gambling or keeping any gaming tables,  
85 commonly called "A, B, C," or "E, O," table or faro bank or keno table, or table of like kind, under  
86 any denomination, whether the gaming table be played with cards, dice or otherwise, or any  
87 person who shall be a partner or concerned in interest, in keeping or exhibiting the table or bank, or  
88 keeping or maintaining any gaming house or place, or betting or gambling for money or anything of  
89 value;

90 ~~To provide for the elimination of hazards to public health and safety and to abate or~~  
91 ~~cause to be abated anything which in the opinion of a majority of the governing body is a public~~  
92 ~~nuisance~~ To provide for, in accordance with §55-7-32 of this code, and unless otherwise set forth in  
93 this code, the elimination of hazards to public health and safety and to enjoin or cause to be

94 enjoined a public nuisance;

95           (24) To license, or for good cause to refuse to license in a particular case, or in its discretion  
96 to prohibit in all cases, the operation of pool and billiard rooms and the maintaining for hire of pool  
97 and billiard tables notwithstanding the general law as to state licenses for any such business and  
98 the provisions of section four, article thirteen of this chapter; and when the municipality, in the  
99 exercise of its discretion, refuses to grant a license to operate a pool or billiard room, mandamus  
100 may not lie to compel the municipality to grant the license unless it shall clearly appear that the  
101 refusal of the municipality to grant a license is discriminatory or arbitrary; and in the event that the  
102 municipality determines to license any business, the municipality has plenary power and authority  
103 and it shall be the duty of its governing body to make and enforce reasonable ordinances  
104 regulating the licensing and operation of the businesses;

105           (25) To protect places of divine worship and to preserve peace and order in and about the  
106 premises where held;

107           (26) To regulate or prohibit the keeping of animals or fowls and to provide for the  
108 impounding, sale or destruction of animals or fowls kept contrary to law or found running at large;

109           (27) To arrest, convict and punish any person for cruelly, unnecessarily or needlessly  
110 beating, torturing, mutilating, killing, or overloading or overdriving or willfully depriving of  
111 necessary sustenance any domestic animal;

112           (28) To provide for the regular building of houses or other structures, for the making of  
113 division fences by the owners of adjacent premises and for the drainage of lots by proper drains  
114 and ditches;

115           (29) To provide for the protection and conservation of shade or ornamental trees, whether  
116 on public or private property, and for the removal of trees or limbs of trees in a dangerous  
117 condition;

118           (30) To prohibit with or without zoning the location of occupied house trailers or mobile  
119 homes in certain residential areas;

120 (31) To regulate the location and placing of signs, billboards, posters and similar  
121 advertising;

122 (32) To erect, establish, construct, acquire, improve, maintain and operate a gas system, a  
123 waterworks system, an electric system or sewer system and sewage treatment and disposal  
124 system, or any combination of the foregoing (subject to all of the pertinent provisions of articles  
125 nineteen and twenty of this chapter and particularly to the limitations or qualifications on the right of  
126 eminent domain set forth in articles nineteen and twenty), within or without the corporate limits of  
127 the municipality, except that the municipality may not erect any system partly without the corporate  
128 limits of the municipality to serve persons already obtaining service from an existing system of the  
129 character proposed and where the system is by the municipality erected, or has heretofore been  
130 so erected, partly within and partly without the corporate limits of the municipality, the municipality  
131 has the right to lay and collect charges for service rendered to those served within and those  
132 served without the corporate limits of the municipality and to prevent injury to the system or the  
133 pollution of the water thereof and its maintenance in a healthful condition for public use within the  
134 corporate limits of the municipality;

135 (33) To acquire watersheds, water and riparian rights, plant sites, rights-of-way and any  
136 and all other property and appurtenances necessary, appropriate, useful, convenient or incidental  
137 to any system, waterworks or sewage treatment and disposal works, as aforesaid, subject to all of  
138 the pertinent provisions of articles nineteen and twenty of this chapter;

139 (34) To establish, construct, acquire, maintain and operate and regulate markets and  
140 prescribe the time of holding the same;

141 (35) To regulate and provide for the weighing of articles sold or for sale;

142 (36) To establish, construct, acquire, maintain and operate public buildings, municipal  
143 buildings or city halls, auditoriums, arenas, jails, juvenile detention centers or homes, motor  
144 vehicle parking lots or any other public works;

