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**HOW TO PROSECUTE A
CODE ENFORCEMENT CASE
(PART II)**

**ETHICS, WARRANTS AND ADMINISTRATIVE
CITATIONS**

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The genesis for this topic came from a discussion on the City Attorney list serve in 2009. There were a number of requests for information on what civil lawyers must know to prosecute code enforcement cases. My colleague, James Eckart, ably addresses the Anatomy of a Successful Criminal Code Enforcement Prosecution in Part I. This Part II addresses the remaining requested pieces: ethical issues in criminal code enforcement, inspection and abatement warrant basics and legal issues surrounding administrative citations. Finally, because this is such a vast topic, and we have only been able to touch on the highlights, we have also compiled a list of resources for your reference.

I. KEEP YOUR BAR CARD - HOW TO AVOID ETHICAL TRAPS IN CRIMINAL PROSECUTIONS

When acting as City Prosecutor, we do not represent the City Council, or even the City. We represent the People of the State of California. There is a tension between the role of a City Attorney handling civil matters and a City Prosecutor. The former defends the City and takes direction from the City as long as that direction is lawful. The latter represents the People and exercises impartial judgment and objectivity. In spite of this tension, courts have consistently held that a City Attorney can be both Prosecutor and civil defense lawyer for the City, even in a related civil suit, as long as there are no inappropriate circumstances.² The goal of this portion of the paper is to help the City Attorney who primarily practices in the civil arena to avoid these “inappropriate circumstances” and other traps. Some of these traps are not always obvious.

A. No Political Interference With Prosecutions

Sometimes elected officials, following a well-intentioned impulse to serve their constituents, have attempted to intrude on a City Prosecutor’s discretion, either by requesting a particular code violation be prosecuted or by intervening to defend a person subject to prosecution. Even if the City Attorney does not respond to a City Council member’s attempts to intervene, such actions can give the appearance that the City Attorney is not acting impartially. Therefore, City Attorneys need to regularly inform the City Council that the City Attorney cannot take direction from the City Council on prosecutorial matters. This can be phrased palatably, as in –“Ethical rules prohibit us from working together on criminal prosecutions. I am asking for your assistance in ensuring that no appearance be given that any of these rules are violated by refraining from asking me about this matter or making suggestions on how to proceed. I will provide the city council status updates as appropriate.” In a worst case scenario,



the City Attorney should refuse to prosecute code enforcement violations if Council members continually interfere in spite of repeated warnings.

Courts have explained the prosecutor's role as follows:

"The prosecutor is a public official vested with considerable discretionary power to decide what crimes are to be charged and how they are to be prosecuted. [Citations.] In all his activities, his duties are conditioned by the fact that he 'is the representative not of any [sic] ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" [Cites omitted.] The American Bar Association's Code of Professional Responsibility elaborates on the public prosecutor's duty to seek justice: "This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all...." (ABA Code of Prof. Responsibility, EC 7-13.) Thus a prosecutor's duty of neutrality is born of two fundamental aspects of his employment. First, he is a representative of the sovereign; he must act with the impartiality required of those who govern. Second, he has the vast power of the government available to him; he must refrain from abusing that power by failing to act evenhandedly. . . . Not only is a government lawyer's neutrality essential to a fair outcome for the litigants in the case in which he is involved, it is essential to the proper function of the judicial process as a whole. Our system relies for its validity on the confidence of society; without a belief by the people that the system is just and impartial, the concept of the rule of law cannot survive. (See *id.*, EC 9-1, 9-2.)"³

Another court explained the prosecutor's role as follows:

"The "disinterest" demanded of a prosecutor is not the type of true disinterest that is the domain of the judge and jury. [Citation.] A prosecutor has a duty of zealous advocacy and need not be disinterested on the issue of whether the prospective defendant has committed a crime. (*Ibid.*) If convinced of the defendant's guilt, the prosecutor is free, and indeed obligated, to be deeply interested in urging that view by any fair means. (*Ibid.*) In this respect, however, the prosecutor's interest should coincide with the interest of the public in bringing a criminal to justice and should not be under the influence of third parties who have a particular axe to grind against the defendant. (*Ibid.*)"⁴

A court can disqualify a City Attorney if an outside influence creates a reasonable possibility that he or she will not act in an even-handed manner.⁵ "A



public prosecutor must not be in a position of ‘attempting at once to serve two masters,’ the People at large and a private person or entity with its own particular interests in the prosecution.”⁶

This does not mean, however, that the City Council has no role in code enforcement. The City Council can be involved in three ways:

First, as with any other citizen, a City Council member can make a complaint to code enforcement staff. However, after that report, then the matter must be investigated and enforced by City staff the same as with any other complaint and accorded the priority staff deems appropriate to the violation. It is not proper for a Council member to accompany City staff on any investigation or to ask for any priority. It is, however, reasonable to expect that staff would keep a City Council member informed to the extent that they would any other complainant.

Second, it is appropriate to ask the City Attorney or the City Manager to report to the City Council regarding the general issue of code enforcement. The City Council is obviously interested in, and has the responsibility of, ensuring that the City Attorney is carrying out the prosecutorial duties effectively. Therefore, a reporting requirement of general issues can occur in a variety of ways. Any document or meeting addressing these issues would be available to the public because there is no attorney-client privilege between the City Prosecutor and the City Council.

