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Regulating Short-term Rentals: A Federal Circuit Roundup

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CONTENTS

NOVEMBER / DECEMBER 2024

REGULATING SHORT-TERM RENTALS: A FEDERAL CIRCUIT ROUNDUP
By: Katie Hodgdon, Association Counsel, Association of Towns of the State of New York, Albany, New York
Airbnb and other short-term rental apps have revolutionized lodging worldwide—in the process reducing the stock of residential housing and driving rents skyward. Local governments across the US have instituted a range of mechanisms to slow the negative impacts, often encountering legal challenges.
PAGE 6



DEPARTMENTS

14 INSIDE CANADA
Irresponsible Downspouts, Fees to Losing Parties, Non-Vicious Dogs, and More.
By: Monica Ciriello, Director of Municipal Law and Licensing Compliance, City of Hamilton, Ontario
Recent Canadian cases of interest.

16 DAY IN THE LIFE
From Thunder Bay to Toronto
By: Avery Morris, IMLA Editorial Staff
The journey to service as lead lawyer in Canada's biggest city.

18 AMICUS
Where We've Been, and What's Ahead
By: Erich Eiselt, IMLA Deputy General Counsel and Director of Legal Advocacy
A review of IMLA's advocacy last Term, and a look forward.

20 CODE ENFORCEMENT
Protecting Health and Safety: Administrative Search Warrants vfor Beginners
By: Katie Leininger, Assistant City Attorney, City of Pearland, Texas
The pivotal role played by ASWs in enforcing code provisions.

24 LISTSERV
Unwanted Visitors on Main Street
By: Brad Cunningham, Municipal Attorney, Lexington, South Carolina
Disaster recovery after *Helene* and *Milton*.

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CODE ENFORCEMENT

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Protecting Health and Safety: Administrative Search Warrants for Beginners

INTRODUCTION

As we all hopefully learned in law school, a search warrant is a court order authorizing agents of a governmental body to search one or more persons and/or places and potentially confiscate evidence of a criminal act from the person or place. Federal and state laws authorize the use of search warrants by specified agents of the government in certain circumstances. The Fourth Amendment to the United States Constitution states in part "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[1] In similar ways, the states' individual constitutions and statutes also outline the general expectations and specific requirements for a valid criminal search warrant.[2]

What is an Administrative Search Warrant? An Administrative Search Warrant (ASW) is a specific type of search warrant authorizing government employees responsible for enforcement of health and safety statutes and ordinances to inspect properties thought to harbor health and safety violations, rather than authorizing searches based on suspected violations of criminal laws. ASWs typically permit non-peace officers to conduct warrant searches. Although probable cause is still required to obtain an ASW, the facts permitted in an affidavit supporting an ASW are often much broader than in a traditional criminal search warrant. For example, in the ASW context the Texas Code of Criminal Procedure allows the magistrate to consider an affiant's specific knowledge of the property as well as (1) the age and general condition of the premises; (2) previous violations or hazards found present in the premises; (3) the type of premises; (4) the purposes for which the premises are used; and (5) the presences of hazards or violations in and the general condition of premises near the premises sought to be inspected.[3] As with criminal warrants issued pursuant to the Fourth Amendment, there is extensive case law outlining when and in what circumstances the ASW may or must be obtained prior to conducting an administrative search to determine whether health and safety violations exist at a specific location. ASWs are required for most administrative health and safety type searches.[4]

The federal case law requiring an ASW in most health and safety searches originates with *Camara v. Municipal Court*, a 1967 Supreme Court decision arising from a San Francisco city ordinance authorizing city building inspectors to enter any building at a reasonable time in furtherance of their code enforcement duties.[5] In *Camara*, the Court extended the same Fourth Amendment protections to administrative searches it previously granted to searches by government officials seeking "evidence of criminal action."[6] The Supreme Court clarified *Camara* in *New York v. Burger* by creating a three-part test to articulate when "closely regulated" industries have a reduced expectation of privacy and therefore, may be subject to warrantless searches by government inspectors despite *Camara*'s general Fourth Amendment protections.[7] Under the *Burger* test, a warrantless inspection will be found reasonable only if a "substantial" government interest exists, the warrantless inspections are necessary to further the regulatory scheme, and the inspection program provides a constitutionally adequate substitute for a warrant.[8] The Supreme Court then reminded cities in *City of Los Angeles v. Patel* that the Fourth Amendment exceptions to the ASW requirement outlined in case law are intentionally narrow: "the closely regulated industry…is the exception," not a rule extending to broader groups such as Patel's hotel or the hospitality industry as a whole.[9] The practical version of case law in this area: get the ASW before you conduct your search.

