TRAINING YOUR CODE ENFORCEMENT OFFICERS

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City of San Antonio
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Topics

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Investigating: Admin Warrants & Documenting Code Offenses

02

Litigation Choices: Administrative, Criminal, or Civil

03

Case in Point:

PAIP lawsuit (Federal Western District/5th Cir.)

Investigating and Documenting Code Cases



Investigating Code cases . . . Properly

We train our Code officers on this topic regularly

The officers are tasked with gathering ALL the evidence to be used at trial.

The strength of a case can be measured by the ***admissible*** amount of supporting evidence collected.

Building strong cases is a great way to avoid trial.

The evidence collected should show the basis for prosecution/litigation.

Investigating Code cases . . . Properly (cont.)

Types of evidence used in trial:

- Notes – Officer Testimony (what you observed)
- Admissions by Defendant or Agents of the Defendant
- Photos/Videos/Audios relevant to the violations/offenses/condition of the property
- Witness statements or observations

FILING SUCCESSFUL CASES

INSPECTION/EVIDENCE GATHERING

1) The single most important stage of the filing process.

2) This is where you are tasked with gathering ALL the evidence we can use at trial.

3) The strength of a case can be measured by the amount of supporting evidence collected.

4) Building strong cases is a great way to avoid trial.

5) The evidence you collect will be the basis for writing your affidavit.

INSPECTION/EVIDENCE GATHERING

1) Types of evidence:

a) Notes – Your Testimony (what you observed)

b) Admissions by Defendant

c) Photos

d) Witnesses

*** Try to check all four boxes when building your case.

INSPECTION/EVIDENCE GATHERING

NOTES

You must keep detailed notes which contain all your observations, conversations, and overall investigatory items relating to the particular case. This report is important because you will need to refer to it later to refresh you memory if you have to testify in court. Understand that this could be many months later.

- Details add credibility to your testimony
- Write down what defendant/witness tells you
- List observations that relate to elements of the violation
- Write down what you see

INSPECTION/EVIDENCE GATHERING

ADMISSIONS BY DEFENDANT

Easily the single best piece of evidence of any wrong doing. Think about it, if I am the defendant and I want to dispute a citation. Am I going to set it for trial if you have the date and time of a detailed quote where I admit I violated the law.

- Write down what was said and when it was said
- You will be able to testify to any admission stated by the defendant
- Make it a habit to take notes on anything relevant said by defendant or anyone working or living with him/her.
- Ask questions that may illicit an admission or culpable statement
  - Do you know why I am here?
  - Any reason you haven't picked up this debris or build this structure on the setback?
  - Do you have a permit? Do you know what your property's zoned use is?

INSPECTION/EVIDENCE GATHERING

PHOTOS

An excellent way to build a strong case. Photos are typically conclusive pieces of evidence that are exceptionally helpful to win these cases at trial.

- Take Photos:

  1) of violation focusing on the elements we need to prove at trial

  2) of required by law notices

  3) Use a yard stick, ruler, etc. if a unit of measure is required for an element of the citation

  4) Remember: If some is good, more is better. Take LOTS of photos (up close, far away, each element)

INSPECTION/EVIDENCE GATHERING

WITNESSES

Witnesses can offer great supporting evidence and can potentially testify at trial corroborating your observations. From a juror stand point the more witnesses that testify in support of our case the easier it is for them to enter a guilty verdict.

- Make note of statements made by reporting or observing witnesses
- Take down name and contact info of any one with relevant observations.

AFFIDAVITS

1) An AFFIDAVIT will serve as the basis for all municipal court code prosecutions.

2) Each affidavit must put forth facts that support a single violation of law.

3) These sworn legal documents MUST be written by someone with personal knowledge of the facts stated in the affidavit.

4) **Element** – is a requirement you must support with evidence in order to prove that a violation has occurred. Without every single element present and supported by facts, you do not have a fileable offense. In a criminal case, the elements are things like: who, what, when, where and how.

5) At trial we must prove all elements of the stated violation <u>beyond any reasonable doubt</u>.

- Please remember, this is the highest burden of proof for any formal legal proceeding.

AFFIDAVITS

1) Every affidavit must state facts establishing all elements necessary to prosecute the case.

