

# State Statute MCA § 21-19-11

## Cleaning of Private Property

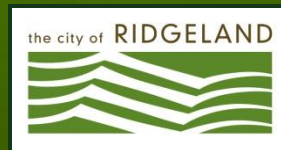
Presenters:

Alan Hart, Director of Community Development - City of Ridgeland

Troy Johnston – Phelps Dunbar LLP

MML Small Town Conference Presentation

November 17, 2011





**21-19-11  
Cleaning of  
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# **State Statute MCA § 21-19-11 Cleaning of Private Property**

- **Overview of Importance of MCA § 21-19-11**
  - Alan Hart
- **Explanation of MCA § 21-19-11**
  - Troy Johnston
- **Collecting the Cost of Cleanup**
  - Troy Johnston
- **Demonstration of Process**
  - Alan Hart
- **Questions / Answers**

the city of RIDGELAND



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# Overgrown Property

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# 2009 Legislative Changes

- **HB 1281** includes amendments that simplified the notice requirements but still allows for due process.
  - Sponsors: Representatives Myers, DeLano, Bennett
- **HB 1412** adds to HB 1281 by clarifying language to the collection of assessments through tax liens.
  - Sponsors: Representatives Calhoun, Robinson, Banks, Brown, Buck (72nd), Clarke, Coleman (65th), Evans (70th), Bennett

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# Importance

- Prevent Blight / Decline
- Redevelopment
- Purpose of 21-19-11: To clean property that is declared to be a menace to the public health, safety, and welfare of the community, allow for due process, and collect fees associated with cleaning costs.

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# Uses of 21-19-11

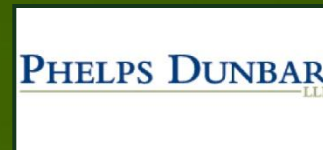
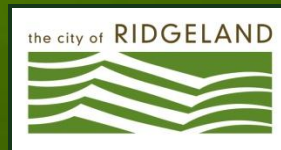
- State Statute 21-19-11 establishes a process for a Municipality to perform the following on Private property: cutting grass and weeds; filling cisterns; removing rubbish, dilapidated fences, outside toilets, dilapidated buildings, personal property and other debris; and draining cesspools and standing water.

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# Explanation of MCA § 21-19-11





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# WARNING!!

**The citations included in this presentation are for your guidance. However, you should discuss any actions based on these citations with your City Attorney to ensure the citations continue to adequately reflect current law regarding MCA § 21-19-11**



# EXPLANATION OF AUTHORITY

- **Property cleanup is a function of a municipality's authority to remove a public nuisance pursuant to its police power**
  - **Public holds property subject to this police power**
  - **There is no Constitutional right to maintain a nuisance**
  - **No compensation is required when a municipality destroys a nuisance because there is no Constitutional taking**

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# EXPLANATION OF AUTHORITY

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- **The property owner is always entitled to Due Process of Law and entitled to a hearing to determine whether the property is in fact a public nuisance**
- **Litigation is likely to be over whether property was in fact a public nuisance and/or whether the owner received proper notice of the hearing to make such determination**



# Additional Cleanup Statutes

- **MCA § 21-19-20: Demolishing Drug Houses**
- **MCA § 21-19-21: Fire Prevention**
- **MCA § 43-35-1 *et. seq.*: Urban Renewal Act**

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# Scope of MCA §21-19-11

## 21-19-11 Cleaning of Private Property



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- **Applies to:**
  - **Property within City limits**
    - Commercial and Residential
    - Undeveloped/developed property
  - **Railroads. Miss. Atty. Gen. Op. 2004-0427 (Aug. 20, 2004)**
    - Specific area of track may be designated as in need of cleaning. Miss. Atty. Gen. Op. 1989 WL 503235 (June 13, 1989)
  - **Public utilities. MCA § 21-27-3; *Columbus & Greenville Railway Co. v. Scales*, 578 So. 2d 275, 279 (Miss. 1991); Miss. Atty. Gen. Op. 2004-0099 (Mar. 9, 2004)**
- **Historic Preservation Districts**
  - **Must obtain approval of the Department of Archives prior to making any repairs pursuant to the Act. MCA § 39-13-15**
- **Does not apply to state and/or political subdivisions**
  - **Limited application to 16<sup>th</sup> Section land. Miss. Atty. Gen. Op. 2003-0650 (Dec. 5, 2003)**
- **No exemptions for elderly, charitable organizations or churches**



