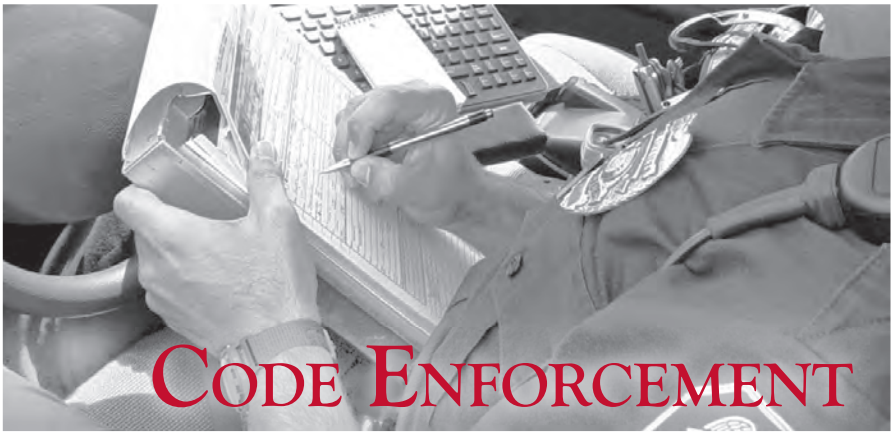

Code Enforcement

Enter At Your Own Risk

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Every single day code enforcement officers struggle to decide when they should or shouldn't enter onto private property. Attorneys advising in this area have a special responsibility because an officer who unlawfully enters property could potentially face personal liability.

It's settled law that the Fourth Amendment's warrant requirement applies to entry onto a private property to perform municipal or administrative code inspections or to abate known or suspected nuisances. *See Camara v. Municipal Court of City and County of San Francisco,* 387 U.S. 523 (1967); *Michigan v. Tyler*, 436 U.S. 499 (1978).

Even though the warrant requirement clearly applies as the general rule, it's been said that "reasonableness is the touchstone of the Fourth Amendment," and it is reasonableness that allows for the many exceptions to the general rule.

However, what is "reasonable" is far from settled, so facts are paramount, and courts seem to be all over the place. Since the jurisprudence on this issue is vast and complicated, this article will explore two recent cases dealing with the context of code enforcement officers: *Archer v. Gipson*, 108 F. Supp. 3d 895, 908 (E.D. Cal. 2015) (appeal pending) and *Davis v. City of Milwaukee*, 13-CV-982-JPS, 2015 WL 5010459 (E.D. Wis. Aug. 21, 2015), aff'd, 642 Fed. Appx. 627 (7th Cir. 2016) (unpublished).

Get Off My Curtilage!

In *Davis v. City of Milwaukee*, the court examined and denied a smorgasbord of legal theories brought under § 1983 by a *pro se* litigant. The case originated from the City's warrantless inspection of two rental properties owned by the plaintiff.

The City had an inspection policy that the court referred to as the "cable guy rule" where basically "if the cable guy [could] go there" then so could the City inspector. The City would not go through a locked gate, around a fence, or walk past a "No Trespassing" sign.

In this instance, the City performed "cable guy" inspections of the two subject properties by walking around the exteriors of the homes and writing up all visible violations. Even though the cases were docketed for municipal court, they were not ultimately pursued there for various reasons. However, the plaintiff was charged an inspection fee, and the § 1983 lawsuit commenced nonetheless.

The court found that the gravamen of the plaintiff's suit was whether or not the inspections violated the Fourth Amendment, and that question hinged on whether the inspector entered the curtilage; if so, did the entrance into curtilage violate a reasonable expectation of privacy.

Looking to the U.S. Supreme Court's four-factor test to determine whether an area constitutes the curtilage of the home (*United States v. Dunn*, 480 U.S. 294, 301 (1987)) the court considered: (1) the proximity of the area claimed to be curtilage to the home, (2) whether the area is included within an enclosure, (3) the nature of uses in the area, and (4) the steps taken by the resident to protect the area from observation by the public.

However, after articulating these factors the court failed to say exactly whether or not the inspector had in fact entered the curtilage, because the Court decided it wasn't entirely relevant. "Curtilage cannot define a defendant's reasonable expectation of privacy when the very same reasonable expectation is the basis for defining curtilage in the first place."

It was undisputed that the inspector trespassed when he inspected the property, but the court held that "trespasses alone are insufficient to establish a Fourth Amendment violation." (citing *United States v. Karo*, 468 U.S. 705, 713 (1984) ("an actual trespass is neither necessary nor sufficient to establish a constitutional violation.")

The court then stated, "[e]very trespass, by definition, invades someone's right of possession, but not every government trespass violates the Fourth Amendment," because "the Fourth Amendment does not protect possessory interests in land." *United States v. Kramer*, 711 F.2d 789, 794 (7th Cir. 1983) (citations omitted).

The court also noted that the searches performed here were administrative and regulatory—not criminal; therefore, they were inherently less intrusive. The Court cited to *Widgren v. Maple Grove Tp.*, 429 F.3d 575, 579 (6th Cir. 2005) for this proposition. *Widgren* held that a zoning administrator's walk up a driveway and past a "no trespassing" sign to observe a zoning violation was not a Fourth Amendment search because of both: the open fields doctrine as well as the idea that "a criminal investigation is generally more intrusive than an administrative or regulatory investigation."

Finally, the court noted that the property was vacant and admittedly abandoned at the time of inspection. Abandonment is relevant in that it weighs against privacy interests. The court concluded by quoting Judge Tone's dissent in a Seventh Circuit case: "[g]iven the Katz principle that the Fourth Amendment protects people and not places, ownership unaccompanied by either occupancy or any exhibition of an expectation of privacy or an intention to assert a privacy interest should not be sufficient for Fourth Amendment protection." *Wilson v. Health and Hosp. Corp. Of Marion Cnty.*, 620 F.2d 1201, 1219 (7th Cir.1980) (Tone, J. dissenting). The Court also cited to a barrage of cases that have held that empty houses have no curtilage to invade.