2) These MUST statements of fact, NOT a restatement of the law.

a) BAD – "Defendant built structure on property in violation of Sec. 35-516 of SACC - Setbacks"

b) GOOD – "Defendant build stone and wood carport one foot from right property line. The violation runs along this property line for about 30 feet"

3) Each separate violation requires a separate affidavit alleging the facts that support the elements of each particular offense.

4) Typically, 1-2 sentence affidavit is going to be weak and problematic to accept. Please do not be stingy with your statements of observation.

WHO TO FILE AGAINST?

Be sure the person or entity you file against is a proper responsible party (defendant).

- In most instances, the property owner is the proper responsible party. However, some ordinances are worded so that an occupant or any other person exercising care and control of the property can be cited.

- If you are uncertain who can be held as a responsible party, then refer to the language of the applicable ordinance or statute.

- Be sure that the facts support the allegation against the person charged with the violation.

CASE FILING CHECKLIST

1) Did you observe the violation? If not, you cannot file.

2) Detailed notes

3) Did you have a defendant admission? What? When?

4) Photographic evidence

5) Witnesses contact info

Investigating Code cases, Administrative Warrants Probable Cause

Collecting admissible evidence and the Fourth Amendment: the Administrative Warrant

- First step is articulating initial observations which provide probable cause for the warrant
- Probable Cause is a reasonable, good faith belief – even if ultimately mistaken – that an offense or violation exists
  - Code officers can get probable cause from personal observation
    - This is pre-warrant so the observation needs to be from a lawful place that doesn't violate the 4th Amendment, such as from the street or other public location
  - Information provided from a reasonably reliable source, such as a neighbor

Administrative Warrants

The Affidavit

ADMINISTRATIVE SEARCH WARRANT AFFIDAVIT

STATE OF TEXAS §

COUNTY OF BEXAR §

BEFORE ME, the undersigned authority, a Magistrate of the Municipal Court, San Antonio, Bexar County, Texas, on this day personally appeared Officer's Name #, from Development Services Department for the City of San Antonio, who being by me duly sworn, did depose and state:

My name is . I am a Code Enforcement Officer certified by the State of Texas Department of Licensing and Regulations as a Code Enforcement Officer for the City of San Antonio, Texas. I am over the age of twenty-one (21), of sound mind and capable of making this affidavit. I have good reason to believe and do believe that serious violations of the City Health and Safety Codes are occurring at the premises described in Bexar County Appraisal District as **14348 Donop Road Elmendorf, TX 78112; Legal description CB 4007-5 P-233 C (0.75Ac) & P233 D (0.75 Ac) ABS 11** which is located within the city limits of the City of San Antonio, Texas. The owner of record of the property per the Bexar County Appraisal District is Brandlich Energy Solutions LLC.

On April 4, 2019, I personally observed the exterior conditions through the chain link fence and found the property to be in violation of City codes, to include but not limited to, a large pile of discarded roofing shingles, trash and debris littering the property and outside placement. Additionally, I observed tipped over 55 gallon barrels which are placarded with flammable chemical decals along with chemical containers which are also placarded with flammable or dangerous decals. These containers are stored outside in direct contact with the elements. Research of records also found the business operating without a certificate of occupancy, hence, the safety inspections required by the trade inspectors and the fire marshal were never conducted prior to the opening of the business. Further research also shows the current zoning is BP (Business Park) which does not allow for outside storage of any kind. The current business on site requires an I-1 Industrial zone. The extent of the violations poses a severe fire hazard and potentially dangerous situation to the public and adjoining properties.

Therefore, in order to inspect the current safety condition of the property, a warrant is required to conduct a thorough inspection to assess all exterior and interior health and safety violations and take photos if needed.

For the foregoing reasons, an Administrative Search Warrant is hereby requested to be issued authorizing a Texas Peace Officer and required City, County & State staff to enter the above described premises to inspect for **14348 Donop Rd Elmendorf, TX 78112** pursuant to the authority granted in Section 18.05 of the Texas Code of Criminal Procedure.

_____

SIGNATURE

SUBSCRIBED AND SWORN BEFORE ME this _____ day of _____2019.