The job titles of personnel authorized to seek the ASW may vary from one state to another. Texas specifically permits fire marshals, health officers, and code enforcement officers to obtain an ASW to conduct an inspection of residential or commercial private property if they can show "probable cause to believe that a fire or health hazard or violation or unsafe building condition is present" at the specified premises.[10] For whomever among your city staff is au-

thorized by law to obtain one, the ASW makes it possible for city staff with a background in ICC codes and/or health and safety ordinances to gain access to properties whose owners are uncooperative, noncompliant, or actively creating or permitting unsafe conditions that endanger themselves or the larger community. Once access is granted, staff observations from an administrative search may be used as basis for a variety of further enforcement actions, including filing civil or criminal cases, seeking injunctions, and so on.

Drafting an Administrative Search Warrant

The ASW is composed of three parts: the affidavit, the warrant, and the warrant return. The longest section of the ASW is usually the affidavit, which contains the factual basis for why city staff are requesting permission to search the property. The warrant and the return are usually much shorter, often a single page each, and tend to look very similar from one ASW to the next.

Pro tip: legal review of the warrant affidavit, before presentation to the magistrate, is worth your time.

The affidavit underlying the request for an ASW should be drafted by someone familiar with the current conditions at the nuisance property as well as supporting information, including the property/owner's criminal or civil case history, other nearby properties with similar problems, number or frequency of complainants, relevant statutes and/or ordinances, etc. The affidavit must contain the "substantial facts" (factual basis) to explain why the affiant wishes to search the named property.[11] Depending on what your statutes permit, the affidavit underlying an ASW may summarize facts from months or years of complaints about and/or documented problems at the nuisance property. In practice, an affidavit accompanying a request for an ASW may include information gathered by multiple staff members over an extended time period. Ultimately, however, it is a single affiant who signs the affidavit before a magistrate 1) to certify s/he has statutory authority to search the property; and 2) to certify th e contents of the affidavit are true and correct.[12]

The warrant itself must contain certain information, usually specified in state law; a failure to include all required elements in the warrant may mean the magistrate denies your warrant request, or a court later decides you did not have valid authority to conduct the search.[13] Check your state's requirements, but when drafting a Texas ASW, the warrant must be properly titled pursuant to state law; it must sufficiently identify what is to be seized (if anything) and the name or description of the person, place, or thing to be searched; and it must command the authorized individuals to search forthwith the person, place, or thing.[14] A Texas ASW must also be dated and signed by the magistrate, with the magistrate's name appearing in clearly legible handwriting or typewritten and paired with the magistrate's signature.[15] The date and hour of issuance must be listed on the Texas ASW and the document must affirm the person signing the affidavit has statutory authority to search and s/he has established probable cause.[16]

Pro tip: make sure the person drafting the affidavit actually knows facts and history of the property they wish to search.

The warrant return is a document provided to the court after a warrant search is complete; it informs the magistrate when and in what manner the issued warrant was executed.[17] If any property is seized during the warrant search, an inventory of such much be provided to the court. Seizure of items is relatively unusual in the ASW context. Anecdotally, seizures tend to be either neglected animals or items associated with criminal activity left in plain view at the time of the search. Although administrative warrant searches sometimes uncover criminal activity, staff should be familiar enough with the property to know in advance whether the warrant search of a particular property is likely to lead to a seizure of any property. If staff think execution of an ASW may reveal evidence of criminal activity, they should consult with the City's legal advisor and/or law enforcement to prepare for such an eventuality before executing the search warrant.

Pro tip: if you think it might also be a drug house, prepare for your search as if it's a drug house.

Once all three parts of the document have been drafted, the affiant presents the ASW to an authorized magistrate for approval. Check your state laws to determine which magistrates may issue a warrant. In Texas the list includes municipal court and county court judges who are licensed attorneys in Texas, statutory county court judges, district court judges, judges of the Court of Criminal Appeals, justices of the Supreme Court of Texas, and other magistrates with jurisdiction over criminal cases serving a district court.[18] The affidavit should be signed by the affiant in front of the magistrate. Once the magistrate reviews, approves, and signs the warrant, the affiant, and other staff as appropriate, n authorized to execute the warrant at the property listed on the ASW. If you conduct a property search without following the proper procedural steps, you may not be able to use the information obtained during your warrant search in later criminal or civil cases, and you may become the subject of a § 1983 claim or other civil lawsuit.

