

# **WEST VIRGINIA LEGISLATURE**

## **2023 REGULAR SESSION**

### **Committee Substitute**

**for**

### **Senate Bill 572**

By Senators Maynard, Deeds, Stover, Trump,

Maroney, and Stuart

[Originating in the Committee on the Judiciary;

reported on February 24, 2023]

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 reforming the cause of action for public nuisance; providing definitions; outlining  
4 appropriate remedies; clarifying when municipal entities and individuals have standing to  
5 pursue a public nuisance action; and noting that any changes to current law of public  
6 nuisance have only prospective effect.

*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  
9 kept free from obstructions on or over them which have not been authorized pursuant to the  
10 succeeding provisions of this subdivision; and, subject to such terms and conditions as prescribed  
11 by the governing body ~~shall prescribe~~, to permit, without in any way limiting the power and  
12 authority granted by the provisions of §8-16-1 *et seq.* of this code, any person to construct and  
13 maintain a passageway, building or other structure overhanging or crossing the airspace above a

14 public street, avenue, road, alley, way, sidewalk, or crosswalk, but before any permission for any  
15 person to construct and maintain a passageway, building, or other structure overhanging or  
16 crossing any airspace is granted, a public hearing thereon shall be held by the governing body  
17 after publication of a notice of the date, time, place, and purpose of the public hearing has been  
18 published as a Class I legal advertisement in compliance with the provisions of ~~article three,~~  
19 ~~chapter fifty-nine of §59-3-1 et seq.~~ this code and the publication area for the publication shall be  
20 the municipality: *Provided*, That any permit so granted shall automatically cease and terminate in  
21 the event of abandonment and nonuse thereof for the purposes intended for a period of ~~ninety~~ 90  
22 days, and all rights therein or thereto shall revert to 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,  
31 and 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 §8-18-1 et seq. of this code,~~ to order the sidewalks, footways, and  
37 crosswalks to be paved, repaved, curbed, or recurbed and kept in good order, free and clean, by  
38 the owners or occupants 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~~ use 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: *Provided, That no abatement or other regulatory action seeking to*  
64 *address or otherwise remediate annoyance of any similar injury, where the underlying basis for the*  
65 *annoyance or similar injury is excessive noise, may be maintained against a venue that hosts*

66 sporting events, including, but not limited to, motor sports events, as long as that venue has been  
67 in regular operation hosting sporting events at its current location for a period of two years or more;

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

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

70 (16) To arrest, convict, and punish any individual for carrying about his or her person any  
71 revolver or other pistol, dirk, bowie knife, razor, slingshot, billy, metallic or other false knuckles, or  
72 any other dangerous or other deadly weapon of like kind or character: *Provided*, That with respect  
73 to any firearm a municipality may only arrest, convict, and punish someone if they are in violation  
74 of an ordinance authorized by §8-12-5a of this code, a state law proscribing certain conduct with a  
75 firearm or applicable federal law;

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

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

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

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

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

88 (22) To arrest, convict, and punish any person for gambling or keeping any gaming tables,  
89 commonly called "A, B, C," or "E, O," table or faro bank or keno table, or table of like kind, under  
90 any denomination, whether the gaming table ~~be~~ is played with cards, dice or otherwise, or any  
91 person ~~who shall be~~ is a partner or concerned in interest, in keeping or exhibiting the table or bank,

92 or keeping or maintaining any gaming house or place, or betting or gambling for money or anything  
93 of value;

94 (23) To provide for the elimination of hazards to public health and safety and to abate or  
95 cause to be abated anything which in the opinion of a majority of the governing body is a public  
96 nuisance: Provided, That nothing in this subdivision shall be construed as to allow for a  
97 municipality or its governing body to bring an action or seek relief inconsistent with §55-7-32 of this  
98 code;