Third, it is appropriate to discuss as a City Council the general priorities that are of public concern and expect that the City Attorney’s office will prioritize resources on a code enforcement issue of public concern. For example, it was appropriate in one case for a county/city redevelopment agency to fund a position in the District Attorney’s office to bring nuisance abatement proceedings.⁷

City staff also needs to be informed that politics has no place in their code enforcement decision-making and that a City Council member’s interest in a particular case, or the latest newspaper editorial, do not create their priorities. Staff should know not to succumb to such pressure and should be comfortable asking the City Attorney’s office to intervene if interference occurs. Regular meetings with staff are appropriate to address any problem issues, assist with proper prioritization and provide information on the relevant law. This will ensure that decisions from the beginning of the code enforcement process are made without improper motive.



B. Discovery: No Attorney-Client Privilege

Another issue to keep in mind is that because there is no attorney-client privilege between the City Prosecutor and City staff, the discovery obligation is very different than in a civil case. The City Prosecutor must share all exculpatory information even if it damages his or her case.⁸ Emails and other correspondence between the City Attorney's office and City staff that would normally be protected by the attorney-client privileged may instead be required to be produced. There are times that a work-product privilege or an official information privilege might apply to protect some interchanges, but staff should be cautioned to avoid extraneous commentary or humorous asides in email or other correspondence that might compromise a case when taken out of context.

C. Do Not Threaten Criminal Prosecution To Gain Advantage In A Civil Suit

California Rules of Professional Conduct rule 5.100 prohibits the threat of presenting criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute. This rule seeks to discourage the collateral use, or threat of use, of criminal, administrative or disciplinary proceedings to exert leverage in the settlement of civil disputes. The reverse, however, is not a violation of this ethical rule. Be conscious of your actions throughout a case – from the wording of a compliance letter to negotiations in pleading out a case – so that you do not violate this rule. An example of a violation: a prosecutor cannot offer to dismiss a criminal prosecution on the condition that a release of civil liability be provided.⁹

4. Contract City Attorneys: Representation of Criminal Defendants

For contract city attorneys, Government Code Section 41805 was enacted in the wake of cases prohibiting representation of defendants by city attorneys in certain instances. The concern is that a City Prosecutor represents the People – whether in Eureka or San Diego – so representing a defendant anywhere in California is a conflict of interest. Instead of a strict prohibition, Government Code Section 41805 authorizes City Attorneys to act as criminal defense attorneys when they do not also have a prosecutorial function under strict conditions that should be closely followed.¹⁰

II. ADMINISTRATIVE INSPECTION WARRANT BASICS – FOR INSPECTION AND ABATEMENT

Inspection and abatement activity in the code enforcement context must comply with the Fourth Amendment.



A. Inspection Warrant

An inspection can be useful both as an evidence gathering mechanism and because it sends a strong message to the violator that the City means business. Sometimes violators decide to comply after an inspection warrant is executed.

The United States Supreme Court has long recognized that criminal searches are not the legal equivalent of administrative inspections.¹¹ The starting point for understanding warrants in the code enforcement context is the case of *Camara v. Municipal Court of San Francisco* (1967) 387 U.S. 523.¹² In that case, a tenant in an apartment building refused to permit warrantless inspection of his premises for a routine annual inspection conducted to find housing code violations. The United States Supreme Court held that administrative searches by municipal health and safety inspectors constitute significant intrusions upon interests protected by the Fourth Amendment, and such searches, when authorized and conducted without warrant procedure, lack traditional safeguards which the Fourth Amendment guarantees to individuals.

The court in *Camara* set forth the following principles:

- (1). Warrants are required for administrative health and safety inspections.¹³
- (2). However, the probable cause showing required for such an administrative search warrant for a health and safety inspection is different than in a criminal case. The facts justifying a warrant will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building (e.g., a multi-family apartment house), or the condition of the entire area, and will not necessarily depend upon specific knowledge of the condition of the particular dwelling.¹⁴
- (3). "Warrants should normally be sought only after entry is refused unless there has been a citizen complaint or there is other satisfactory reason for securing immediate entry."¹⁵

1. Procedures for Obtaining Administrative Inspection Warrants

It is important to follow appropriate procedures for obtaining and executing warrants to avoid suppression of evidence should a judicial action be required to enforce the City's laws. Essentially, there are two basic prerequisites to obtaining an administrative inspection warrants: 1) refusal by the occupant¹⁶ to inspect (or a sufficient basis to proceed without such refusal); and 2) "cause"¹⁷ which may be a somewhat lesser standard than probable cause some have



called “reasonable cause.”¹⁸ In California, administrative inspection warrant procedures are established in California Code of Civil Procedure (“CCP”) Section 1822.50 through 1822.60. These provisions must be read closely when requesting a warrant.

Attached are forms for obtaining inspection warrants. These forms can be used by either the City Attorney’s office or the code enforcement officer. Depending upon the customary practice in your jurisdiction, some courts grant warrants without the appearance of an attorney. However, if there are difficulties expected, then the attorney should appear with the officer. There are three essential documents:

- The Declaration;
- The Inspection Warrant; and
- The Return.

The Declaration sets forth the reasons why an inspection warrant is needed in a particular case.¹⁹ In addition to establishing that the City was refused entry onto the property, the Declaration shows a judge the reasons why there is reasonable cause to believe that there are municipal code violations on a particular piece of property.²⁰ In addition, if forcible entry is needed then reasons for this must be set forth in the declaration.²¹

This form can be modified to address the unique circumstances of a case.

