Essential Hour: Code Enforcement 101

Friday, Nov. 15, 2024

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City Attorney's Department "Essential Hour"

November 15, 2024

"A county or city may make and enforce within its limits all local, police, sanitary and other ordinances and regulations not in conflict with general laws." (Cal. Const. Art XI, § 7; *Schroeder v. Municipal Court* (1977) 73 Cal.App.3d 841, 848 (zoning regulations); see also *Sullivan v. City of Los Angeles* (1953) 116 Cal.App.2d 807, 810 (building regulations.) A city is free to enforce violations administratively, civilly, criminally or a combination of these alternatives. (*Flahive v. City of Dana Point* (1999) 72 Cal.App.4th 241, 244.)

Under any of the three remedies, the first step is to gather evidence. Usually, a city is made aware of a violation by a complaint made by a reporting party. Some cities have proactive enforcement that targets certain violations such as short term rentals, illegal businesses, etc. Enforcement is generally conducted by code enforcement, but it could also be conducted by police officers, building officials, or inspectors, depending on the violation. To initiate any of the three remedies, the investigator must write a report of the violations and attempts to notify the owner with any supporting evidence.

Anyone investigating a potential violation must adhere to the Fourth Amendment when inspecting private property. (*Department of Toxic Substances Control v. Superior Court* (1996) 44 Cal.App.4th 1418, 1422.) There is no violation of the Fourth amendment if the observation is made from plain view, including from a neighboring property where the neighbors invite you onto their property (*Dillon v. Superior Court* (1972) 7 Cal.3d 305, 310.) The most prudent approach is always to first obtain and then document consent from the property owner.

<u>Administrative Approach</u>

Procedures for administrative and summary abatement of a public nuisance must be adopted by ordinance. (Gov. Code, §§ 38773.5 & 53069.4.) Public nuisance ordinances should provide notice and hearing provisions, but absent express language, the requirement for notice and hearing may be implied. (See *Bess v. Park* (1956) 144 Cal.App.2d 798, 804.) Notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections." (*D & M Fin. Corp. v. City of Long Beach* (2006) 136 Cal.App.4th 165, 174, citing *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 314.) The hearing body or officer must be impartial. (*Haas v. County of San Bernadino* (2002) 27 Cal.4th 1017, 1025.) In general, the investigators present evidence to the hearing officer or body. The attorneys that advise the hearing officer and the investigators must be separated. (*Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 737.) A partner from a law firm may not act as an advisor to a decision-making body when another partner from the same law firm acts as an advocate in the same contested matter. (*Sabey v. City of Pomona* (2013) 215 Cal.App.4th 489, 498.) During the hearing, the violating party must have an opportunity to controvert the evidence. (*Today's Fresh Start, Inc. v. Los Angeles County Office of Educ.* (2013) 57 Cal.4th 197, 230.)

When the conditions are so severe that immediate action is required without time to seek a court or administrative order, a city may summarily abate the nuisance. (*Flahive v. City of Dana Point, supra,* 72 Cal.App.4th at p. 245, fn. 5.) There must be an imminent risk of harm. (*Leppo v. City of Petaluma* (1971) 20 Cal.App.3d 711, 718.) The city must provide a post-abatement hearing to contest the validity of summary abatement to comply with due process and prove by a preponderance of the evidence that an actual emergency existed that justified not providing the responsible party with an opportunity to be heard before abatement of the nuisance condition. (See *Rose v. City of Coalinga* (1987) 190 Cal.App.3d 1627, 1635.)

For a thorough discussion of administrative citation, inspection warrants, and abatement warrants, please refer to "How to Prosecute a Code Enforcement Case (Part II)" by Elizabeth M. Calciano, Assistant City Attorney, City of Monterey Park and City of Rolling Hills, Jenkins & Hogin, LLP, League of Cities, City Attorneys Department, May 5-7, 2010.

<u>Civil</u>

Many violations can be resolved with a cease and desist letter to the property owner, and if the circumstances allow, the business owner as well. However, if the violation is not corrected, a municipality may be able to go forward with a civil suit. Some common causes of actions are nuisance per se, public nuisance under the Civil Code, or a violation of State Housing Laws, the Drug Abatement Act, the Red Light Abatement Act, or Unfair Competition Laws.