_____

MAGISTRATE, MUNICIPAL COURT

SAN ANTONIO, BEXAR COUNTY, TEXAS

Administrative Warrants

The Search Warrant

ADMINISTRATIVE SEARCH WARRANT

STATE OF TEXAS §

COUNTY OF BEXAR §

KNOW ALL MEN BY THESE PRESENT, IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS, TO THE CODE ENFORCEMENT OFFICIAL OF THE CITY OF SAN ANTONIO, TEXAS: GREETINGS:

WHEREAS, an affidavit on oath and in writing, which is hereto attached and expressly made a part hereof, has this day been made before me alleging that the premises described as:

ADDRESS: **ADDRESS; Legal description CB 4007-5-P-233C (0.75Ac) & P233D (0.75 Ac) ABS 11**, in the City of San Antonio, Bexar County, Texas, said premises being under the control of or possession of:
Owner: **Brandlich Energy Solutions LLC**

is a place where serious violations of the City of San Antonio Health and Safety Code, more particularly described below and in said affidavit are alleged to exist, you are hereby commanded to enter immediately and search the above described premises to determine the presence of a fire or health hazard, unsafe building condition, or a violation of any fire, health, or building regulation, statute or ordinance.

On April 4, 2019, affiant personally observed the exterior conditions through the chain link fence and found the property to be in violation of City codes, to include but not limited to, a large pile of discarded roofing shingles, trash and debris littering the property and outside placement. Additionally, I observed tipped over 55 gallon barrels which are placarded with flammable chemical decals along with chemical containers which are also placarded with flammable or dangerous decals. These containers are stored outside in direct contact with the elements. Research of records also found the business operating without a certificate of occupancy, hence, the safety inspections required by the trade inspectors and the fire marshal were never conducted prior to the opening of the business. Further research also shows the current zoning is BP (Business Park) which does not allow for outside storage of any kind. The current business on site requires an I-1 Industrial zone. The extent of the violations poses a severe fire hazard and potentially dangerous situation to the public and adjoining properties.

HEREIN FAIL NOT, but return to me this warrant within three days from the date of its issuance showing how you have executed the same.

WITNESS my hand this the _____ day of _____, 2019 at _____ a.m./p.m.

_____

MAGISTRATE, MUNICIPAL COURT
SAN ANTONIO, BEXAR COUNTY, TEXAS

OFFICER'S RETURN

CAME TO HAND this the _____ day of _____, 2019 at _____ a.m./p.m.

and executed on the _____ day of _____, 2019 at _____ a.m./p.m.by

_____, a City of San Antonio _____.
(Peace Officer Name) (Title)

ADMINISTRATIVE WARRANTS

Getting the Code Officer's Foot in the Door

What is an Administrative Search Warrant?

Magistrate-issued order authorizing entry onto private property for the purposes of:

- Investigating a health and safety or nuisance abatement ordinance violation – including building, housing, fire, sanitation, animals.

- Authorizing action necessary to test, photograph, secure, remove or demolish property or remove debris found in violation of a health and safety or nuisance abatement ordinance.

WHY WOULD A CODE OFFICER NEED A WARRANT?

- To help safeguard individuals against arbitrary privacy invasions by government officials
- Unconsented warrantless search of private property is per se “unreasonable” (certain narrow exceptions)
- Warrantless admin search not justifiable on grounds search makes minimal demands on occupants; obtaining warrant infeasible or burdensome for global compliance inspections; requirement interferes with code program efficiency, etc.
- In nonemergency context, ordinarily consent should be sought first

Administrative vs. Criminal Investigation

- Administrative
  - May be looked into in much shorter time
  - No rummaging through private papers & effects – less intrusive
  - Routine inspections during business hours
  - Many are conducted with advance notice
  - Are for *search* purposes only – not for seizures (can be obtained by separate court order/criminal warrant)

- Criminal
  - More time intensive
  - Rummaging through private effects
  - Looking for evidence of criminal act – intrusive
  - Conducted by armed law enforcement – perceived as more offensive that that of inspector
  - Conducted at all times of the day & night
  - Nature - surprise

The Fourth Amendment

Expectations of Privacy



Camara v. Municipal Court
387 US 523 (1967)

- The keystone case applying Fourth Amendment protections to an apartment building in which non-criminal violations were suspected.
- Bottom line, even health and safety concerns do not justify a warrantless intrusion into a home (unless falls within exceptions)

Documenting Code Cases

- Part of preparation is reviewing the reports/citations created by Code Officers.
- You will be faced with poorly written reports from your Code investigators, some with errors and some with omissions (aka gaping holes).
- Fast does not equal good.
- Why does that matter?
- Can it be fixed? If so, how do you fix it?