On appeal, the Seventh Circuit affirmed the lower court's decision and held that the "[plaintiff] has not identified a single case (nor can we) that applies Fourth Amendment protection to the unenclosed areas surrounding an unoccupied house and prohibits

observations of its exterior from those areas. And [the plaintiff] submitted no evidence that he resided in the house or used it or its yard for any private activities. In fact, he admits that he never lived there, and [the Inspector] was inspecting the property precisely because it had been vacant of any residents for more than 30 days." *Davis v. City of Milwaukee*, 642 Fed. Appx. 627, 629 (7th Cir. 2016) (unpublished).

One Man's Junk Is Another Man's § 1983 Liability!

Compare that result with another recent case, where the Court was not so friendly to the City. *Archer v. Gipson*, 108 F. Supp. 3d 895 (E.D. Cal. 2015) involved another *pro se* litigant who alleged a cornucopia of legal theories, and after several amended complaints and orders, the Fourth Amendment claims stuck.

The key difference here was that the Court drew a distinction between a search and a seizure, and in this case property was seized as part of a nuisance abatement. Clearly the terms "search" and "seizure" have obvious practical differences, but arguably those practical differences equate to legal differences in terms of Fourth Amendment reasonableness.

That is because whether or not a *search* is proper hinges on the individual's reasonable expectation of privacy, and whether or not that expectation of privacy is one that society is prepared to recognize. *United States v. Jacobsen*, 466 U.S. 109 (1984). However, a *seizure* is different because privacy rights need not be implicated at all to be unreasonable under the Fourth Amendment–merely affecting possessory or liberty interests can suffice. *Soldal v. Cook County*, 506 U.S. 56 (1992).

In this case, the City affected the Plaintiff's possessory interest in personal property by seizing a pile of construction materials from the front porch of a vacant home without permission or a warrant. The litigation arose after the Plaintiff sued the City for trying to assess a $937.36 lien for the cost of abating the pile. However, the court ultimately held that the City was not entitled to collect that lien, and in fact, they were on the hook for § 1983 damages.

The court found the City's actions *per se* unreasonable even though the pile of materials was in plain view from the public street, and the City could easily access the porch because the wire fence in front of it was in disrepair.

According to the Plaintiff, the pile had an estimated value of $6,000, and it were planning to use the materials when construction on the property resumed. But the materials sat there for about a year in disorganized fashion and in open view to the public street. Among other things, the City tried to argue that the pile of debris was dangerous because of nearby school children, and that the property owner had no expectation of privacy in what appeared to be an openly visible trash pile.

However, the court held that the emergency exception to the Fourth Amendment requires the "contemporaneous presence of actual and immediate serious consequences." The Court further pointed out that it took several months to initiate the abatement process and such a delay undermined any argument of emergency here. The court also disregarded the City's lack of privacy and plain view arguments, since the property owner had a *possessory interest in the materials* that were seized and that interest was violated by the abatement, rendering any privacy interests irrelevant.

The result of this case is particularly interesting in light of the fact that courts have held that "[s]earch or seizure of abandoned property, even without a warrant, is simply not unreasonable." *United States v. Wilson*, 472 F.2d at 902 (9th Cir.1972). Courts have also held that a warrantless entry into a house that *appears* to be abandoned, but is not actually abandoned, does not violate the Fourth Amendment when officers act on an objectively reasonable mistake of fact. *Olvera v. City of Modesto*, 38 F. Supp. 3d 1162, 1172 (E.D. Cal. 2014). However, the court made no mention of whether or not it was reasonable for the City to believe that the construction debris was abandoned on the vacant property, even though it had been sitting there for a year. The court simply accepted that the property was not abandoned based on the plaintiff's testimony.

Perhaps another big sticking point for the court here were questions of whether or not the City's abatement procedure was sufficient for due process in this case, when there were issues involving lack of notice and questions about whether a meaningful opportunity to be heard was had either before or after the deprivation. Maybe that is because the method of curing an improper search or seizure is dependent on the process that follows it. Courts have held that in some circumstances, the government can cure what would otherwise be an unconstitutional deprivation of life, liberty, or property by providing adequate post-deprivation remedies.

The typical remedy to an improper search is the application of the exclusionary rule to whatever evidence is gathered from that search in the following proceedings. However, it's questionable whether the exclusionary rule would apply in the context of a municipal abatement hearing, which is civil in nature; and regardless, the exclusionary rule is not enough to remedy an improper abatement, since the property seized during the abatement is usually destroyed and may have some value even if the City considers it "junk."

So, let's boil it down. What do we learn from these two cases? First, "cable guy" inspections are ok, and subject the City and the inspectors to minimal risk of liability. Second, when the City proposes to seize or abate property – enhanced procedural protections should be added. Here are some suggestions: 1) Make sure to consummate notice to the property owner *and* all other potentially interested parties beforehand. 2) If you are arguing that the abatement is necessary due to an emergency, then act quickly. Any delay will undermine your argument that it is in fact an emergency. 3) If it is not an emergency, and there is arguably some value to what is to be abated, consider getting a warrant. 4) The more valuable the property to be abated is (or could be argued to be worth), then the more process – pre- or post-deprivation, should be had in order to minimize risk and give the City an opportunity to cure.

And remember:

"Whether [junk] has little or great value, it is constitutionally protected property." *Price v. City of Junction*, 711 F.2d 582, 589 (5th Cir. 1983).

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