Look Before You Leap:
How Code Officials and City Attorneys
Can Effectively Plan Enforcement

by

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Nicholas Spiropoulos was appointed the Matanuska-Susitna Borough Attorney in 2006 and currently supervises an office of four attorneys and two staff. Prior experience includes serving as a law clerk to the Chief Judge of the Circuit Court of Cook County, Illinois, a position as an Assistant State's Attorney in Chicago, and an Assistant Municipal Attorney in Anchorage. Mr. Spiropoulos was born and raised in Chicago, Illinois and graduated college with degrees in Chemistry and Economics with highest honors before attending Chicago-Kent College of Law. Mr. Spiropoulos has represented municipalities before all levels of the Alaska court system and numerous administrative agencies. He currently works with administrative and elected officials on diverse matters including elections, property, land use, procurement, contracts, taxation, torts, and numerous state and municipal law issues in the fastest growing area in Alaska. Mr. Spiropoulos lives near Palmer, Alaska with his wife and four young children.
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This paper identifies on some steps which can be taken to become more proactive and effective in code enforcements.

Identify the goal(s) and reason(s) for the enforcement.

The purpose and desired outcome of enforcement should be considered. Many times, code officials and attorneys simply react to a situation, complaints by neighbors or demands by elected officials. Rather than doing this, thought should be given to the reasons for and goals of enforcement. Proactive planning allows the enforcement officials to better control the case and be clear from the outset what the plan of enforcement will be, what the goal is, and what will the outcome look like. Clear expectations can eliminate a host of after-action complaints and criticisms. Some reasons for enforcement are:

   Practical – ex. violations need to be remedied because they are a barrier to further development, are impeding some public service or are causing other effects.

   Policy – ex. uniform enforcement of “x” portion of the code has been adopted as a policy. There are few, if any, exceptions because of the strong public interest involved and resources will be diverted to this important goal.

   “Because the code says so” – ex. the violation is in a remote area, does not affect anyone else, is not creating a danger, and there are 5,262 other cases. We are going after this one because it is in violation of the code.

   Benchmarks or performance standards to be met – ex. our goals call for “x” cases to be closed and “x” new cases to be opened. We need some easy ones to keep the numbers up.

   Complaint driven / political - ex. almost completely reactive to whomever complains. We drive by the same violation week after week, but nobody complains about it, so we quell the complaints instead.
Types of enforcement to serve the reasons/goals.

Depending upon your jurisdiction and your local ordinances, and the size of your city or county, there are several options for enforcement. There are pros and cons to some of them as well. The target of the enforcement and the reasons and goals of enforcement should be taken into account before decisions are made here.

Many times, there may be a policy or practice in place that simply allows anyone who wants to initiate a particular type of action. The benefits and issues of various enforcement actions should be considered.

Generally, a Civil Suit w/ Injunctive and/or Statutory Relief have the following applicable benefits:
1) Effective. Usually police will enforce a court order to have things happen. Even if the police are not involved, contempt can be a great motivator. Civil contempt can be used to compel future compliance with a court order;
2) Burden of proof is preponderance. The lesser standard than quasi-criminal cases are easier to prove. This may not be as big of an issue where structures are involved, but for use violations, it can be a larger consideration.
3) You get discovery – citations make discovery a one-way street and discovery can help fill in the blanks. It can also give you reason to ask for punitive damages.
4) Where an injunction is authorized by statute, the moving party need not show irreparable harm. The only burden is to show that the statutory requirements have been met.
5) Can get damages, fees, etc.

But, civil cases can have the following issues:
1) For some of the same reasons noted above, these cases can take much longer to reach a resolution.
2) Discovery, motion work, trial, etc. can be expensive
3) In the end, you may get a “You do it” order (i.e. writ). Everyone should be prepared and/or have funding available to carry out the clean up order.
4) Defendants may be judgment proof. If this is true, there will be little motivation for someone to comply with an order where the sanction is monetary.

On the opposite end of the courthouse spectrum, citations have some generally applicable benefits of:
1) Inexpensive. Compared to the expense of interrogatories, depositions, witness lists, exhibit lists and days in trial, citations are very inexpensive.
2) Quick. For the same reasons above, resolution is on a faster timetable.
3) Many jurisdictions allow presentation of a citation without an attorney. A properly experienced code official can be extremely effective.
4) Can be effective. Sometimes, violators are not looking to be scofflaws and many people are respectful of the court system. This can result in a situation where after conviction on a citation, there is a change of attitude and someone looks to have the city help them resolve the issues they have.
But citations can have the following issues:
1) Service rules can be fuzzy. For code violations, citations may have to be served in the same manner as other rules, these can be ambiguous. When in doubt, use personal service.
2) Higher burden of proof - beyond reasonable doubt. This can be of particular concern for use violations which may be sporadic, infrequent or are occurring in different locations.
3) Statutory interpretation. Rules of statutory interpretation as applied to criminal laws will resolve ambiguities in favor of the defendant.
4) Criminal rules may apply – check your local jurisdiction.
5) If presented without attorneys, the code officials need to know elements better and need to properly present the case or there will be no rebuttal.