Civil remedies include mandatory or prohibitory injunctive relief (temporary, preliminary or permanent), civil contempt (Code Civ. Proc., §§ 1209 & 1211), criminal contempt (Pen. Code, §§ 166(a)(4) and 166(a)(9)), and in some cases, cost recovery, attorney fees or civil penalties. In addition, a local legislative body may provide by ordinance the recovery of the expense of the persons maintaining a nuisance for abating the nuisance (Gov. Code, §§ 38773-38773.5), attorney fees (Gov. Code, § 38773.5(b)), related administrative costs by a nuisance abatement lien (Gov. Code, §§ 38773.1 & 54988), special assessments (Gov. Code, § 38773.5.), treble costs (Gov. Code, § 38773.7), civil penalties (Gov. Code, § 36901), and/or administrative fines or penalties (Gov. Code, § 53069.4). Note that placing a lien on the property would make the city eligible to become an executor to a person's estate if the property owner is deceased, thereby entitling the city to statutory and extraordinary fees.

A nuisance per se under the municipal code exists whenever "a legislative body with appropriate jurisdiction, in the exercise of the police power, expressly declares a particular object or substance, activity or circumstance, to be a nuisance." (Gov. Code, § 38771; *Beck Dev. Co. v. Southern Pac. Transpo. Co.* (1996) 44 Cal.App.4th 1160, 1206.) Additionally, all municipalities adopt by reference the California Building Code, the California Fire Code, and the other model codes adopted as part of the California Building Standards Code (by the California Building Standards commission and published in Title 24 of the California Code of Regulations, along with any local amendments.) (See Health and Saf. Code, §§ 17922 & 17958.) To prove a nuisance per se, two elements must be established: 1) there must be a valid ordinance identifying a nuisance; and 2) there is a violation of that ordinance. (*City of Corona v. Naulls* (2008) 166 Ca.App.4th 418, 425 (medical marijuana dispensary's operation as nonpermitted, nonconforming use); *City of Costa Mesa v. Soffer* (1992) 11 Cal.App.4th 378, 385 (vehicle abatement).)

Under the Civil Code, a public nuisance is "one which affects at the same time, an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage may be unequal. (Civ. Code, § 3479.)

Under the State Housing Law, an enforcement agency may declare a building or homeless shelter to be "substandard." (Health & Saf. Code, §§ 17991-17998.3.) If the substandard conditions have not been corrected within 30 days (or a shorter period if necessary to remedy an immediate threat to the health and safety of the public or occupants), the enforcement agency may file a civil action against the owner or other responsible party. (Health & Saf. Code, §§ 17980-17982.) The violating owner may be responsible for civil penalties, franchise tax board deductions, and relocation assistance.

The California Drug Abatement Act allows cities to remove occupants from any building or place where any illegal drug activity occurs. Every building or place used for the purpose of illegal drug activity is expressly declared a nuisance, subject to injunctive relief. (Health & Saf. Code, §§ 11570 – 11587.) The Drug Abatement Act applies to "controlled substances," as identified in Health and Safety Code sections 11054 through 11058, including opiates, heroin, hallucinogenic substances, cocaine, cannabis, and amphetamines, among others. The city can obtain a temporary restraining order or preliminary injunction ordering the building to be vacated and boarded against entry for up to one year. (Health & Saf. Code, § 11573.5(b).)

The Red Light Abatement Law covers buildings or places used for the purpose of illegal gambling, lewdness, assignation, human trafficking, or prostitution, or used as bathhouses that encourage or permit conduct that could lead to the transmission of AIDS. (Pen. Code, §§ 11225-11235.) The remedies are similar to the Drug Abatement Act. Penalties apply to both the property owner and the business owner, so cease and desist letters should be sent to both, outlining the potential consequences.

The California Supreme Court refers to Business and Professions Code sections 17200 to 17499 as the Unfair Competition Law or UCL. (See *Rose v. Bank of America, N.A.* (2013) 57 Cal.4th 390, 394.) The UCL broadly defines unfair competition to encompass "anything that can properly be called a business practice and that at the same time is forbidden by the law." (*Barquis v. Merchants Collection Association of Oakland, Inc.* (1972) 7 Cal.3d 94, 113.) Unfair competition encompasses repeated violations of state and local regulations, as long as they are a part of a "business practice." (See *People v. McKale* (1979) 25 Cal.3d 626, 632.) Any action to enforce the UCL must be commenced within four (4) years after the cause of action accrued. (Bus. & Prof. Code, § 17208.)