# Setting the Hearing

- **Governing Authority**
  - **Sets hearing**
    - **On its on motion; or**
      - **Also has the authority to delegate setting the hearing to an administrative staff member or Mayor**
    - **Upon receipt of petition from a majority of residents living within 400 feet of the property**

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# Notice of Hearing

- **Notice must be sent to “Property Owner”**
- **Notice requirements**
  - Language that informs property owner of right of re-entry
  - Include notice in the minutes of the City
- **Required methods of notice**
  - **Mail notice 2 weeks before hearing to**
    - The address of the subject property; and
    - The address where the ad valorem tax notice is sent
  - **Post notice 2 weeks before hearing**
    - On the property; and
    - At City Hall or somewhere in town where such notices would be normally be posted

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# Who is a “Property Owner”

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- **Multiple Owners (Notice Required)**
  - Notice must be given to all owners of subject property. *Scarborough v. City of Petal, Miss.*, 60 So. 3d 193,197 (Miss. 2010)
  - Each owner should be sent a separate notice
- **Deceased Owners (Notice Required)**
  - Notice must be given to the owner deriving title through the deceased property owner. Miss. Atty. Gen. Op. 2009-00126 (Apr. 17, 2009)
- **Mortgagees (Notice Probably Required)**
  - Consider extent of cleanup project



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# Who is a “Property Owner”

- **Lienholders (Notice Not Required)**
  - There is no requirement that lienholders receive notice. Miss. Atty. Gen. Op. 2005-0105 (Mar. 1, 2005)
- **Renters (Notice Not Required)**
  - With respect to the manner in which the governing authority should deal with the occupants of any structure to be removed under 21-19-11, the municipality must comply with notice requirements. Miss. Atty. Gen. Op. 2007-00159 (Apr. 6, 2007)
  - Notice addressed to “occupants” may assist in notifying owner of hearing. *Jones v. Flowers*, 547 U.S. 220, 235 (2006)
- **Unique information should be considered**
  - Consider unique information about an intended recipient of notice regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case. *Jones v. Flowers*, 547 U.S. 220, 230 (2006)
    - Is the property owner in prison?
    - Is the property owner in a nursing home?
    - Does the property owner have a guardian?
  - A city is accountable if it ignores information about an intended recipient

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# Notice by Mail

- Certified mail is not required
- Advantage of sending notice by certified mail
  - Provides evidence of receipt of notice
- Advantage of sending notice by regular mail
  - Method to quickly determine whether address is good
  - Cheap
- Suggestion: Send notice by both certified mail and regular mail. *Jones v. Flowers*, 547 U.S. at 237
- Notice must be mailed to the address of the subject property regardless of the city's expectation that it will be returned undeliverable. Miss. Atty. Gen. Op. 2010-00582 (Oct. 29, 2010)

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# Posting Notice

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- “[P]osting notice on real property is a singularly appropriate and effective way of ensuring that a person . . . is actually apprised of a proceedings against him.” *Jones v. Flowers*, 547 U.S. at 236
- No particular method of posting notice on property (*i.e.*, no size requirement, color, *etc.*)



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# How Far to Go to Ensure Notice is Proper Under Due Process

- **Goal**: To balance the rights of the property owner with efficient government
- City's obligation under due process to provide notice to property owner increases with the size of the cleanup project
  - Due process requirements of giving notice are **flexible** and depend on the particular project (mowing grass v. tearing down a building). *Wheeler v. Stewart*, 798 So.2d 386, 391 (Miss. 2001)
- If a city has knowledge that notice pursuant to normal procedure is ineffective, **the city has an obligation to take additional steps to affect notice.** *Jones v. Flowers*, 547 U.S. at 231 (2006)
  - Additional steps suggested by the in *Jones v. Flowers*
    - Posting notice on the property;
    - Sending notice by both certified mail and regular mail;
    - Sending notice addressed to “occupant” if the property is rented



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# How Far to Go to Ensure Notice is Proper Under Due Process

- **But**, due process does not require a municipality to pursue “heroic” efforts to achieve notice to affected parties. *Dusenbery v. U.S.*, 534 U.S. 161, 170 (2002)
  - Too burdensome for cities according to *Jones v. Flowers*
    - Looking at income tax records for owner’s address
    - Looking in the phone book for owner’s address
- **And**, the fact that notice is ineffective does not mean it is inadequate
- **Suggestion**: File notice of the hearing in the *Lis Pendens* book
- **Note**: Publication of the notice in a newspaper may be a problem unless the property owners are unknown
  - “Chance alone brings a person’s attention to an advertisement in small type inserted in the back pages of a newspaper.” *Jones v. Flowers*, 547 U.S. at 230 (2006)