99 (24) To license, or for good cause to refuse to license in a particular case, or in its discretion  
100 to prohibit in all cases, the operation of pool and billiard rooms and the maintaining for hire of pool  
101 and billiard tables notwithstanding the general law as to state licenses for any such business and  
102 the provisions of ~~section four, article thirteen of this chapter~~ §8-13-4 of this code; and when the  
103 municipality, in the exercise of its discretion, refuses to grant a license to operate a pool or billiard  
104 room, mandamus may not lie to compel the municipality to grant the license unless it shall clearly  
105 ~~appear~~ appears that the refusal of the municipality to grant a license is discriminatory or arbitrary;  
106 and in the event that the municipality determines to license any business, the municipality has  
107 plenary power and authority and it shall be the duty of its governing body to make and enforce  
108 reasonable ordinances regulating the licensing and operation of the businesses;

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

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

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

116 (28) To provide for the regular building of houses or other structures, for the making of  
117 division fences by the owners of adjacent premises, and for the drainage of lots by proper drains

118 and ditches;

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

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

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

126 (32) To erect, establish, construct, acquire, improve, maintain, and operate a gas system, a  
127 waterworks system, an electric system, or sewer system and sewage treatment and disposal  
128 system, or any combination of the foregoing (subject to all of the pertinent provisions of ~~articles~~  
129 ~~nineteen and twenty of this chapter~~ §8-19-1 et seq. and §8-20-1 et seq. of this code, and  
130 particularly to the limitations or qualifications on the right of eminent domain set forth in ~~articles~~  
131 ~~nineteen and twenty~~ §8-19-1 et seq. and § 8-20-1 et seq. of this code), within or without the  
132 corporate limits of the municipality, except that the municipality may not erect any system partly  
133 without the corporate limits of the municipality to serve persons already obtaining service from an  
134 existing system of the character proposed and where the system is by the municipality erected, or  
135 has heretofore previously been so erected, partly within and partly without the corporate limits of  
136 the municipality, the municipality has the right to lay and collect charges for service rendered to  
137 those served within and those served without the corporate limits of the municipality and to prevent  
138 injury to the system or the pollution of the water thereof and its maintenance in a healthful  
139 condition for public use within the corporate limits of the municipality;

140 (33) To acquire watersheds, water and riparian rights, plant sites, rights-of-way, and any  
141 and all other property and appurtenances necessary, appropriate, useful, convenient, or incidental  
142 to any system, waterworks or sewage treatment and disposal works, ~~as aforesaid~~, subject to all of  
143 the pertinent provisions of ~~articles nineteen and twenty of this chapter~~ §8-19-1 et seq. and §8-20-1

144 et seq. of this code;

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

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

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

151 (37) To establish, construct, acquire, provide, equip, maintain, and operate recreational  
152 parks, playgrounds and other recreational facilities for public use and in this connection also to  
153 proceed in accordance with the provisions of ~~article two, chapter ten of~~ §10-2-1 et seq. this code;

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

156 (39) To provide for the appointment and financial support of a library board in accordance  
157 with the provisions of ~~article one, chapter ten~~ §10-1-1 et seq. of this code;

158 (40) To establish and maintain a public health unit in accordance with the provisions of  
159 ~~section two, article two, chapter sixteen of this code~~ §16-2-2 of this code. ~~Which~~ The unit shall  
160 exercise its powers and perform its duties subject to the supervision and control of the West  
161 Virginia Board of Health and State Bureau for Public Health;

162 (41) To establish, construct, acquire, maintain, and operate hospitals, sanitariums, and  
163 dispensaries;

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

169 (43) To exercise general police jurisdiction over any territory without the corporate limits



170 owned by the municipality or over which it has a right-of-way;

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

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

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

177 (47) To require and take from the employees and contractors such bonds in a penalty, with  
178 such sureties and with such conditions, as the governing body may see fit;

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

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

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

188 (51) To require owners, residents, or occupants of factory-built homes situated in a factory-  
189 built rental home community with at least ~~ten~~ 10 factory-built homes, to visibly post the specific  
190 numeric portion of the address of each factory-built home on the immediate premises of the  
191 factory-built home of sufficient size to be visible from the adjoining street: *Provided*, That in the  
192 event no numeric or other specific designation of an address exists for a factory-built home subject  
193 to the authorization granted by this subdivision, the municipality ~~has the authority to~~ may provide a  
194 numeric or other specific designation of an address for the factory-built home and require that it be  
195 posted in accordance with the authority otherwise granted by this section.