145 (37) To establish, construct, acquire, provide, equip, maintain and operate recreational

146 parks, playgrounds and other recreational facilities for public use and in this connection also to  
147 proceed in accordance with the provisions of article two, chapter ten of this code;

148 (38) To establish, construct, acquire, maintain and operate a public library or museum or  
149 both for public use;

150 (39) To provide for the appointment and financial support of a library board in accordance  
151 with the provisions of article one, chapter ten of this code;

152 (40) To establish and maintain a public health unit in accordance with the provisions of  
153 section two, article two, chapter sixteen of this code, which unit shall exercise its powers and  
154 perform its duties subject to the supervision and control of the West Virginia Board of Health and  
155 State Bureau for Public Health;

156 (41) To establish, construct, acquire, maintain and operate hospitals, sanitariums and  
157 dispensaries;

158 (42) To acquire, by purchase, condemnation or otherwise, land within or near the corporate  
159 limits of the municipality for providing and maintaining proper places for the burial of the dead and  
160 to maintain and operate the same and regulate interments therein upon terms and conditions as to  
161 price and otherwise as may be determined by the governing body and, in order to carry into effect  
162 the authority, the governing body may acquire any cemetery or cemeteries already established;

163 (43) To exercise general police jurisdiction over any territory without the corporate limits  
164 owned by the municipality or over which it has a right-of-way;

165 (44) To protect and promote the public morals, safety, health, welfare and good order;

166 (45) To adopt rules for the transaction of business and the government and regulation of its  
167 governing body;

168 (46) Except as otherwise provided, to require and take bonds from any officers, when  
169 considered necessary, payable to the municipality, in its corporate name, with such sureties and in  
170 a penalty as the governing body may see fit, conditioned upon the faithful discharge of their duties;

171 (47) To require and take from the employees and contractors such bonds in a penalty, with



172 such sureties and with such conditions, as the governing body may see fit;

173 (48) To investigate and inquire into all matters of concern to the municipality or its  
174 inhabitants;

175 (49) To establish, construct, require, maintain and operate such instrumentalities, other  
176 than free public schools, for the instruction, enlightenment, improvement, entertainment,  
177 recreation and welfare of the municipality's inhabitants as the governing body may consider  
178 necessary or appropriate for the public interest;

179 (50) To create, maintain and operate a system for the enumeration, identification and  
180 registration, or either, of the inhabitants of the municipality and visitors thereto, or the classes  
181 thereof as may be considered advisable;

182 (51) To require owners, residents or occupants of factory-built homes situated in a factory-  
183 built rental home community with at least ten factory-built homes, to visibly post the specific  
184 numeric portion of the address of each factory-built home on the immediate premises of the  
185 factory-built home of sufficient size to be visible from the adjoining street: *Provided*, That in the  
186 event no numeric or other specific designation of an address exists for a factory-built home subject  
187 to the authorization granted by this subdivision, the municipality has the authority to provide a  
188 numeric or other specific designation of an address for the factory-built home and require that it be  
189 posted in accordance with the authority otherwise granted by this section.

190 (52) To appropriate and expend not exceeding twenty-five cents per capita per annum for  
191 advertising the municipality and the entertainment of visitors;

192 (53) To conduct programs to improve community relations and public relations generally  
193 and to expend municipal revenue for such purposes;

194 (54) To reimburse applicants for employment by the municipality for travel and other  
195 reasonable and necessary expenses actually incurred by the applicants in traveling to and from  
196 the municipality to be interviewed;

197 (55) To provide revenue for the municipality and appropriate the same to its expenses;

198 (56) To create and maintain an employee benefits fund which may not exceed one tenth of  
 199 one percent of the annual payroll budget for general employee benefits and which is set up for the  
 200 purpose of stimulating and encouraging employees to develop and implement cost-saving ideas  
 201 and programs and to expend moneys from the fund for these purposes;

202 (57) To enter into reciprocal agreements with governmental subdivisions or agencies of  
 203 any state sharing a common border for the protection of people and property from fire and for  
 204 emergency medical services and for the reciprocal use of equipment and personnel for these  
 205 purposes;

206 (58) To provide penalties for the offenses and violations of law mentioned in this section,  
 207 subject to the provisions of section one, article eleven of this chapter, and such penalties may not  
 208 exceed any penalties provided in this chapter and chapter sixty-one of this code for like offenses  
 209 and violations; and

210 (59) To participate in a purchasing card program for local governments authorized and  
 211 administered by the State Auditor as an alternative payment method.