# Key Points for Notice

- **2 Standards of Notice to meet**
  - **MCA § 21-19-11**
    - Always provide the notices in the manner and to the addresses that it requires
  - **Constitutional Due Process**
    - Whether this standard is met will be determined by facts of each case
    - This may require more effort than required by MCA § 21-19-11, *i.e.*, sending notices to additional addresses
- **Consider unique information**
  - The city has an obligation to provide notice based on information that it either receives or knows about a property owner
- **Sometimes notices will fail**
  - MCA § 21-19-11 was drafted with this in mind
  - Include all city's efforts to find property owners and to provide notice in the minutes of hearing to adjudicate the condition of the property

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# The Hearing

- Conducted by Board of Alderman/Council. Miss. Atty. Gen. Op. 2007-00412
- The purpose of the hearing is to determine “whether the property is a menace to the public health, safety and welfare of the community”
  - The property’s condition must affect an interest common to the public rather than the interest of a particular individual, but it is not necessary that the condition affect the entire community
- Minutes of hearing should include:
  - Extensive documentation and photos that supports decision. *Bray v. Meridian*, 726 So. 2d 1200, 1205 (Miss. 1998)
  - Attempts at notice. *Bray v. Meridian*, 726 So. 2d at 1204 (Miss. 1998)
  - A finding that the property owner has been properly served. *Bray v. Meridian*, 726 So. 2d at 1204 (Miss. 1998)

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# The Hearing

- Decision may be appealed pursuant to MCA § 11-51-75
  - Ten-day period for appeal begins to run when municipality adjourns the meeting to discuss the property, not when the minutes are adopted. *Rankin Group, Inc. v. City of Richland, Miss.*, 8 So. 3d 259, 261 (Miss. 2009)
  - The board’s action will be upheld on appeal unless it is “arbitrary, capricious or contrary to applicable law.” *City of Jackson, Miss. v. United Water Serv.*, 47 So.3d 1160, 1161 (Miss. 2010)
    - “Arbitrary” means not done according to reason or judgment, but depending upon the will alone, – absolute in power, tyrannical, despotic, non-rational – implying either a lack of understanding of or a disregard for the fundamental nature of things
    - “Capricious” means done without reason, in a whimsical manner, implying either a lack of understanding of or a disregard for the surrounding facts and settled controlling principles. *Smith County Sch. Dist. v. Barnes*, No. 2010-CA-00681-COA (Miss. App. 2011)



# The Cleanup

- **Permission to enter property is not needed. Miss. Atty. Gen. Op. 2005-0270 (June 10, 2005)**
- **Work must be consistent with the resolution adjudicating that the property needs cleaning**
- **Scope of cleanup**
  - **Cut grass and weeds**
    - **Herbicides may be used to kill grass and weeds. Miss. Atty. Gen. Op. 2003-0455 (Aug. 29, 2003)**
  - **Fill cisterns**
  - **Remove rubbish**
  - **Remove dilapidated fences**
  - **Remove outside toilets**
  - **Remove dilapidated buildings**
    - **Houses are considered “buildings.” Miss. Atty. Gen. Op. 2009-00411 (July 13, 2009)**
  - **Remove personal property**
    - **Municipalities cannot sell abandoned personal property. Miss. Atty. Gen. Op. 2006-00193 (May 19, 2006)**
  - **Remove other debris**
  - **Drain cesspools and standing water**

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# The Cleanup

- **Work must address the public nuisance problem and not improve, restore or landscape private property. Miss. Atty. Gen. Op. 1992 WL 614041 (July 8, 1992)**
  - **The Act does not permit a municipality to board up windows and doors to secure abandoned structures. Miss. Atty. Gen. Op. 2009-00732 (Jan. 29, 2010)**
  - **However, with approval of the Department of Archives and History, repairs can be made to historic buildings. MCA § 39-13-15**

