

Code Enforcement

Human Nature vs. Code Enforcement– Part I: Let the Battle Begin

by David Wesner

I considered using the title "Human Nature *and* Code Enforcement;" however, upon reflection, I think "versus" reflects the reality of what municipal code officials face every day. Municipal attorneys, as well as code officials, know that human nature can be an extremely difficult obstacle when it comes to code enforcement. The myriad personality types that we come across on a regular basis always leave us guessing as to how to reach the desired outcome of compliance in any particular circumstance. Many pre-law undergraduates are encouraged to take philosophy courses; I would suggest, instead, psychology, or even sociology, classes. Philosophical discussions on the law may make for interesting dinner conversation, but they don't help address the reality that is code enforcement. We truly need a good understanding of human nature and behavior if we ever hope to get through to people, and, while such an understanding might not help us achieve the desired goal of compliance, it will help us determine the best course of action as we step into a situation.

The easiest types of individuals to work with are the ones who are merely forgetful or lazy, or who are simply unaware of the code requirements that bring the municipality to their doorstep. You don't need much psychology to recognize such individuals. They are usually very agreeable, polite, and apologetic over creating the situation. Knowing our code enforcement staff to be courteous and fair, the desired goal of compliance can be reached speedily and easily. Strict code enforcement is likely not necessary (and may actually cause the individual to "get their dander up," making compliance more difficult).

A person that's harder to work with is the obstinate and obstructionist type. This type believes that government should never interfere with private citizens and that citizens should be allowed to do whatever they want on their property (until, of course, their neighbor does something undesirable, whereupon they want the municipality to jump on the neighbor with both feet). Since this type is so opposed to government interference, compliance will never be easy. You'll not only face a battle in dealing with this individual, but you may end up battling your elected officials over their belief that the individual can and should correct the problem immediately. In such situations, code enforcement staff will have their work cut out for them, and only steadfast enforcement efforts will likely get the desired result. One situation I dealt with involved a small business owner. His response to me when I got involved was that he did not earn enough from the use of the building, so he wasn't going to do anything. The business, in fact, did very well and he was fully capable of correcting the problem. So, unfortunately, we had to take the hard road to gain compliance.

I think the hardest type to deal with is the individual who has no concept of the societal "norm" when it comes to keeping a house and property clean, livable, and in good repair. Some individuals may want to correct the problem but don't really have the means to get the job done, but most in this category just don't understand that the junk piles around the yard and in the house creates health issues for the neighbors (as well as their own family), and surely don't understand why they can't be allowed to accumulate "stuff." Strict or steadfast enforcement likely won't work because the penalties (paying fines) don't make a difference to someone who does understand that he doesn't have money to pay. Strict enforcement also will not likely change the behavior that led to the problem. If the offender doesn't understand the problem, he certainly won't understand that enforcement is supposed to teach him to keep his house and property clean and orderly.

My experience with one such type is an example of how difficult it may be to achieve compliance. The individual was a "collector" with a pick-up truck and trailer that he drove around town, picking up anything and everything. He'd add these to his "collection," both inside and outside his house. When code enforcement staff met with him, he did not understand why he couldn't do what he was doing. He did not remedy the violations after these conversations and letters from code enforcement staff, so he was ordered to pay a fine and correct the violations. An order for per-day fines was imposed against him subsequently in the hope that that would get him to finally begin correcting the violations. Needless to say, that didn't work, either. At one point, I told him that he could go to jail for not paying the fines and, more importantly, for not correcting the violations. He said he didn't care. When he was released from jail, he advised me that it didn't have any impact on him. I informed the mayor and code enforcement staff that the only way to remedy the situation would be to have the city correct the violations, and I imposed a continuing order that, if the property was not maintained, the city would clean it up. We were not happy about spending municipal funds to maintain a private individual's property, but, in the circumstances, it was the only effective solution for dealing with this individual.