The Warrant sets forth:

- the property that may be inspected;
- what actions may be taken while inspecting the property;
- the types of violations that may be present on the property;
- at what times the property may be inspected;
- whether or not the occupant or owner must be present;
- whether notice must be given;
- whether force may be used to gain entrance onto the property; and
- how long the warrant is effective. (No longer than 14 days, although it can be extended.)²²
- Who (what agencies) may attend the inspection.²³

The Return is completed after the City executes the Inspection Warrant.²⁴ This document is returned to the court with the Inspection Warrant.

Finally, also attached is a form application which is not required but will come in useful if the court is unfamiliar with inspection warrant procedures – a common occurrence. It is also important for those instances where the request is



out of the ordinary (e.g., waiver of 24-hour notice requirement, forcible entry, etc.). Our office usually includes an application.

2. Practical Steps for Obtaining an Inspection Warrant

After drafting the appropriate documents, the Declaration and Inspection Warrant must be presented to the court. There is no requirement that the City inform the occupant or property owner that an Inspection Warrant is being sought, although there is no prohibition either.²⁵ Moreover, most jurisdictions do not require that a hearing be scheduled. We often attempt to appear mid-morning (around 10:00 a.m.) before the court reporter typically takes a break. The code enforcement officer, and any other significant witness, should appear with the City Attorney's office representative.

Usually the matter will be heard inside the judge's chambers rather than in the courtroom. There, the judge will place the officer under oath and have the officer sign the Declaration. The judge may ask some additional questions. Assuming that the judge is satisfied that there is reasonable cause for issuing an Inspection Warrant, he or she will sign it. Usually, the warrant will then be filed and logged by a clerk elsewhere in the courthouse.

3. Executing the Warrant

Government Code Section 1822.56 sets forth explicit requirements for the conduct of the inspection including a twenty-four hour advance notice requirement unless the judge has excused this requirement. Further, unless otherwise provided in the warrant, the warrant can only be executed between 8 a.m. and 6 p.m., and the warrant must be executed within 14 days (unless an extension is granted). Therefore, it is important to plan for the timely execution of the warrant even before obtaining it.

If there are any safety concerns or concern that the occupant may impede the inspection, it may be advisable to ask a police officer to accompany the code enforcement officer when executing the Inspection Warrant. Note, however, that police officers are held to a higher standard when entering onto property; and a police officer may not use force unless it is authorized by the Inspection Warrant.²⁶ The only option, should the owner/occupant interfere with execution of a valid Inspection Warrant, is for the police officer to arrest that individual. Inspection Warrants are not alternatives for police officers to circumvent the need to obtain a search warrant; there should not be any appearance that an Inspection Warrant is being used other than for health/safety inspections.²⁷ After the completion of the inspection, the return as described above must be filed.²⁸



B. Abatement Warrants

The term “abatement warrant” is a misnomer. An “abatement warrant” is actually merely an inspection warrant as described above that allows the City staff to execute an abatement order that the City issued through its own administrative abatement procedures. Cities use this process because courts have consistently approved of its use to execute such abatement orders.

A city may, by ordinance, declare what constitutes a nuisance and may establish procedures for the abatement of the nuisance at the Property owner’s expense.²⁹ However, absent exigent circumstances, the need to summarily abate a public nuisance does not of itself justify state invasion of legitimate privacy interests without consent or a warrant.³⁰ Courts have held that abatement of a nuisance involving simultaneous inspection and treatment of a nuisance require compliance with Code Civ. Proc., § 1822.50 et seq. - administrative inspection warrants. This procedure is also the procedure recognized by California courts to obtain warrants solely for abatement activity. In 1985, the court in *Gleaves v. Waters* (1985) 175 Cal.App.3d 413 approved of its use. Then later, the court in *Flahive v. City of Dana Point* (1999) 72 Cal.App.4th 241, 246 at fn. 8; cited with approval the use of the procedures set forth in Code of Civil Procedure §1822.50 et seq. for issuance of an abatement warrant by stating:

“In the 14 years since *Gleaves*, no statutory procedure has been enacted [for abatement warrants]. We have examined the commentators and treatises listed above (*ante*, fn. 5), and have found no discussion of common or suggested procedures. But because *Flahive* only challenges the commissioner's power to issue the warrant, we need only address that point. [Footnote.] We note, however, the procedure the City employed appears to pass constitutional muster because it mirrored the statutory requirements for other types of warrants. The warrant was issued upon probable cause³¹ to believe grounds for the abatement existed, shown by an affidavit which also particularly described the place to be inspected. The warrant was in writing, directed to a state or local official, and commanded the abatement authorized by an appropriate law. The warrant particularly described the place where the abatement was to take place and designated the purpose for the intrusion and limitations on it. The warrant was valid for a reasonable time and limited the hours during which it could be executed. The owner’s presence was not required, but the City was required to post notice on the property at least 24 hours before the abatement. Only reasonable force to execute the warrant was authorized.”

A valid abatement warrant may offer some protection to a city and its code enforcement officers from liability. But the City should carefully follow all



procedures and requirements for due process for the abatement order, and ensure all anticipated actions are addressed in the warrant, because there can be holes in that protection.³² Also, given the risks, if an action involves significant destruction – such as the demolition of the house – a more prudent approach may be to seek a preliminary injunction with demolition ordered by the judge in a court proceeding.³³

III. ADMINISTRATIVE CITATIONS

In code enforcement, there are a number of criminal, civil and administrative remedies to consider. Administrative Citations is merely a subset of a subset.³⁴ Use of Administrative Citations has become more common now that many cities have adopted administrative citations ordinances.³⁵ This portion of the paper is devoted to topical issues in administering administrative citations programs.