Investigating and Documenting Code Cases

What's in a Good Report

- A report should have all of the elements of the offense
- A report should include supporting documents, as necessary to prove the case
- Photographs should be clear and, if necessary, be labeled as to location
- The identity of all parties should be noted
- Statements against interest should be written down, as much as possible, verbatim

Investigating and Documenting Code Cases

Why does it matter?

- A case is only as good as the report
- Errors in the report or underlying affidavit can be fatal to a case
- Inadequate reports make for inadequate testimony
- Poorly written reports can tank civil litigation

Investigating and Documenting Code Cases

- **Common Errors**

  - Failing to gather sufficient facts to prove the elements of the offense
    - Who? What? When? Where?
      - How do you know? (junked vehicle is inoperable – admission by defendant)
  - Failing to document witness statements / admissions
  - Failing to document witness information (hearsay problems)
  - Inadequate photos (do not clearly show violation, not organized or labeled correctly)
  - Making sure notice and/or time requirements are followed
  - Multiple violations – large properties (need specifics for each violation)
  - Zoning cases – operating auto repair business in residential zone – need more than a one time inspection
  - Rush to file cases – Quality vs Quantity

Investigating and Documenting Code Cases

Can Errors be Fixed – When and How

- Intake
- Affidavits
- Before trial – Fixing the Charging Instrument
- Preemptive – Training

Litigation Choices



Litigation Choices

- Administrative remedies
- Criminal Prosecution
- Civil Litigation

Litigation Choices

Administrative Remedies

- Administrative remedies inherent in the Building Official, as per your Municipal Code and/or Charter
  - Notices to Vacate
  - Revocation of certificates of occupancy
  - Revocation of permits
- Administrative remedies in Municipal Court
  - Administrative Hearing Officers
  - Municipal Court civil proceedings

Litigation Choices

Administrative Remedies

- **Pros:**
  - Faster than the court system
  - Guaranteed outcome
  - Has built in Due-Process (or it should!) which is less formal than the courts
  - May side-line civil litigation due to 'failure to exhaust administrative remedies.'
  - Failure to timely challenge administrative decisions may lead to legal presumptions which can be useful in civil litigation (*See* nuisances).
- **Cons:**
  - Subjects your Director to personal attacks, such as ultra vires challenges
  - May create the perception of a political, arbitrary system
  - Can be abused by over-use

Litigation Choices

Criminal Prosecution

- The traditional courtroom resolution of Code complaints
- Arraignment, plea bargains, trials, appeals
- Traditional criminal procedure Due Process

Litigation Choices

Criminal Prosecution

- **Pros:**
  - Greatest measure to Due Process
  - Clearest roadmap of procedure – few ambiguities
  - Trials
- **Cons**
  - Process can take a long time, nothing immediate or quick
  - Beyond a Reasonable Doubt – highest burden of proof
  - No guaranteed outcome
  - No appeal of a 'not guilty' verdict
  - Limited fine ranges
  - No injunctive powers

INVESTIGATING

& TESTIFYING IN COURT

ABOUT CODE CRIMES



Keep in Mind the Elements of a criminal case

(1) On or about [a date];