## **CHAPTER 55. ACTIONS, SUITS AND ARBITRATION; JUDICIAL SALE.**

### **ARTICLE 7. ACTIONS FOR INJURIES.**

#### **§55-7-32. Limitations on actions related to public nuisances.**

1 (a) Definitions.-- Unless otherwise set forth in this Code:

2 (1) "Public nuisance" means an ongoing and unlawful condition that proximately causes an  
 3 interference with an established public right.

4 (2) "Established public right" means a right, commonly held by all members of the public, to  
 5 the use of public land, air, or water.

6 (3) "Unlawful condition" means a circumstance or effect of an instrumentality that is  
 7 expressly prohibited by the laws of this state or the laws of the United States.

8 (b) Specific Limitations on Public Nuisance Actions. -- Unless otherwise set forth in this

9 code, and in addition to any other action or condition not recognized under common law or the  
10 definition set forth in subsection (a) of this section as a public nuisance, the following shall not  
11 constitute a public nuisance for purposes of a legal action in this state:

12 (1) An action or condition that is permitted, authorized, approved, or mandated by a  
13 statute, ordinance, regulation, permit, order, rule, court order, or other similar measure issued,  
14 adopted, promulgated, or approved by a federal, state, or local governmental entity;

15 (2) A product or the distribution, sale, labeling, promotion, or marketing of a product; or  
16 the manufacturing of a product, unless the act itself of manufacturing a product creates a public  
17 nuisance as defined in subsection (a) of this section.

18 (c) *Standing for Government Entities.* —

19 (1) A public nuisance cause of action shall only be available to a government entity if the  
20 source of the ongoing and unlawful condition is within the jurisdiction of that government entity.

21 (2) Past, current, or future financial expenditure made by the state, an agency of the state,  
22 or a political subdivision of the state related to injunction of, or any other response to, an ongoing  
23 and unlawful condition does not itself confer standing to file or maintain a public nuisance action.

24 (d) *Remedies Available to Government Entities.* -- Unless otherwise set forth in this code,  
25 in a public nuisance action brought by the state, an agency of the state, or a political subdivision of  
26 the state, the remedies available to the governmental entity are limited to injunctive relief, including  
27 prospective abatement only. A governmental entity may not recover economic, noneconomic, or  
28 exemplary damages, or for costs associated with potential future harms.

29 (e) *Standing for Private Citizens.* —

30 (1) A public nuisance cause of action shall only be available to a private citizen if the injury  
31 suffered by the individual is proximately caused by the ongoing and unlawful condition and is  
32 different in kind, not just in degree, from an injury suffered by the other persons exercising the  
33 same established public right.

34 (2) Interference with the personal, spiritual, cultural, or emotional use of public land, air, or

35 water does not constitute a special injury for purposes of availability of a public nuisance cause of  
36 action to a private citizen.

37 (3) Financial expenditure made by an individual related to injunction of, or any other  
38 response to, an unlawful condition does not constitute a special injury sufficient to confer standing  
39 to file or maintain a public nuisance action.

40 (4) Aggregation of multiple individual injuries or private nuisances does not constitute a  
41 public nuisance.

42 (f) Remedy Available to Private Citizen. -- In a public nuisance action brought by a private  
43 citizen in accordance with subsection (d) of this section the remedy available to that individual is  
44 limited solely to compensatory damages.

45 (g) Affirmative Defense. -- Unless otherwise set forth in this code, it is an affirmative  
46 defense to any claim under this section that defendant does not have actual control over the  
47 source of the alleged public nuisance.

48 (h) Prospective Effect. -- The provisions set forth in this section shall apply only to a cause  
49 of action that accrues on or after the date that this amendment becomes effective. A cause of  
50 action that accrued prior to this amendment becoming effective is governed by the law applicable  
51 to the cause of action immediately before this amendment became effective, and that law is  
52 continued in effect for that purpose.

NOTE: The purpose of this bill is to codify the common law cause of action of public nuisance in a manner consistent with its originally intended and historical applications.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.