When the condition of a property becomes so dangerous to the occupants or the public, a city may petition a court for a receivership. A receiver is a court agent that brings a violating property into compliance. A receiver may be appointed to enforce an injunction when a permanent injunction is violated (Code Civ. Proc., § 564((b)(3)), to enforce a health and safety violation (Health and Saf. Code, § 17980.7(c)), or to effectuate a closure order under the Red Light Abatement Law (Pen. Code, §§ 11225-11235), the Drug Abatement Act (Health & Saf. Code, §§ 11570-11587), or the Unfair Competition Law (Bus & Prof. Code, §§ 17200-17499.).

Criminal

City authorities, including city attorneys, have the exclusive authority to prosecute misdemeanor criminal cases to enforce city ordinances. (Gov. Code, § 36900(a).) The city attorney may prosecute these municipal code violations in the name of the People of the State of California. (*Id.*) However, in a general law city, a city attorney may only prosecute state laws if authorized by the district attorney. (Gov. Code, § 41803.5(a).) In charter cities, the charter may designate the city attorney or a deputy city attorney as the "city prosecutor" charged with the duty to prosecute both state and municipal violations committed within the city. (Gov. Code, § 72193.)

A violation of a city ordinance is a misdemeanor unless it is made an infraction by ordinance. (Gov. Code, § 36900(a).) An infraction is punishable by a fine (Pen. Code. 19.8(b)), and a misdemeanor is punishable by a fine of not more than one thousand dollars ($1,000), or by imprisonment in the city jail for a period of not more than six (6) months, or both (Pen. Code, 19.). An ordinance can develop a sliding scale that would elevate an infraction to a misdemeanor after a certain number of violations within a year (Gov. Code, §§ 36901 & 53069.4) or designate some violations as a wobblet where the enforcing agency has discretion to enforce a violation as either an infraction or misdemeanor (Gov. Code, § 36900(a) and Pen. Code, 17(d).). The existence of the public nuisance for each and every day after the service of the notice is a separate and distinct offense. (Pen. Code, § 373a.)

The majority of cases, especially municipal code violations, do not result in a trial. If a defendant does not want to pursue his or her right to trial, the prosecutor can obtain compliance either by summary probation or an order by the court through a diversion program. Whether placed on diversion or probation, the court has the authority to place conditions that the defendant must comply with, which could include fines, community service, community labor, bringing the property to compliance, and other conditions related to the violation.

If a defendant enters into a plea to a misdemeanor, that defendant can be sentenced to straight jail time or be placed on summary probation for up to one year. (Pen. Code, § 1203a.) A violation of probation can result in additional consequences and conditions as well as revocation and termination of probation. (Pen. Code, § 1203.3.) If the defendant has not complied with the terms of probation by the end of twelve months, the court must sentence the defendant for failing to comply or the defendant can agree to extend probation by waiving the right. Normally, a condition of probation is to obey all laws, so a new violation of a city ordinance is grounds for a violation of probation. (*In re Coughlin* (1976) 16 Cal.3d 52, 57; *People v. Ortiviz* (1977) 74 Cal.App.3d 537, 540.)

Alternatively, the defendant can go into a diversion program where the defendant promises to comply with the court's order to receive a dismissal or reduction of the charges. There are several types of diversions in the Penal Code such as military diversion (Pen. Code, § 1001.80), mental health diversion (Pen. Code, § 1001.36) and pre plea diversion (Pen. Code, §§ 1001-1001.9) among others. A prosecutor has discretion to offer informal (pre-plea) or formal (post-plea) diversion. AB 3234 authorized judges to grant Judicial Diversion over the prosecutor's objections. (Pen. Code, §§ 1001.95 et seq.) If the defendant has not complied with the terms of diversion, the criminal case resumes with the defendant's right to trial.

For a more thorough discussion of prosecution of code enforcement cases, please refer to "Anatomy of a Successful Criminal Code Enforcement Prosecution" by James Eckart, Law Offices of Dapeer, Rosenblit & Litvak, LLP, League of Cities 2010 City Attorney's Spring Conference, May 5, 2010 and "How to Prosecute a Code Enforcement Case (Part II)" by Elizabeth M. Calciano, Assistant City Attorney, City of Monterey Park and City of Rolling Hills, Jenkins & Hogin, LLP, League of Cities, City Attorneys Department, May 5-7, 2010.