A. Overview

Administrative citations allow code enforcement officers and other authorized city officials to issue administrative fines to obtain compliance with the Municipal Code. These procedures are an alternative to the often time-consuming, costly, and cumbersome method of going to court. Criminal citations and civil actions are still available as a remedy, especially if administrative citations fail to obtain compliance, but the administrative citation procedure in many cases can more efficiently achieve compliance

B. Legal Authority

California Government Code Section 53069.4 provides authority for implementing an administrative citation ordinance. Charter cities may also choose to implement the proposed Ordinance through the municipal affairs provision of its charter.

C. Procedures

Administrative citations generally follow procedures substantially similar to the administrative process very successfully used for enforcing parking citations.³⁶ Government Code Section 53069.4 requires the local agency to set out procedures by ordinance for the imposition, enforcement, administrative review and collection of administrative citations.³⁷ When the violation pertains to building, plumbing, electrical, or other similar structural or zoning issues that do not create an immediate danger to health or safety, the ordinance must provide for a reasonable period of time for a person responsible for a continuing violation to correct or otherwise remedy the violation prior to the imposition of administrative fines or penalties.³⁸ After a City's final decision is made, a citee



has twenty days to appeal the hearing officer's decision to the Superior Court where the appeal will be heard *de novo* as a limited civil case.³⁹

There are a number of examples of ordinances to be found in Municipal Codes online.⁴⁰ Some require the issuance of administrative citations for most offenses,⁴¹ while other City's make the administrative citations an electable remedy for any violation.⁴²

D. Advantages

1. Effective, Increased, Enforcement

With Administrative Citations, code enforcement cases are not "lost" in the court system. The City retains control over any administrative citation case from the date of issuance until, and if, a citation is appealed to the superior court. Among other things, this reduces the time enforcement officers must spend on code violation cases. This should lessen both the time and cost of enforcement.

2. Faster Resolution of Cases

Administrative Citation violations can be processed more quickly. An administrative citation could take as little as sixty days (including an administrative hearing) to process (assuming that the citation is not appealed to the superior court). This reduces enforcement costs and leads to faster resolution of cases.

3. Better Resolution of Cases

Administrative citations likely lead to more effective enforcement. Code enforcement officers tend to utilize the administrative process more frequently than other citations, and the threat of a fine can prod violators to comply, which results in more violations being resolved. Also, because there can be new fines every day that a violation exists (such as a zoning code or building code violation), the administrative fines can increase fairly dramatically if the City issues a new citation every day, for example: \$100 for the 1ST day; \$250 for the 2ND day; and \$500 for the 3RD and subsequent days. However, jurisdictions are generally judicious in their use of this power, only issuing citations every day in the most egregious cases or when a single fine is regarded as merely a cost of doing business by the violator. Also, many jurisdictions choose not to issue citations while an appeal is viable in order to avoid a multiplicity of appeal hearings.



4. Less City Attorney Involvement – Less Costly

There is less need to rely on the City Attorney's office to prosecute criminal violations, thus generally resulting in less cost for the code enforcement department. This also helps to ensure that when a case does end up in court, it may be taken more seriously because it is clear the prosecutor is resorting to the court after all other alternatives have failed.

5. Tailoring of Fines

Administrative citations provide cities with the opportunity to tailor its fines to the offense to obtain compliance. The only requirement for the establishment of fines set forth in Government Code Section 53069.4 is this: "Where the violation would otherwise be an infraction, the administrative fine or penalty shall not exceed the maximum fine or penalty amounts for infractions[.]"⁴³ Presumably there is also a reasonableness requirement. But this leaves a wide latitude to cities for fines for misdemeanor offenses. I recommend that such fines be adopted by resolution so the City can adjust the fine schedule over time as appropriate. Some cities choose to stick with the general infraction limits for all fines: \$100 for first offense, \$200 for second, and \$500 for third. Others choose to assign a different fine for different violations. And others cherry pick a few fines to assign specific amounts to and leave the rest to the general schedule. Fines for misdemeanors can vary greatly in amounts. There are some jurisdictions which take a conservative approach to administrative fines for misdemeanor violations and cap the fines at the cap for misdemeanor violations (\$1000). However, others set fines that greatly exceed \$1000 when warranted because the Government Code did not state a cap as to those violations that would otherwise be misdemeanors.⁴⁴

6. All Fees Go To City – No Sharing

With administrative citations, all of the fees collected go to the City rather than being divided between the city and the various court fees and penalties assessments. Generally, a city collects only around 30% of the total money paid to a court for a fine processed through criminal court.

E. Disadvantages

1. Start-Up and Maintenance Investment of Time and Effort

As with any code enforcement effort, there are costs associated with this program. There are up-front costs of starting a program. There are also costs associated with administrative reviews and hearings, including a hearing officer. The City will also need to ensure that it complies with the *Haas v. County of San Bernardino* requirements for a hearing officer.⁴⁵ *Haas* involved a due process



challenge to a procedure utilized by the County whereby an informal *ad hoc* process was employed to select a temporary hearing officer to preside over business license revocation hearings. The County Counsel appointed a local attorney to act as hearing officer, and the record was clear that there was potential for future employment, although such employment was not guaranteed. The Court held that a “procedure holding out to the adjudicator, even implicitly, the possibility of future employment in exchange for favorable decisions creates such a temptation and, thus, an objective, constitutionally impermissible appearance and risk of bias.”⁴⁶ This problem can be avoided by entering into a pooling arrangement with other agencies to function as advisers for each other when the needs for hearing officers arise, using in-house hearing officers, contracting with the State to use administrative law judges, or engaging hearing officers in a long-term contract that provides the hearing officer will be eligible for a future appointment only after a predetermined period of time long enough to eliminate any temptation to favor the administrative agency.⁴⁷

Finally, if a citation is appealed to superior court, the expense of paying an attorney to assert the City’s position can be substantial. An attorney is not necessarily required for these hearings since many courts handle them like small claims or traffic matters, however, the use of a City Attorney or City Prosecutor is generally recommended.