No, not that type of date …



Elements, *cont.*

(2) … the Defendant, [name], …

(3) …did then and there, intentionally, knowingly, recklessly …

Typical Defendant demonstrating mens rea



Elements, *cont.*

(4) … at [location/street address] …

(5) … did [prohibited act] … OR …did not do [mandatory act] …

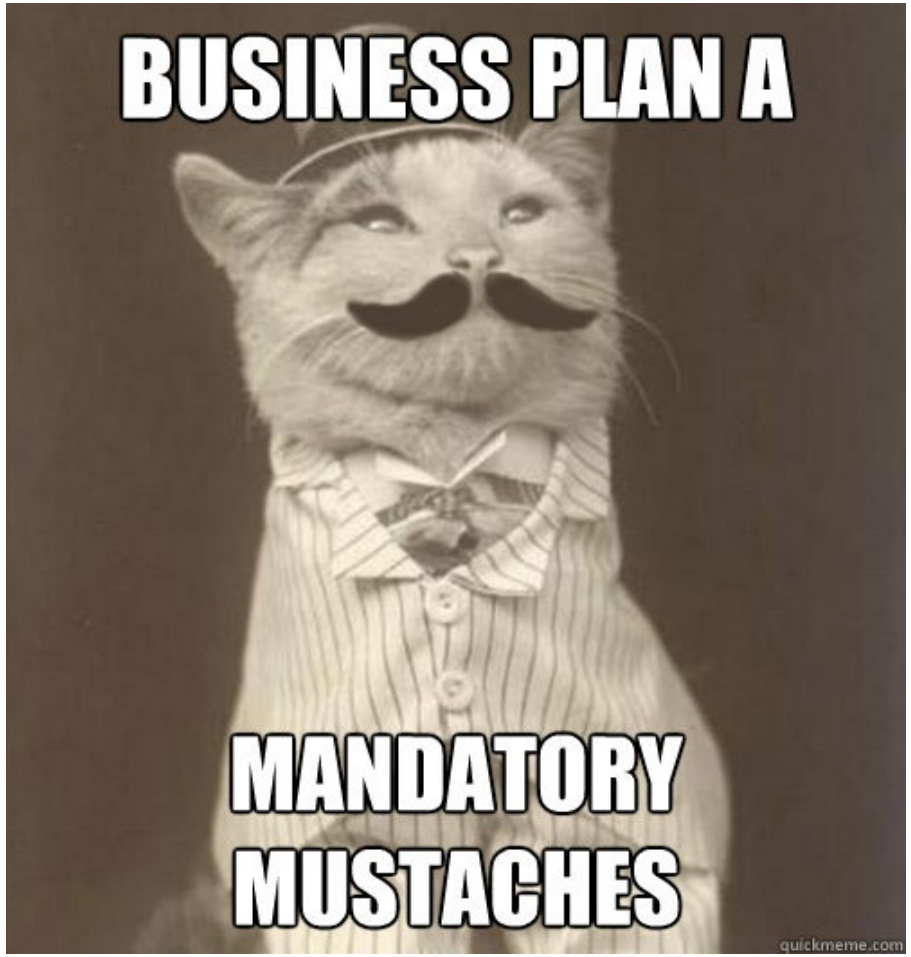
(6) … namely, [specific manner and means] …