Other types of enforcement are available which can be considered as well. These can vary by jurisdiction but the pros, cons and effectiveness should be considered when deciding how to enforce a code. These include:

- Criminal charges
- Administrative determinations and enforcement
- Letters / talking / working cooperatively, etc.

**Costs are a consideration.**

Everyone is faced with less resources and the same or greater demands. Consideration should be given to staff expenses, locality of enforcement, expense of gathering/preserving evidence and abatement. While pursuing a violation for garbage on the front lawn is not as exciting as chasing down the local drug dealer, it is enforcement of the laws. Law enforcement is never a money maker.

**Code Officials need to be armed with knowledge.**

Code officials who are responsible for administering the code, initiating enforcement investigations, gathering evidence, testifying, etc., need to know what they are doing. Poor administration, problems in gathering or retaining evidence and lack of understanding of the court process can undermine enforcement attempts. Practical advice to be professional and courteous can go a long way as well.

Many city and county employees have no idea about what an actual trial looks like. Many employees may have no background or improper experience/training in courtroom presentation and evidence gathering. Code officials should be trained on subjects like:
Be professional – anyone who appears in court more than once or twice a year has a reputation among the judges, clerks and other staff. Particularly with citations, when a case hinges on credibility or there is a weakness in the code, it will be invaluable for you to have a reputation of being honest and forthright. On the flipside, if judges constantly hear you are rude, overbearing and abrasive, it will start to rub off. Also, your elected officials will know your reputation (sometimes, even before they are elected). Perceptions can be hard to un-do.

The 4th Amendment to the U.S. Constitution and your State equivalent, be aware of it. There need not be an entire treatise or multiday training on the topic, but code officials should have general knowledge of some of the larger rules that apply to people acting on behalf of a governmental entity in the United States. Flagrant violations could lead to bad things. But note, the exclusionary rule may not apply to a variety of civil or administrative proceedings such as civil tax proceedings, civil deportations proceedings, administrative license revocation proceedings, etc.

Gathering evidence – the admissibility of evidence is one thing, gathering evidence is another. The rules of admissibility need not unduly influence gathering of evidence when talking to someone (ex. hearsay). Furthermore, any evidence gathered needs to actually be useable – consider your audience (a lay board, judge or jury) when deciding how much to rely on what types of evidence. Other things to know about when gathering evidence are:

- Look
- Listen
- Take
- Photograph
- Record*
- Write
- Talk and ask questions

Basic evidentiary foundations – it can be helpful for code officials to know what it takes to get things into evidence. That way, the necessary foundational items can be noted in the report (i.e. date, location, etc.) Some evidentiary foundations to review are:

- Photographs
- Statements
- Diagrams
A general overview can also be given of various topics so a basic understanding can be had of:

Demonstrative v. Exact Evidence (drawings, maps)
Direct v. Circumstantial and why not to be afraid
Fungible v. Non-Fungible evidence - chain of custody
Rule for cases (civil, infraction, criminal)
Case progression
Testifying
Legal Tips
Practical Tips

Elements of a case or charge

Training can also include a healthy dose of practical legal advice about a variety of things most people don’t know about courtroom practice like how defendants, witnesses and attorneys can act and react to conversations, inquiries, evidence and trial. Also, things like “Anything you say can and will be used against you in a court of law” - this always applies and works both ways.

Review the code.

Before deciding to take enforcement action once the facts are known (or suspected), be sure to review the code. There is nothing like a lawsuit to figure out what’s wrong with your code. Rather than have code weaknesses or issues brought up by opposing litigants (or worse, the judge) review the code to be enforced before moving forward. If there are potential weaknesses or flaws in the code, research can be done ahead of time to prepare to deal with them. At the extreme, amendments can be made to remedy issues. Areas of concern may be:

Definitions – a definition may read as generally applicable to the entire code or chapter. There may be exemptions and other definitions “for the purposes of this chapter.” In addition, definitions may not contain complete descriptions. Finally, there may be terms which are undefined, this will require a default dictionary.

Errors and omissions and mistakes

Bad references or references to non-existent code sections

Illegal delegation of powers / consent of neighbors

Class of offense (infraction, misdemeanor, both, neither)

Mental states – “permit” or “allow”
Finally, make sure the facts as know actually constitute a violation of the code when all these are taken into account.

Miscellaneous items.

Initial contact can set the tone for the entire action. Consider a proactive letter be it targeted or mass mailing. There are bound to be objections to the most innocuous letters. (See attached letter)

If citations are resulting in fines not being paid and violations persist, consider simultaneous execution on several judgments at once. If you are the prosecuting authority, criminal fines can be collected simultaneously with civil fines.