2. Collection Difficulties

Second, it can be difficult to collect civil penalties imposed as a result of the administrative citation process. Most administrative citations ordinances contain provisions permitting the City to lien a violator’s real property for delinquent fines should the violation be property related.⁴⁸ If a violation is not related to property, however, the City will have to use other means to collect fines from individuals refusing to pay. Other options are small claims court, the Franchise Tax Board Interagency Intercept Collections procedures⁴⁹ and a collection agency. These methods require additional staff time and some additional cost. Cities likely will not obtain 100% of the fines owed.

IV. RESOURCES

Code Enforcement – A Comprehensive Approach, by Joseph M. Schilling and James B. Hare (Solano Books 1994)

- Extremely useful but dated.
- This book is being updated by Mr. Schilling and his colleague Doug Leeper, the Director of Code enforcement in Chula Vista. Due to the publisher in June, and Mr. Schilling and Mr. Leeper are hoping it will be out around Thanksgiving.



California Criminal Law: Procedure and Practice, (CEB 2009)

- Carry it with you to court, so you can quickly lookup the lingo, etc., that is thrown around.

Municipal Law Handbook

- Code Enforcement Chapter: Don't forget to check this resource – there is a wealth of useful information.

Local District Attorneys/large City Attorneys offices

- Usually have good templates and trial book inserts to borrow.

Community Prosecutions Seminars offered by the California District Attorneys Association

- Good, solid training, but they skipped this year.
- The past years' conference materials have a number of useful forms.

National Institute for Trial Advocacy (NITA) training

- Excellent training - highly recommend taking this training before filing a criminal complaint just in case you go to trial.

Find an experienced criminal lawyer/code enforcement lawyer you can bend the ear of if you don't have one in your office.

Practicing Ethics: A Handbook for Municipal Lawyers, League of California Cities (2004), Chapter 5.

“Prosecutors and Their Relationship with Other Municipal Actors,” by Constance E. Orozco, Chief Prosecutor, City of Pasadena, presented at the League of California Cities Annual Conference, September 17-19, 2004

“Los Angeles City Attorney Rocky Delgadillo Prosecutorial Ethics,” California League of Cities, May 2004

¹ Karl H. Berger of my firm permitted me to borrow shamelessly from the body of work he has developed in his many years of representation of public entities. His work formed the backbone of the sections on warrants and administrative citations. He deserves much credit for any assistance this paper provides you in your practice, but none of the blame for any errors.

² *People v. Municipal Court (Byars)* (1978) 77 Cal.App.3d 294, 297-300 (held that order recusing city attorney as prosecutor in misdemeanor case on ground that defendants in such case had filed civil claim for damages against city arising out of same incident which was basis of prosecution constituted an abuse of discretion, in view of absence of any evidence of personal, as opposed to purely professional and official, involvement of anyone in prosecutor's office in civil litigation and in view of absence of evidence supporting inference that prosecutor was improperly utilizing criminal proceeding as vehicle to aid his function of defending claims against his employer).



³ *People ex rel. v. Clancy* (1985) 39 Cal.3d 740,745.

⁴ *People v. Parmar* (2001) 86 Cal.App.4th 781.

⁵ See Penal Code Section 1424; *People v. Eubanks* (1997) Cal.4th 580, 596.

⁶ *Ganger v. Peyton* (4th Cir.1967) 379 F.2d 709, 714.

⁷ The discussion in *People v. Parmar* (2001) 86 Cal.App.4th 781 is worth setting forth here because the relationship between the City Attorney and the City Council is similar:

“The prosecutorial function is an executive branch function, and the prosecutor's independence is founded in part on the principle of separation of powers. [Citation.] A prosecutor is not required to be wholly independent of executive branch influences. [Citation.] While the Constitution requires each county to have a district attorney who serves as public prosecutor [citations], the district attorney is a county officer [citation] subject to the authority of the county board of supervisors. [Citations.] The district attorney's office is funded with county funds pursuant to the county budget established by the board of supervisors and, except as otherwise provided by law, is limited in the making of expenditures or the incurring of liabilities to the amount of appropriations allowed by the budget. [Citation.] A county has the option, in its discretion, to employ a county counsel to perform most of the civil legal duties required by the county. [Citations.] In the absence of such an election, the district attorney serves as both public prosecutor and civil attorney for the county. [Citation.] When county counsel is employed, most, but not all, of the district attorney's civil functions are performed by the county counsel. [Citation.] However, the district attorney retains some civil law duties, including nuisance abatement. [Citation.]

In this respect, Government Code section 26528 provides: “The district attorney may, and when directed by the board of supervisors shall, bring a civil action in the name of the people of the State of California to abate a public nuisance in his county.” Likewise, Code of Civil Procedure section 731 provides that the district attorney must bring such an action whenever so directed by the board of supervisors. Accordingly, [one case] held that a district attorney could be compelled by writ of mandate to bring a nuisance action when so directed by the board of supervisors.

In addition to usual duties, a district attorney has the authority to participate in noncriminal actions or proceedings that are in aid of or auxiliary to the district attorney's usual duties. [Citation.] While, as a general rule, district attorneys may not use their funds and powers to intervene in purely private litigation, some functions, though civil in nature, are so closely related and in the furtherance of criminal law enforcement that the district attorney may properly perform them. [Citation.]