Continued on page 22



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Execution of the Administrative Search Warrant

Before getting a magistrate's signature, know how long your state laws allow for an ASW to be executed (also commonly described as "served") after the warrant is signed by the magistrate. In Texas the affiant has three *calendar* days after the warrant is signed to visit the property and inspect it for violations. As much as possible, staff should plan ahead to ensure all relevant departments are aware of an anticipated ASW search, so relevant departments/staff are able to participate in execution of the ASW. The affiant who requested the ASW should execute the ASW, but be aware, the group of people whose subject-matter expertise is needed during execution of the warrant can rapidly grow to include staff from multiple other departments, depending on the nature of the complaints and conditions at the property subject to search. At a minimum, consider whether one or more peace officers should be present to clear structures and ensure staff safety. Although surprises can and do happen, thorough planning usually leads to a more efficient, effective search of a nuisance property.

Pro tip: confirm you will have a magistrate available to sign your ASW before gathering staff to execute the ASW.

If the execution of an ASW leads to plain view observation of criminal activity, such as narcotics packaged for sale, abused animals, illegal weapons, etc., staff should immediately pause their administrative search. If your search team does not include peace officers and/or legal counsel, staff should immediately contact law enforcement and/or their city's legal counsel because it may be appropriate to seek a criminal search warrant based on staff members' plain view observations. The Texas appellate court in *Cardoso v. State* decided searches based on ASWs may lead to valid criminal charges even if the ASW itself lacks specific dates or times, because complaint history listed in an affidavit for an ASW can indicate a course of conduct.[19] Other states may have similar helpful case law to support later prosecutions based on staff observations during the execution of an ASW.

If a criminal search warrant is sought by law enforcement, when possible, staff should hold the property based on their ASW authority (to avoid destruction of evidence, etc.) but take no additional actions to continue the administrative search. The administrative search authorized by the ASW should resume only after the criminal warrant execution has been completed and any people or items seized pursuant to the criminal warrant. Staff who were originally executing the ASW should release the property back to the owner or occupant only after all warrant search activities, administrative and, where applicable, criminal, have been completed. When in doubt at any point in this process, staff should seek guidance from their legal counsel to prevent problems in later civil or criminal cases.

Pro tip: bring bug spray and hand sanitizer to your warrant search; take your own pictures. Warrant return

Before executing the ASW, know when the return must be provided to the magistrate who issued the warrant.[20] For our ASWs, this notice includes informing the magistrate of the date, time, and the location of the search within three days after the search is completed. If any property is seized, the warrant return generally must include an inventory of what property was seized, by which person, and based on what authority. When circumstances allow, it is helpful to plan the execution of a search warrant at a time and on a day that will not make warrant return difficult for your affiant. For example, if the ASW is issued on Thursday afternoon and not executed until Friday afternoon, staff may be statutorily required to submit the return to the magistrate before they (and possibly your magistrate) are back at work the following week.

After the inspection – civil and criminal enforcement

Once the property inspection has been completed and the warrant return has been provided to the court along with any inventory of property seized, staff should work with legal counsel to determine next steps. Each property is different, with its own combination of violations and concerns. Depending on state laws, type of city, and what ordinances your governing body has enacted, you may have multiple options to seek abatement of nuisance conditions. Thoughtful drafting of ordinances and adoption of international codes can give a city powerful tools to eliminate nuisance structures if staff (and elected officials) can be patient and allow the enforcement process to take place.

Seeking voluntary abatement by a property owner, lienholder, tenant, or other person with authority over the property (collectively, "owner") should often be the first option you consider. Voluntary agreements for a timeline of what abatement work will be completed and on what timeline can be successful in some circumstances. Alternately, if the owner would like to correct the nuisance conditions, but is physically or financially unable to do so, the city may consider creating a written agreement with the owner wherein the city agrees to pay costs to complete the work necessary to abate the nuisance conditions. Such an agreement might include a payment plan for the owner to reimburse the city or acknowledge the city's inten-

tion to place a lien on the property and obtain reimbursement later, when the property is sold.

Pro tip: you probably want your city to draft the agreement; document and verify the property owner understands the agreement.