Prohibited Act

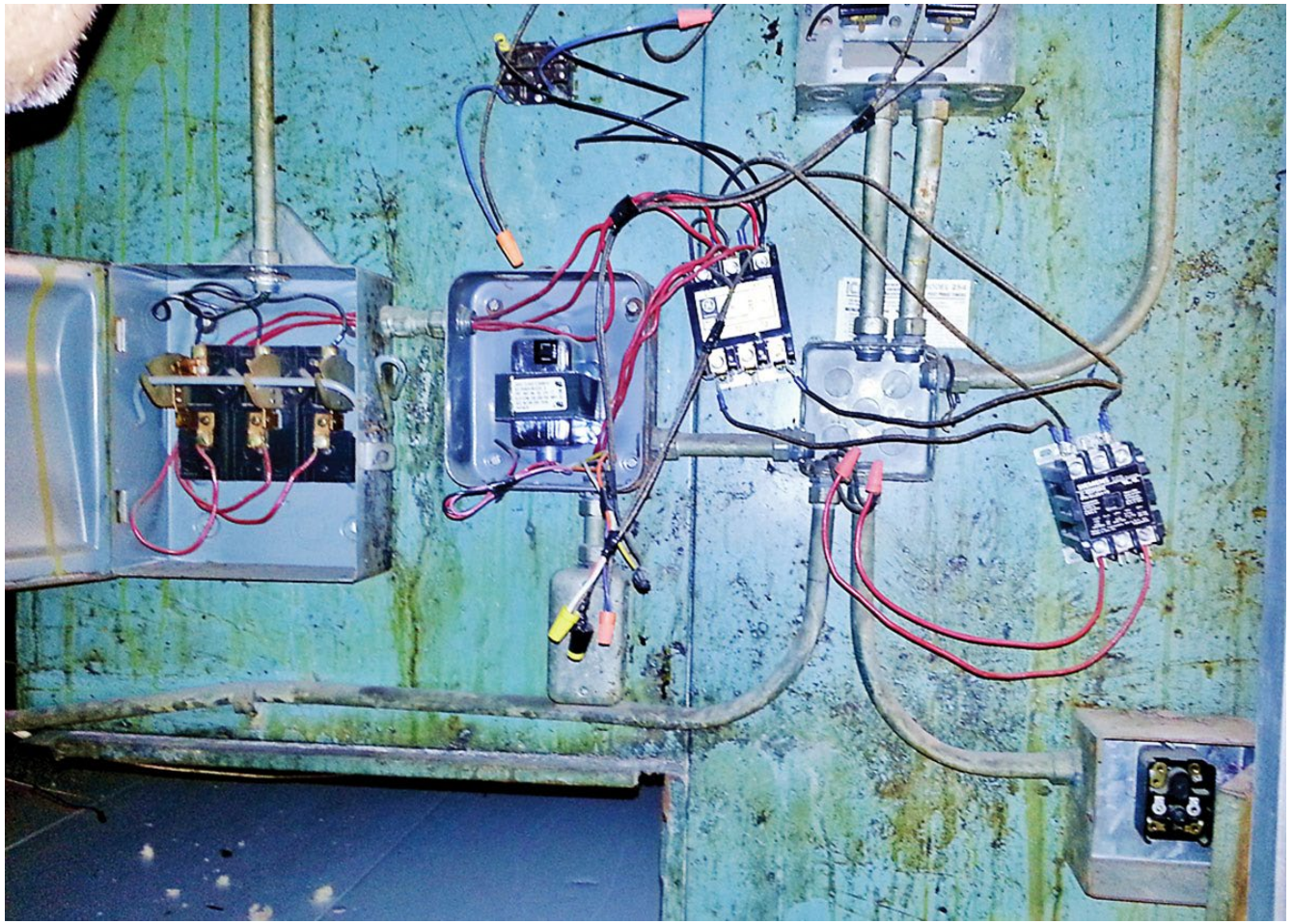


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Mandatory Act



Manner & Means



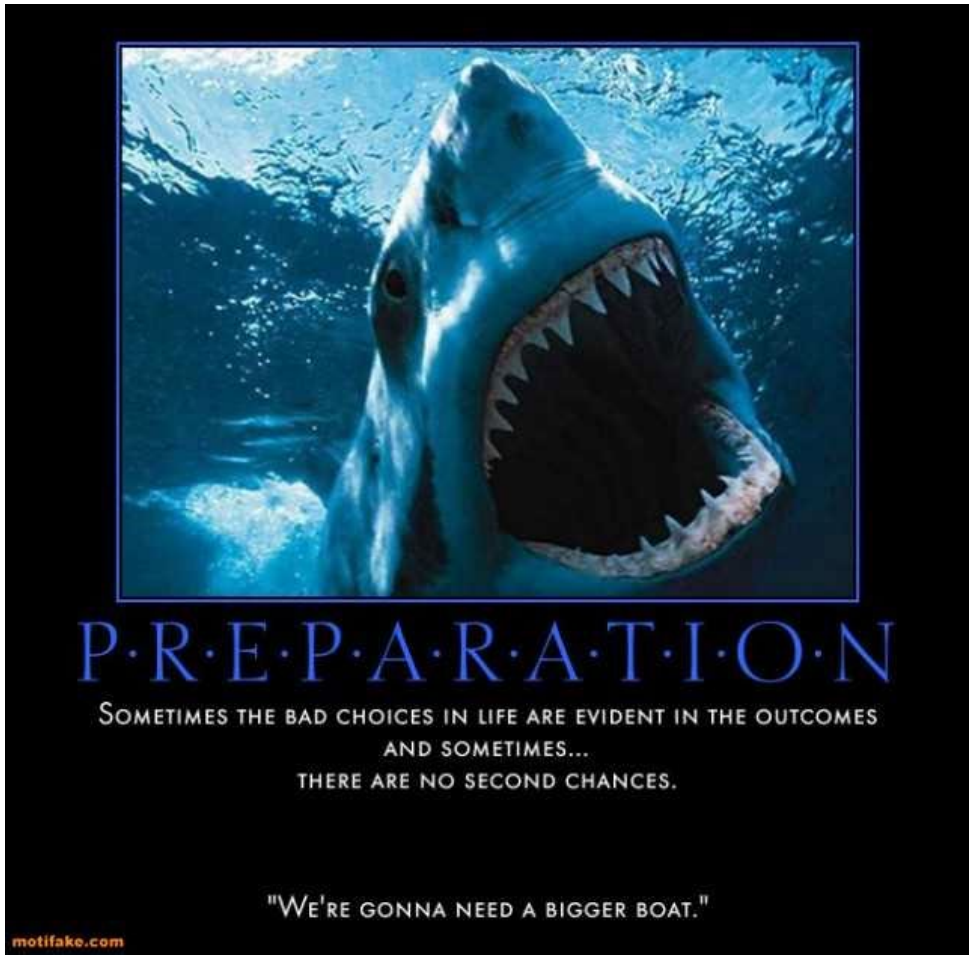
Investigating



Report Writing



Pre-Trial Prep



Courtroom Appearance



Courtroom Testimony



Litigation Choices

Civil Litigation

- Typically injunctive in nature
- Usually based upon an enabling state statute
- Standard of Proof: preponderance of the evidence
- Can be in civil district court or county court

Litigation Choices

Civil Litigation

- **Pros:**
  - Injunctive powers
  - Higher fines/civil penalties
  - Attorney's fees
- **Cons:**
  - Much longer time-frame than Administrative or Criminal remedies
  - Judges who are not familiar with this niche area of the law
  - May open the City to liability

CIVIL LITIGATION



"What code violations?"

Basics of Code Enforcement Authority

- *Federal laws*
- *Case laws*
- *ICC/IPMC/IBC/ FIRE CODE*
- *State statutes*
- *City charters*
- *City ordinances*
- *Department Policies & Procedures*

CIVIL ENFORCEMENT

- Civil trial/hearing
- Burden of proof – preponderance of evidence
- Generally lengthier & more time consuming than criminal
- Judge can order defendant to do or not do something
- Can jail defendant for contempt
- City can ask for a fine of $1000 per day for violations

Civil Enforcement -Trial

- On the stand – tell the truth!!
- "I don't know" or "I don't recall" are valid answers – sometimes
- Listen to the questions