From this it can be seen that the district attorney is not, and is not required to be, wholly independent of the influence of governmental authorities. While the office of district attorney itself is elective, the district attorney is dependent upon county funds budgeted by the county board of supervisors. In some, but not all respects, the district attorney is subject to supervision by the board of supervisors. [Citation.] In some respects, particularly with regard to nuisance properties, the district attorney is subject to the directions of the board of supervisors.

Therefore, it is evident that, if the board of supervisors budgeted funds to establish a deputy district attorney position to concentrate on nuisance actions, there could be no cause



for complaint. If the board of supervisors asked the district attorney to concentrate nuisance abatement activities in certain targeted areas, there could be no cause for complaint. Even if the board of supervisors directed the district attorney to pursue nuisance abatement against a particular nuisance property or nuisance property owner, there could be no cause for complaint. And in pursuing nuisance abatement actions, the district attorney may become involved in any activities that are in aid of or auxiliary to the abatement of the nuisance.”

⁸ *Brady v. Maryland* (1963) 373 U.S. 83, 87.

⁹ State Bar Formal Opinion 1989-106.

¹⁰ Another potential trap to consider is whether cases such as *Nightlife v. City of Beverly Hills* (2003) 108 Cal.App.4th 81 and its progeny affect a City Attorney’s ability to function as both prosecutor and impartial counsel at an administrative proceeding on a matter that has both criminal and civil consequences (e.g., a CUP, variance, or business license revocation) based on the same facts. *Nightlife* dealt with the issue of a City Attorney acting as a prosecutor in administrative proceedings, but similar concerns might be raised with respect to a prosecutor in judicial proceedings. The League of California Cities has a white paper on *Nightlife* and its progeny which is available from the League’s website entitled: “Model Guidelines for Avoiding Unconstitutional Commingling of Functions in Adversarial Proceedings” November 2004, found at: www.cacities.org/resource_files/24258.due%20process%20guidelines.doc. See also “Report of the Department’s Ad Hoc Due Process Committee on the Commingling of functions in Quasi-Judicial Proceedings in the Wake of *Nightlife* and *Quintero*”, presented by Michael Jenkins, et al., at the League of California Cities Annual Conference, September 2005. To find, input search terms “due process” in the League papers website: http://www.cacities.org/index.jsp?zone=locc§ion=locc_front_page&app=searchcapodb. Finally, note that the holding in *Nightlife* and progeny was tempered recently - see a discussion in “Due Process In Local Administrative Hearings After The California Supreme Court’s Opinion in *Morongo Band of Mission Indians v. California State Water Resources Control Board*, 45 Cal.4th 731 (2009) by Manuela Albuquerque, presented at the League of California Cities, City Attorneys Department Conference, May 6-8, 2009.

¹¹ In *U.S v. Thriftmart, Inc.* (9th Cir. 1970) 429 F.2d 1006, 1008-10, the court noted: “[I]t was not until . . . 1967 [in *Camara v. Municipal Court of San Francisco* (1967) 387 U.S. 523 and *See v. Seattle* (1967) 387 U.S. 541] that the Court even applied the Fourth Amendment to the administrative search. [Footnote omitted.] . . . [T]he Court clearly recognized that administrative searches must be viewed differently than criminal searches, and that their constitutionality must be tested by different standards. . . . Further, . . . the administrative search is ‘neither personal in nature nor aimed at the discovery of evidence of crime’ and thus involves ‘a relatively limited invasion of the urban citizen’s privacy’ [and the] inspection process . . . should not be ‘hobbled by the blanket requirement of the safeguards necessary for a search of evidence of criminal acts.’ [cite omitted.] Moreover, while in the case of the search for evidence of crime the Supreme Court has repeatedly urged the desirability of securing a search warrant where time permits, here ‘most citizens allow inspection of their property without a warrant’ and ‘it seems likely that warrants should normally be sought only after entry is refused * * *’ 387 U.S. at 539, 87 S.Ct. at 1736. See suggests that it would be unreasonable to do otherwise save in a case where the element of surprise is crucial to the success of the operation. 387 U.S. at 545 n. 6, 87 S.Ct. 1737. That subjecting inspection to the warrant procedure is not intended to upset past practices is emphasized. In *Camara* it is stated that the Court’s holding ‘does not suggest any change in what seems to be the prevailing local policy, in most situations, of authorizing entry, but not entry by force, to inspect.’ 387 U.S. at 540, 87 S.Ct. 1736. In *See* the Court characterized the warrant process as ‘minimal limitations on administrative action.’ 387 U.S. at 545, 87 S.Ct. at 1740. It is



clear, therefore, that the administrative search is to be treated differently than the criminal search.”

¹² See also *City and County of San Francisco v. Municipal Court* (1985) 167 Cal.App.3d 712, 719, in which the court stated that a civil inspection warrant must be justified by reasonable governmental interests. Where the governmental interest at stake is to enforce building standards and thereby prevent conditions that are hazardous to public health and safety, the test for determining reasonableness may vary with the particular municipal program being enforced. (Id.) “Enforcement, obviously, cannot be accomplished without inspection and *Camara* permits an inspection with a warrant to enforce building codes.” (Id. at 720.) Thus, the court authorized an inspection warrant to allow redevelopment officers to enter private property to determine whether that property complied with redevelopment standards.