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containers and wrappers; and where the customer paid before eating. The plaintiff company bought property in the Village that was subject to the ban. One of its potential tenants was a national chain sandwich shop. The company sought to invalidate the ban on the basis that the prohibition of FFFRs was based solely upon ownership and was unlawful, unconstitutional and void, premised on the fundamental rule that zoning dealt with land use and not with the person who owned or occupied the land. The ban, it alleged, was based on the nature or identity of the owner or operator, and not upon the land use itself. The court disagreed: the FFFR ban was not based "simply upon who owns or operates the restaurant. The challenged Code is not 'plainly personal' and does not seek to regulate a specific entity," but was a neutral rule that applied to the entire business district, and addressed conduct that affected the character of the community. *Mead Sq. Commons, LLC v. Village of Victor*, 930 N.Y.S.2d 431, 2011 N.Y. Misc. LEXIS 4630 (N.Y. Sup. Ct. 2011). ML

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immunities secured by the Constitution and laws...") (emphasis added). What I, among others, have been awaiting is the right set of facts to determine if a city also can be an injured "other person within the jurisdiction" of the United States for the purpose of being a civil rights plaintiff. In *South Macomb Disposal Authority v. Washington Tp.*, 790 F.2d 500, 503 (6th Cir. 1986), the Sixth Circuit confronted this situation and opined:

> We are of the opinion that in light of *Monell*, it would be a strained analysis to hold, as a matter of statutory construction, that a municipal corporation was a "person" within one clause of section 1983, but not a "person" within another clause of the same statute. Rather, we believe the outcome in this case is dictated by a different body of law, which analyzes whether the appellant, as a municipal corporation, may assert constitutional claims against its creating state, or political subdivisions thereof, and, if so, in what context may it assert such claims. *See, e.g.*, Appling County v. Municipal Electric Authority of Georgia, 621 F.2d 1301, 1308 (5th Cir.) (per curiam), *cert. denied*, 449 U.S. 1015, 101 S.Ct. 574, 66 L.Ed.2d 474 (1980).

In a footnote, the court added that, in *Moor v. County of Alameda*, 411 U.S. 693 (1973), the Supreme Court stated that section 1983 was enacted to provide a new remedy to "private parties," although the Fifth Circuit had concluded that a municipal corporation was not such a "private party" entitled to section 1983 relief. However, after *Monell*, the Sixth Circuit concluded that whether a municipal corporation was or was not a "private party" did not necessarily pose the correct question, and declined to focus on that inquiry. The court resolved the *South Macomb* case on the constitutional grounds that one political subdivision of a state lacked standing to challenge the constitutionality of the acts of another political subdivision of the same state. 790 F.2d at 505. But what if a city sued a business corporation or individual acting under color of state law for a violation of the city's federal constitutional or statutory rights? An aside: What is a "private party" in the sense used by the *South Macomb* court? Is a publicly-traded business corporation a "private party"? What about a city official or employee?

5. *See, e.g.*, Fed. R. Civ. P. 1 (rules "should be construed and administered to secure the just, speedy, and inexpensive determination").

6. Of course, business corporations, unlike municipal corporations, are often considered "persons" for Bill of Rights purposes. The way that corporations sidled their way into constitutional personhood is a pretty frightening tale, but not my subject today. *See* Katie J. Thoennes, *Frankenstein Incorporated: The Rise of Corporate Power and Personhood in the United States*, 28 HAMLINE L. REV. 203 (2005), particularly the discussion of *Santa Clara Cnty. v. Southern Pac. RR Co.*, 118 U.S. 394 (1886), in *Frankenstein* at 209 *et seq.* No discussion on this general topic would be complete without mention of *Citizens United v. Fed. Election Com'n*, 130 S. Ct. 876 (2010). Consider it mentioned.

7. *See, e.g.*, Texas Workers' Comp. Com'n v. City of Bridge City, 900 S.W.2d 411, 414 (Tex. App.-Austin 1995, writ denied).

8. The U.S. Supreme Court articulated the doctrine as follows:

> [T]hat whenever a party who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy.

Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 244–45 (1933) (quoting John Norton Pomeroy, A TREATISE ON EQUITY JURISPRUDENCE AS ADMINISTERED IN THE UNITED STATES OF AMERICA § 397 (4TH ED. 1918)).

9. *See* T. Leigh Anenson, *Limiting Legal Remedies: An Analysis of Unclean Hands*, 99 KY. L. J. 63, 65 (2010-2011). ML

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Because human nature is what it is, you may run into situations where you first believe the individual is a particular type, only to find out later he is completely different. In light of that, I believe one of the most beneficial ordinance provisions is one that allows a city to correct violations and charge the costs to the responsible person if he can't (or won't) correct them. Although it's a difficult proposition to spend tax dollars to clean up or otherwise correct violations on private property, the alternative—letting the problem continue or get worse—is not very appealing, and you'll likely have elected officials and neighbors pounding down your door to get the problem corrected.

Good luck in your battles. ML