- Answer the questions
- Make eye contact with judge or jury
- Maintain your professionalism
- Know the violation – file, ordinance
- Law vs. Policy vs. Procedure

Civil Enforcement
WITNESS Do's & Don'ts

- DO be honest under oath
- DO review your entire file including the specific ordinance at issue
- DO listen carefully to the question being asked
- DO speak loudly, clearly, and slowly so judge, court reporter, and/or jury can understand you
- DO answer with certainty
- DO make eye contact with judge or jury
- DO maintain your professionalism
- DO stay for the entire trial unless released by prosecutor

Legislative Update

Weeds and Public Nuisance
HB 837

- Allows a city to require the owner of real property to keep the property free from:
- (1) weeds;
- (2) brush; and
- (3) the following specific conditions which constitute a public nuisance:
  - (a) keeping, storing, or accumulating refuse on premises in a neighborhood unless the refuse is entirely contained in a closed receptacle;
  - (b) keeping, storing, or accumulating rubbish, including newspapers, abandoned vehicles, refrigerators, stoves, furniture, tires, and cans, on premises in a neighborhood or within 300 feet of a public street for 10 days or more, unless the rubbish or object is completely enclosed in a building or is not visible from a public street; and
  - (c) maintaining premises in a manner that creates an unsanitary condition likely to attract or harbor mosquitoes, rodents, vermin, or disease-carrying pests.