¹³ The court explained: “We simply cannot say that the protections provided by the warrant procedure are not needed in this context; broad statutory safeguards are no substitute for individualized review, particularly when those safeguards may only be invoked at the risk of a criminal penalty.” (Id. at 533.)

¹⁴ Id. at 538-39.

¹⁵ Id.

¹⁶ Generally, it is the occupant who has the right to consent to a search because that is the person with the reasonable expectation of privacy protected by the Fourth Amendment. *U.S. v. Impink* (1984) 728 F.2d 1228, 1232.

¹⁷ CCP Section 1822.51

¹⁸ See discussion in *Code Enforcement – A Comprehensive Approach*, Joseph M. Schilling and James B. Hare (Solano Books 1994), pp. 75-76 (citing to *People v. Wheeler* (1973) 30 Cal.App.3d 282, 298 and *Salwasser Manufacturing Co. v. Municipal Court* (1989) 214 Cal.App.3d 625, 631 (“Thus, when the warrant application is based on specific evidence of violations, ‘... there must be some plausible basis for believing that a violation is *likely* to be found. The facts offered must be sufficient to warrant further investigation or testing.’”)

¹⁹ The Declaration is permitted as a substitute for the affidavit pursuant to CCP Section 2015.5

²⁰ See CCP Section 1822.51.

²¹ See CCP Section 1822.56.

²² See CCP Section 1822.55.

²³ The warrant should specify any agency that is participating or attending the execution of the warrant, such as law enforcement, the City Prosecutor’s Office (to ensure the safe and proper execution of the warrant), Planning and Building & Safety officials, health department, fire department, etc. This is important, especially when persons other than Code Enforcement are participating. Otherwise, there could be a motion to suppress evidence filed later.

²⁴ Id.

²⁵ *Flahive v. City of Dana Point* (1999) 72 Cal.App.4th 241, 247 at fn. 9.

²⁶ See *People v. Tillery* (1989) 211 Cal.App.3d 1569, 1574-78



²⁷ Schilling and Hare, *supra.*, at p. 79.

²⁸ See CCP Section 1822.55.

²⁹ Government Code § 38771; see also California Constitution, Article XI, § 7: "A city has police power authority to declare what activities or uses constitute a nuisance and, in an effort to protect the general welfare, to enact regulations designed to eliminate or reduce the occurrence of a nuisance."

³⁰ *Gleaves v. Waters* (1985) 175 Cal.App.3d 413, 418.

³¹ Note that this court appears to require "probable cause" rather than the lesser standard of "reasonable cause." This could be because the court was unaware of the line of cases indicating a somewhat lesser standard for administrative inspection cases [see footnote 14 above], but this reference could be argued to mean that regular "probable cause" is required for abatement activity.

³² *Ogborn v. City of Lancaster* (2002) 101 Cal. App. 4th 448, 558 (2002) (denying due process claim because court found code officers reasonably relied on the inspection and abatement warrant in demolishing a house, but allowing conversion claim to proceed against code enforcement officer and allowing civil rights claim against City).

³³ See, e.g., *D & M Financial Corp. v. City of Long Beach* (2006) 136 Cal.App.4th 165, in which the court held that the mortgagee had sufficient standing to bring an inverse condemnation against city for the demolition of an apartment building, and the city's notice of pending demolition to mortgagee did not satisfy procedural due process requirements. Courts seem very willing to find cities liable in demolitions performed pursuant to administrative proceedings if all procedural requirements are not followed precisely.

³⁴ For example, City of San Jose has had an administrative code enforcement program of long-standing with three tiers: an administrative citation program, an administrative enforcement program and an administrative nuisance abatement ordinance. The Municipal Code provisions can be found online specifically Chapters 1.13, 1.14 and 1.15 of Title 1 of the San Jose Municipal Code. See footnote below referencing articles describing these programs.

³⁵ Two papers that may be helpful: "Civilizing Code Enforcement" (May 1-3, 1996) and "Continuing Efforts to Civilize Code Enforcement" (May 19-21, 1999), both by Joan R. Gallo and Renee A. Gurza. Papers can be found by inputting the title as the key words in the League Articles website:

http://www.cacities.org/index.jsp?zone=locc§ion=locc_front_page&app=searchcapodb.

³⁶ Veh. Code § 40215.

³⁷ Gov.Code § 53069.4 (a)(1).

³⁸ Gov.Code § 53069.4 (a)(2).

³⁹ Gov.Code § 53069.4 (b)(1). Note that case law notes that Government Code section 53069.4 provides for alternative procedures for challenging an administrative decision like a ruling on a code violation, either by a de novo appeal to the superior court to be heard by a judge or a subordinate judicial officer or by a petition for writ of mandate under Code of Civil Procedure sections 1094.5 and 1094.6, in spite of the language in Section 53069.4 that would suggest



otherwise. (*Martin v. Riverside County Dept. of Code Enforcement* (2008) 166 Cal.App.4th 1406, 1412, 83 Cal.Rptr.3d 624, 629.)

⁴⁰ Some examples from Municipal Codes: City of Chino Hills, City of West Hollywood, City of Santa Paula, City of El Segundo.

⁴¹ See West Hollywood Municipal Code Section 1.08.010, subsection (e).

⁴² See Santa Paula Municipal Code Section 11.40.