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# Who Performs the Cleanup

- Work can be done by the city or a third party. Miss. Atty. Gen. Op. 1988 WL 25020217 (Dec. 13, 1988 )
- Work done by Third Party
  - Bid required in some instances based on the type of project. Miss. Atty. Gen. Op. 2011-00171 (May 13, 2011 )
    - Projects to clean lots are considered a construction project and must comply with purchasing statutes
    - Mowing is considered a service and not subject to purchasing statutes
  - Separate bid for each project is required. Miss. Atty. Gen. Op. 1990 WL 548011 (May 16, 1990)
    - But, City may request unit bids for additional work if re-entry is required. Miss. Atty. Gen. Op. 2011-00171 (May 13, 2011 )
- County may lend equipment. Miss. Atty. Gen. Op. 2003-0372 (July 25, 2003)
- Inmate labor may be used. Miss. Atty. Gen. Op. 97-0676 (Dec. 19, 1997)

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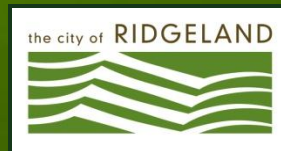
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# Re-entry for Subsequent Cleaning

- **2 scenarios for re-entry allowed**
  - **12 Month Period**
    - Re-enter 6 times
    - **Scope**
      - Remove dilapidated buildings
      - Remove dilapidated fences
      - Remove outside toilets
  - **24 Month Period**
    - Re-enter 12 times
    - **Scope**
      - Cut grass and weeds
      - Remove rubbish
      - Remove personal property
      - Remove other debris
- **7 days' notice required for each re-entry**
  - Posted on property; and
  - At City Hall or somewhere in town where such notices would be normally be posted
- **There is no new hearing required for each re-entry**
- **Re-entry work must be consistent with decision at the hearing adjudicating the property to be in need of cleaning**

# Collecting the Cost of Cleanup





# Cost of Cleanup

- **Cost includes**
  - Cost of the work done either by the municipality or a third party;
  - Administrative costs; and
  - Legal costs
- **Statutory Limits on Cost**
  - Lesser of
    - \$20,000 per calendar year; or
    - Fair market value of the property
  - Limitation refers only to the cost of cleaning and does not include any penalty. Miss. Atty. Gen. Op. 97-0032 (Feb. 21, 1997)
- **Penalty**
  - Greater of
    - Not to exceed \$1500; or
    - Not to exceed 50% of the actual cost of the cleanup
  - May be assessed each time the municipality re-enters property
- **Municipality must adjudicate the cost of cleaning at a meeting and at that time assess the penalty**

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# Required Steps for Adjudication of Cost

- **Prepare all cost data in Invoice Form**
- **Municipality should adopt a resolution**
  - **Adjudicating the cost of cleaning**
  - **May impose a statutory penalty fee**
  - **Determine how to collect**
    - **Give the owner a chance to pay**
    - **Authorize the institution of a civil suit to collect the debt or file a lien against the property**

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# Collecting Cleanup Costs in a Civil Suit

- **Suit on an open account (MCA § 11-53-81)**
- **Filed against the property owner**
- **Demand letter required at least 30 days prior to filing suit**
- **Municipality is entitled to recover court costs, reasonable attorney's fees and interest from the date the property was cleaned**
- **Judgment lien filed against property owner in all counties that property owner owns property**

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# Collecting Cleanup Costs as an Assessment Lien

- **Enroll the resolution adjudicating the cost of cleanup with the Circuit Clerk**
  - **If a municipality is located in two counties file the lien in the county where the property is located. Miss. Atty. Gen. Op. 93-0546 (Sept. 8, 1993)**
- **The lien only applies to the property that has been cleaned. Miss. Atty. Gen. Op. 93-0546 (Sept. 8, 1993)**
- **State and local tax liens have priority over assessment liens. Miss. Atty. Gen. Op. 2005-0142 (Apr. 8, 2005)**
- **Options of a City once a lien is filed**
  - **Liens may be forgiven by city pursuant to MCA § 21-19-12; or**
  - **Municipality may direct tax collector to sell property**



# Lien Amnesty Pursuant to MCA § 21-19-12

- MCA § 21-19-11 liens may be forgiven by city pursuant to MCA § 21-19-12
- Property must be purchased by a
  - Nonprofit 501(c)(3) organization; or a
  - For-profit developer who purchases property considered blighted to convert the property to productive use
- Lien must have been existence for 2 years
- Purchaser must apply to the city for lien amnesty
- The purchaser must convert the property from its blighted state within 18 months (can be extended up to an additional 12 months)

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# Collecting Cleanup Costs via a Tax Sale

- Municipality must direct tax collector to sell property
- Property may be sold even if there are no other liens except assessment liens
- Municipality is authorized to conduct the tax sale. MCA § 21-33-53
- Municipality can authorize a county to sell property in a unified tax sale pursuant to an interlocal agreement. MCA § 21-41-2
- Time table for tax sales applies to assessment liens
  - Notice placed in the paper after February 15 for a tax sale on the first Monday in April. MCA § 21-41-55
  - Notice placed in the paper after August 5 for a tax sale on the last Monday in August. MCA § 21-41-55

# Demonstration of Process





# Cleaning Process

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# Process: Recommended Optional Steps

- Identify the Violation and determine and document (photographic, videographic, and/or written narrative) whether property or parcel of land is in such a state of uncleanness as to be a menace to public health, safety and welfare of the community.