Fireworks
HB 1813

- Packaged and unopened fireworks may no longer be confiscated if the fireworks are not inside the car within reach of passenger or driver
- If packaged fireworks are in a closed glove box, not considered within reach of occupants within the car
- Can still prosecute for possession of fireworks

Graffiti Screw UP
HB 2086 (80th Legislature)

- *City must FIRST offer to clean up graffiti for free*
- *City can require abatement of graffiti ONLY IF owner REFUSES free removal (in writing)*
- *Notice period for abatement must be 15 days*
- *If removal is hazardous to owner --- City cannot require*
- *City cannot require abatement of graffiti on any traffic infrastructure*
- ***Was not fixed by this Legislature***

Litigation Choices

- Deciding the best approach to litigation.
- Strategies with your clients at the beginning of the process
- Multiple, simultaneous litigation coordination



A Case In Point
Principles at Play

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
July 23, 2024
Lyle W. Cayce
Clerk

No. 23-50706

SO Apartments, L.L.C.; Station at Elm Creek, L.L.C.,

Plaintiffs—Appellants,

versus

City of San Antonio, Texas,

Defendant—Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:23-CV-992

Before Higginbotham, Stewart, and Higginson, *Circuit Judges*.

Patrick E. Higginbotham, *Circuit Judge*:

SO Apartments, LLC and Elm Creek, LLC (the "Complexes") appeal the district court's denial of a preliminary injunction, and present a facial challenge to the City of San Antonio's recent enactment of its Proactive Apartment Inspection Program ("PAIP"). Finding that the district court did not abuse its discretion in denying this relief, we AFFIRM.

I.

In light of a documented pattern of property maintenance code violations, the City of San Antonio created the Proactive Apartment

SO APTS. v. CITY OF SAN ANTONIO

- 2023 Proactive Apartment Inspection Program Ordinance enacted ("PAIP")
- The program is designed to identify and address the worst apartment complexes, in terms of violations which are detrimental to the health, safety, and quality of life for the tenants.
- Applies only to **Apartment complexes** with 5 or more units.
- **3 program points** within **6 mos**. will get an apartment complex into the program.
  - A program point is generated when a notice of violation is ignored and/or remains unabated by the apartment owner, and turns into a citation – i.e. a summons to court.
  - The only violations which will create program points are the health and safety Property Maintenance Code violations listed in the ordinance itself.
- Once in the program, the complex will be there for **6 mos**.
  - To get out of the program, all citations must be abated, and they must not receive any more citations for 6 contiguous months.
  - Cost recapture fee of $100 per unit per year if placed in the program.
  - The apartment complex must have a property manager on premises for all inspections, and someone available 24/7 for contact.

PAIP LAWSUIT

- Lawsuit almost immediately filed by two apartment complexes enrolled in the program which alleged numerous constitutional violations:
  - 4th Amendment violation for warrantless searches
  - 8th Amendment (cruel & unusual) violation for $100 per unit cost recovery fees
  - 14th Amendment, claimed PAIP denied them procedural and substantive due process
- Preliminary Injunction hearing in front of Judge X. Rodriguez on October 25, 2023, at 10:30 am.
- Judge Rodriguez ruled against the Plaintiffs, found that they did not meet their burden, and denied their TRO
- Apartments appealed to 5th Circuit

PAIP LAWSUIT

- City's position was that
- No warrantless searches mandated in the PAIP, if there is no consent to enter by the property owner, administrative warrants are pulled.
  - Although administrative warrants are not explicitly stated in the ordinance, they are referenced in our Municipal Code and are explicitly part of the City's policy and procedure.
  - It helped also that in this case the Plaintiff's refused us entry and so we used administrative warrants extensively
- $100 per unit was cost recovery and reasonable based upon financial calculus.
- PAIP provided excessive due process through the courts and a parallel administrative appeals process.

PAIP LAWSUIT

- June 3, 2024 – argument before the 5th Circuit panel (Higginbotham, Stewart, & Higginson)
- July 23, 2024 5th Circuit Opinion issued
- Ruled entirely in favor of the City

Sample Trainings Conducted

Legislative Updates

Fourth Amendment & Warrants

Investigating Code Cases

Report Writing

Trial Prep

Courtroom Testimony

Civil Litigation

Salvage Yards

Summary Abatements

Questions?



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