If, however, the owner does not agree with city staff on how best to abate the nuisance conditions, or the owner is absent, deceased, or otherwise unavailable, filing a civil lawsuit and/or criminal charges may be an appropriate next step to abate the nuisance conditions at the property. Multiple Texas statutes authorize municipalities to bring a civil action to enforce various types of health and safety ordinances.[21] Your state may have similar laws and, if you're lucky, your city may also have adopted ordinances creating a process for civil nuisance abatement lawsuits to be filed in your municipal court. Filing a civil nuisance abatement case in municipal court, if the option is available to your city, can simplify filing the case, scheduling a hearing, and arranging for staff to appear as witnesses at a court setting.

If your state authorizes municipalities to adopt ordinances to require vacation, relocation of occupants, securing, repair, removal, or demolition of a building that is dilapidated, substandard, or unfit for human habitation and a hazard to public health, safety, and welfare, such ordinances are another useful abatement tool.[22] Certain requirements must be met for such an ordinance to be valid and then serve as the basis for a civil suit in Texas. If a lawsuit is filed and an owner is ordered to secure a building or to repair, remove, or demolish a building, failure to comply with the court-ordered timeline may result in the city being authorized to abate nuisance conditions including a dilapidated, substandard, or hazardous structure. Cities often have some flexibility to define (based on "community standards") what conditions may lead a property to be found dilapidated, substandard, or unfit for human habitation.

Depending on state laws, criminal charges filed after the ASW search may be based on your city's adopted ordinances, any international codes your city has adopted, or state laws. Many civil or misdemeanor violations are easily documented with photography during an ASW search. Filing some health-and-safety-type criminal charges will require taking samples of soil or water to test for pollutants, such as in cases of illegal dumping of oil or other substances. These situations may also lead to criminal charges, a civil nuisance abatement, or civil seizure proceedings as outlined in the Texas Health and Safety Code or other similar statutes.[23]

Pro tip: be aware of overlapping regulations and enforcement authority in state laws, ordinances, and adopted international codes.

If your city is receiving complaints about certain types of ongoing criminal activity at a particular location, you may want to check whether your state laws provide a cause of action to abate a common nuisance. In Texas a "suit to enjoin and abate a common nuisance described by Section 125.0015(a) or (b) may be brought by an individual…or by a district, county, or city attorney."[1] The list of nuisance activities that may fit within the scope of this cause of action includes but is not limited to drug sales, gambling, prostitution, graffiti, criminal mischief, and illegal massage services.[2] These suits may be brought against an owner, a party to the use, or even an action *in rem* against the property itself.[3] Some general enforcement authority is also granted to cities in Texas Health and Safety Code Chapter 121, the "Local Public Health Reorganization Act."[4] This chapter outlines the authority of local public health authorities, which for many cities would be your county, but it also helpfully creates processes for a city to work with its county health department to enforce and abate nuisance conditions. Partnering with other governmental bodies may be another option to achieve permanent abatement of nuisance conditions. Familiarizing yourself with which circumstances allow for such partnerships may, in the right circumstances, save your city substantial time and money.//

Cities may also have limited authority to proactively abate certain specific nuisance conditions, but guidance from legal counsel should be sought before taking action to abate nuisance conditions without first obtaining a court order. Depending on circumstances, your city may be able to proactively abate common nuisance conditions including weeds and high grass,[5] mosquito issues,[6] junked vehicles,[7] or other problems endemic to your state, based on authority granted in state law.

CONCLUSION

Requesting and executing an ASW can be an important step in evaluating nuisance properties to determine what, if any, civil or criminal enforcement actions should be taken. The information obtained during a warrant inspection of a property can provide a factual basis for filing one or more cases leading to successful nuisance abatement even if, or after, other methods of enforcement have been unsuccessful. City staff who are so authorized should become familiar with the requirements for obtaining an ASW and the limitations on authority granted by an ASW. ML