Don’t re-invent the wheel. Contact other departments, neighboring jurisdictions and other states to see what types of experience they have. Build on their experiences, use their pleadings and you can even cite to their cases as persuasive authority.

Consider building a strong administrative record as a first step. In an area of agency expertise, courts are more deferential and administrative review can involve the substantial evidence standard. This is particularly helpful when issues of reasonableness become an issue.
Exceptions to Exclusionary Rule.


Illegal delegation of powers.

J.E. Eubank v. City of Richmond, 226 U.S. 137 (1912)
Concordia Collegiate Inst. v. Miller, 93 N.E.2d 632 (N.Y. 1950)
State of Washington, Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (U.S. 1928)

Where injunction authorized by statute, there need not be a showing of irreparable harm.

United States v. Odessa Union Warehouse Co-Op, 833 F.2d 172 (9th Cir 1987)

Definition issues.

MSB 17.125.005(A) The definitions listed in this section shall apply to the words and phrases used in MSB Title 17 unless otherwise described within the individual chapters.

MSB 17.125.010 "Structure" means anything that is constructed or created and located on or under the ground, or attached to something fixed to the ground. For purposes of minimum setbacks and building separation requirements, the following are not considered structures unless specifically addressed by code: fences; retaining walls; parking areas; roads, driveways, or walkways; window awnings; a temporary building when used for 30 days or less; utility poles and lines; guy wires; clotheslines; flagpoles; planters; incidental yard furnishings; water wells; monitoring wells; and/or tubes, patios, decks, or steps less than 18 inches above average grade.

MSB 17.55 Setbacks and Screening Easements
MSB 17.55.004(A)(12) “Structure” means...

MSB 17.55.020 Setbacks for Shorelands

(A) Except as provided in subsection (B) of this section, no structure or footing shall be located closer than 75 feet from the high water mark of a watercourse or body of water. Except as provided otherwise, eaves may project three feet into the required setback area.
(B) Docks, piers, marinas, aircraft hangers and boathouses may be located closer than 75 feet and over the water, provided they are not used for habitation and do not contain sanitary or petroleum fuel storage facilities. Structures permitted over water under this subsection shall conform to all applicable state and federal statutes and regulations.

. . .

(D) In this subsection, a “structure” is any dwelling or habitable building or garage.

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MSB 17.30 Conditional Use Permit for Earth Materials Extraction Activities
(2005 version)

MSB 17.30.020 Applicability
(A) This chapter applies to all private and public lands in the borough except where the use is prohibited by ordinance within a special land use district. Where a special land use district regulates earth materials extraction as a conditional use, the granting of a conditional use permit shall require compliance with this chapter. Where this chapter is in conflict with the conditional use permit conditions of the special land use district, the more restrictive conditions shall apply.

(B) This chapter does not apply within the cities of Houston, Palmer or Wasilla.

(C) This chapter applies to commercial earth extraction activities less than 40 contiguous acres in size.

(D) This chapter does not apply when earth material extraction activity is conducted on a parcel for use on that parcel and is not intended for sale or transfer to third parties.

(E) An owner of less THAN 40 contiguous acres where earth materials extraction is not in existence as of the date of the enactment of this chapter is required to obtain a conditional use permit, or apply for designation as an interim materials district in accordance with MSB 17.28.

(F) An annual exemption from an administrative permit for 500 cubic feet or less annually.
Dear Property Owner:

You are receiving this letter because you own property in a Special Flood Hazard Area. This means that your property may be susceptible to flooding in any given year. As a participating community in the National Flood Insurance Program (NFIP), the Matanuska-Susitna Borough has adopted development standards to help prevent loss of life and property damage for all development in the areas of Special Flood Hazard. This program also makes federally backed flood insurance available to you. Building to specific standards can also lower insurance rates, which can potentially save a homeowner thousands of dollars.

Every 5 years the Federal Emergency Management Agency (FEMA) conducts a Community Assistance Visit (CAV) in the Matanuska-Susitna Borough. This visit is an inspection of our processes to ensure we are operating in compliance with the NFIP.

As preparation for this CAV, we are conducting an inventory for all parcels/lots located within the Special Flood Hazard Areas. During the inventory, we will be documenting all development that has taken place on these properties. To maintain compliance with the NFIP, we must ensure all development after May 1, 1985, has obtained a Flood Hazard Development Permit.

“Development” means any manmade change to improved or unimproved real estate, including but not limited to buildings or other structures, mining, dredging, filling, grading, paving, excavation, or drilling operations or storage of equipment or materials.

If development has occurred on your property after May 1, 1985, without a permit, please contact the Matanuska-Susitna Borough at 745-9853, to obtain more information on development standards and permitting requirements within the Special Flood Hazard Area. If you plan on developing your property, please contact us to obtain all permitting requirements.

Respectfully,

Code Compliance &
Permitting Divisions
Planning and Land Use Department
Matanuska-Susitna Borough