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# Process: Recommended Optional Steps

- Make an attempt to resolve the violation by serving Notice of the Violation in one or more or all of the following forms:
  - Personal Conversation
  - Written Notice posted at the property
  - Letter via US Mail

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# Process: Recommended Optional Steps

- If an open line of communication is established, work to understand the violator's circumstances, and work towards an acceptable time of compliance.
- In situations that warrant charity assistance, connect the violator with area church groups, Boy Scout troops, and/or other civic volunteer/mission groups.

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# Process: Required Steps

- Verify that the Violation still exists and determine whether the property or parcel of land is in such a state of uncleanness as to be a menace to public health, safety and welfare of the community.
- Set Hearing to be conducted by the governing authority of the municipality.
  - Method depends on Municipality's Policy on authority to set Hearings.



# Process: Required Steps

- Provide Notice of Hearing:
  - US Mail two (2) weeks before the date of the Hearing to the address of the subject property and to the address where the ad valorem tax notice for such property is sent.
  - Post the Notice for at least two (2) weeks before the date of the Hearing at the property or parcel of land and at City Hall or another place in the municipality where such notices are posted (i.e. the Post Office).

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# Process: Required Steps

- Re-inspect the property or parcel of land the day of the Hearing to determine and document whether the property or parcel of land is in such a state of uncleanness as to be a menace to public health, safety and welfare of the community.

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# Process: Required Steps

- The Governing Authority shall conduct the Hearing to consider whether or not the property or parcel of land shall be adjudicated based on its then condition to be a menace to public health, safety and, welfare of the community.

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# Process: Required Steps

- After the appeal period of ten (10) days has elapsed and if after the Hearing the owner does not rectify the condition as adjudicated, the municipality has the right to enter the property to proceed to clean the land by use of municipal employees or by contract.

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# Process: Required Steps

- If the property is to be cleaned by Contract, it is recommended that the Municipality seek Bids from at least three (3) Contractors and select the lowest best bid. For most cleanup projects, it does not require action by the Governing Authority to officially select the lowest best bid, and the list of bidders can be from an invited bidders list.

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# Process: Required Steps

- Although not required, it is recommended that the municipality provide Notice, in particular in cases where the violator failed to attend the Hearing, regarding the date (on or after) in which the municipality or contractor will clean the property or land.

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# Process: Required Steps

- Enter property and resolve violation of 21-19-11. It is recommended that you fully document and photograph the process of cleaning.

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# Calendar - July

JULY 2010

- Board / Council Meeting
- Legal Holiday
- Board / Council Work Session

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
27	28	29	30 Completion of optional steps	1 Set Hearing for July 20th	2 Do not count Holidays	3
4	5	6	7	8	9	10
14-day Notice Period						
11	12	13	14 Agenda Deadline	15	16	17
18	19	20 Hearing to Adjudicate Property	21	22	23	24
Begin Bid Process, if cleaning by Contract 10-day Appeal Period						
25	26	27	28	29	30 Complete Bid Process	31
Complete Bid Process						

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# Calendar - August

AUGUST 2010

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
1	2	3	4	5	6	7
	Clean property (1-5 days through City Crews or by Contract)					
8	9	10	Agenda 11 Deadline	12	13	14
	Organize Cost Data and prepare Resolution					
15	16	17	18	19	20	21
		Adjudicate Cost of Cleaning	10-day Appeal Period			
22	23	24	25	26	27	28
10-day Appeal Period (continued)						
29	30	31	1	2	3	4
	File Lien or begin Civil Suit Process					

Board / Council Meeting  
 Legal Holiday  
 Board / Council Work Session

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# Questions / Answers

## Presenters:

Alan Hart - City of Ridgeland

Troy Johnston – Phelps Dunbar LLP

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## Resources

MERS

Mortgage Electronic Registration System

[www.mersonline.org](http://www.mersonline.org)