Code Enforcement *cont'd from page 27*

NOTES

1. U.S. Const. amend. IV.
2. Alaska R. Crim. P. 37; Georgia Const. art. I, § 1, Para. XIII; 21 OK Stat §1266.8 (2023); Tex. Const. art. I, § 9; Tex. Code of Crim. Proc. Ch. 18.
3. Tex. Code of Crim. Proc. § 18.05.
4. Camara v. Municipal Court, 387 U.S. 523 (1967).
5. *Id.*
6. *Id.* at 530.
7. New York v. Burger, 482 U.S. 691 (1987).
8. *Id.* at 702.
9. City of Los Angeles v. Patel, 576 U.S. 409 (2015).
10. Tex. Code of Crim. Proc. § 18.05(b).
11. Tex. Code of Crim. Proc. § 18.01(c).
12. Tex. Code of Crim. Proc. § 18.05.
13. *Camara, supra* note 4, *Patel, supra* note 9.
14. Tex. Code of Crim. Proc. § 18.04(1), (2), and (3).
15. Tex. Code of Crim. Proc. § 18.04(4) and (5).
16. Tex. Code of Crim. Proc. § 18.04, 18.05, and 18.07(b).
17. Tex. Code of Crim. Proc. § 18.10; see also 18.06(a) and 18.07(a)(3).
18. Tex. Code of Crim. Proc. § 18.01(c), (d), (i), and (j).
19. Cardoso v. State, 438 S.W.3d 815 (Tex. App.—San Antonio 2014).
20. Tex. Code of Crim. Proc. § 18.10.
21. Tex. Local Gov't Code § 54.012; Tex. Local Gov't Code § 214.001; Civ. Prac. & Rem. Code §125.002.
22. Tex. Local Gov't Code § 214.001.
23. Tex. Health & Safety Code § 821.022 and 821.023.
24. Tex. Civ. Prac. & Rem. Code § 125.002(a).
25. Tex. Civ. Prac. & Rem. Code § 125.0015(a).
26. Tex. Civ. Prac. & Rem. Code § 125.002(b).
27. Tex. Health & Safety Code § 121.003.
28. Tex. Health & Safety Code § 342.008.
29. Tex. Health & Safety Code § 341.019.
30. Tex. Transp. Code Ch. 683, Abandoned Motor Vehicles, Subch. E Junked Vehicles: Public Nuisance; Abatement.

Inside Canada *cont'd from page 15*

care and control at the time of the incident, and the Board noted that a dog running at-large is an issue that is separate and apart from a designation and did not support a claim of aggressive behaviour. Lastly, the Board found the City's delay in pursuing the designation of the dog problematic, noting that there was a year-long gap between the incident and the designation decision. Based on these factors, the Board removed the vicious animal designation from the Appellant's dog, finding that neither the severity of the injury nor the demonstrated risk to public safety justified a designation under the City's Bylaw. Designation removed.

Slap on the Wrist or a Keen Demonstration of Proportionality?

Toronto (City) v. Adamson Barbecue Ltd., 2024 ONCJ 525 https://canlii.ca/t/k7br3

The Defendant was charged by the City of Toronto ("City") for operating a food service business without a licence. The Court found that the Defendant was aware of the City's licensing requirements, yet continued to operate his business despite receiving multiple warnings. The Defendant was found guilty of 17 counts of operating without a licence. This matter concerned the sentencing of the Defendant, and the City sought $1,500 per conviction, totaling $25,500.

HELD: $1,500 fine imposed on 10 counts.

DISCUSSION: The Defendant's contraventions were governed by the City of Toronto Municipal Code Chapter 545, Sections 2A (33) and 2A (34), mandating licenses for refreshment places and refreshment vehicles within the City. Penalties are set to allow for fines up to $25,000 per infraction. The City proposed a $1,500 fine per conviction, while the Defendant requested a reduced penalty without specifying an amount. The Court highlighted that sentencing for regulatory offences prioritizes deterrence, emphasizing compliance with municipal licensing to uphold public safety and health standards in business. While emphasizing the importance of public safety and deterrence, the Court also carefully considered the principles of proportionality and totality to ensure a fair and just outcome.

For proportionality, the Court must ensure that the sentence is proportionate to the offence. In this case, while there was no evidence of actual harm, the potential harm to the public from an unlicensed restaurant is significant. The Court found that the Defendant's non-compliance undermines these core protections, when it continued to operate unlicensed for over 10 months despite being aware of the violations and failing to remedy them. The Court was satisfied that the Defendant knew the responsibility and failed to obtain a licence. The principle of totality applies where a Defendant is convicted of multiple offences. In this case, the Defendant was charged and convicted of a total of 17 offences. The Court relied on *R v. Parry*, 2012 ONCA 171, finding that the total sum of all penalties should not exceed the overall gravity of the offence. The Court demonstrated a balanced approach to sentencing in regulatory offences, imposing a fine of $1,500 on 10 of the 17 convictions for a total fine of $15,000. The Court suspended the sentenced for the other counts due to the sheer number of charges laid against the Defendant. ML