196 (52) To appropriate and expend not exceeding ~~twenty-five~~ 25 cents per capita per annum  
197 for advertising the municipality and the entertainment of visitors;

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

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

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

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

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

212 (58) To provide penalties for the offenses and violations of law mentioned in this section,  
213 subject to the provisions of ~~section one, article eleven of this chapter~~ §8-11-1 of this code, and  
214 such penalties may not exceed any penalties provided in this chapter and ~~chapter sixty-one~~ §61-1-  
215 1 et seq of this code for like offenses and violations; and

216 (59) To participate in a purchasing card program for local governments authorized and  
217 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) "Public right" means a right, commonly held by all members of the public.

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

7 (b) Specific limitations on public nuisance actions. — Unless otherwise set forth in this  
8 code, and in addition to any other action or condition not recognized under common law or the  
9 definition set forth in subsection (a) of this section as a public nuisance, the manufacturing,  
10 distribution, sale, labeling, promotion, hosting, or marketing of the following products or services  
11 shall not constitute a public nuisance for purposes of a legal action in this state:

12 (1) Food, drink, or raw materials used in food or drink;

13 (2) Motor vehicles;

14 (3) Fossil fuels, unless the act of mining, drilling, extracting, preparing for market, or  
15 transporting the fossil fuels creates a public nuisance, as defined in subsection (a) of this section,  
16 at the location where the acts necessary for the mining, drilling, extracting, preparing for market, or  
17 transporting the fossil fuels are conducted;

18 (4) Firearms, handguns, or ammunition; and

19 (5) A venue for sporting events, including, but not limited to, a venue for motor sport  
20 events, so long as the venue in question has been in regular operation hosting sporting events at  
21 its current location for a period of two years or more.

22 (c) Standing for government entities. —

23 (1) A public nuisance cause of action is only available to a government entity if the source  
24 of the ongoing and unlawful condition is within the jurisdiction of that government entity or the  
25 source of the ongoing and unlawful condition is a substantial factor to the public nuisance  
26 occurring within the jurisdiction of that government entity.

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

30 (d) Remedies available to government entities. — Unless otherwise set forth in this code,  
31 in a public nuisance action brought by the state, an agency of the state, or a political subdivision of  
32 the state, the remedies available to the governmental entity are limited to injunctive relief, including  
33 prospective abatement only. A governmental entity may not recover economic, noneconomic, or  
34 exemplary damages, or for costs associated with potential future harms.

35 (e) Standing for private citizens. —

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

40 (2) Interference with the personal, spiritual, cultural, or emotional use of public land, air, or  
41 water does not constitute a special injury for purposes of availability of a public nuisance cause of  
42 action to a private citizen.

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

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

48 (f) Remedy available to private citizen. — In a public nuisance action brought by a private  
49 citizen in accordance with subsection (d) of this section, the remedy available to that individual is  
50 limited solely to compensatory damages.

51 (g) Affirmative defense. — Unless otherwise set forth in this code, it is an affirmative  
52 defense to any claim under this section that the defendant does not have actual control over the

53 source of the alleged public nuisance.

54 (h) Prospective effect. — The provisions set forth in this section applies only to a cause of  
55 action that accrues on or after the date that this section becomes effective and shall not apply to  
56 any legal action initiated before the date that this section becomes effective. A legal action arising  
57 out of a cause of action that accrued prior to this section becoming effective or a legal action  
58 initiated before the date that this section became effective shall be governed by the law applicable  
59 to the cause of action at the time the cause of action accrued, and that law is continued in effect for  
60 that purpose.