⁴³ Government Code § 36900 (a) Violation of a city ordinance is a misdemeanor unless by ordinance it is made an infraction. The violation of a city ordinance may be prosecuted by city authorities in the name of the people of the State of California, or redressed by civil action. (b) Every violation determined to be an infraction is punishable by (1) a fine not exceeding one hundred dollars (\$100) for a first violation; (2) a fine not exceeding two hundred dollars (\$200) for a second violation of the same ordinance within one year; (3) a fine not exceeding five hundred dollars (\$500) for each additional violation of the same ordinance within one year. (c) Notwithstanding any other provision of law, a violation of local building and safety codes determined to be an infraction is punishable by (1) a fine not exceeding one hundred dollars (\$100) for a first violation; (2) a fine not exceeding five hundred dollars (\$500) for a second violation of the same ordinance within one year; (3) a fine not exceeding one thousand dollars (\$1,000) for each additional violation of the same ordinance within one year of the first violation.

⁴⁴ Under the maxim of statutory construction, *expressio unius est exclusio alterius*, if the Legislature had intended to limit the fines for misdemeanor administrative citations, it would have done so, since it did so with infractions. (See *Suarez v. Pacific Northstar Mechanical, Inc.* (2009) 180 Cal.App.4th 430, 443.)

⁴⁵ *Haas v. County of San Bernardino* (2002) 27 Cal. 4th 1017, 1024 (administrative hearing bodies or officers must be appointed in a way that does not create the risk that decisions that favor the public agency will be rewarded with future remunerative work).

⁴⁶ *Id.* at 1034

⁴⁷ Note that a hearing officer who was paid through a judging service (JAMS) was disapproved of in *The Yaqub v. Salinas Valley Memorial Healthcare System* (2004) 122 Cal.App.4th 474, 484-85.

⁴⁸ See *City of Santa Paula v. Narula* (2003) 114 Cal.App.4th 485, 492-493 which implicitly acknowledges the right of a City to collect administrative citation fines by lien as long as the lien authority is set forth in the ordinance ("Section 53069.4 authorizes the City to enact ordinances to enforce its administrative orders by imposing fines and penalties It also authorizes the City to "collect the penalty pursuant to the procedures set forth in its ordinance." (*Id.*, subd. (d).) Section 11.59 of the City's ordinance provides for attorney fees in litigation by the City to foreclose a lien to collect its administrative costs and penalties.")

⁴⁹ Government Code Section 12419.8 provides for a procedure to intercept State Tax refunds and lottery proceeds to pay off debts owed to cities. The program is administered by the Franchise Tax Board in conjunction with the State Controller's office. A thick booklet explaining the program can be obtained from the Interagency Intercept Dept., Ph# 916-845-5344.



1 (ATTORNEY NAME)
2 (FIRM NAME)
3 (ADDRESS)

4
5 Attorneys for

6
7
8 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF _____**

10
11 In the Matter of the CITY of
12 _____'s application for issuance
13 of an Inspection Warrant for the real
14 property located at [enter address] owned
15 by [enter owner's name].

CASE NO.

**DECLARATION IN SUPPORT OF
INSPECTION WARRANT**

16
17
18 I, _____ declare as follows:

19 1. I am a [title] in the City of _____. I have been employed by the City
20 for _____ years.

21 2. [List additional code enforcement related experience, if any, e.g., college degrees,
22 specialized training, law enforcement]

23 3. The Code Enforcement Division is responsible for the criminal and civil enforcement of
24 the City's land use ordinances (zoning, housing, building, fire, health, etc.).

25 4. On or about _____, I _____[chronologically list your investigation
26 activities; events should demonstrate that the warrant is necessary because you are either
27 unable to contact the responsible party to seek voluntary admittance to the property or the

1 **responsible person refuses to voluntarily permit admittance; make a separate, numbered,**
2 **paragraph for each date of activity].**

3 5. It is my opinion that ____**[state why condition of property is a violation of the**
4 **_____ code & which sections are being violated].**

5 6. It is my opinion that ____**[if appropriate, state why 24-hour advance notice**
6 **should be waived].**

7 7. It is my opinion that ____**[if appropriate, state why court should approve**
8 **forcible entry onto the property].**

9 8. It is my opinion that ____**[if appropriate, state which agencies/departments**
10 **should be permitted to enter the property with you and why].**

11 I declare under penalty of perjury under the laws of the State of California that the
12 foregoing is true and correct.

13 Dated this __ day of ____, ____, in _____, _____ County, California.

14 _____
15 [Name & title]

16 Subscribed and sworn before me
17 this _____ day of _____, _____, at
18 _____ AM/PM

19 _____
20 Judge

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1 (ATTORNEY NAME)
2 (FIRM NAME)
3 (ADDRESS)

4

5 Attorneys for

6
7

8 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF _____**

10

11
12 IN RE PROPERTY AT

13 _____

14
15

CASE NO.

**APPLICATION FOR INSPECTION
WARRANT UNDER C.C.P. SECTION
1822.50, ET SEQ.; DECLARATION**

16
17

18 THE CITY OF _____, CALIFORNIA, HEREBY submits its
19 Application for an Inspection Warrant as provided for by C.C.P. Sections 1822.50 *et seq.* This
20 Application is based upon the Memorandum of Points and Authorities and the Declaration of
21 _____, attached hereto, and upon any oral and documentary
22 evidence, which may be presented to the Court.

23

24 DATED:

Respectfully submitted,

25

26

By: _____

[NAME]

27

Attorney for CITY _____

28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 **The property located at _____ (“Property”),**

5
6 **II.**

7 **FACTS**

8
9 **III.**

10 **ABSENT CONSENT TO ENTER PRIVATE PROPERTY, A WARRANT**
11 **IS REQUIRED PRIOR TO ENTRY FOR PURPOSES OF INSPECTION**

12 The Fourth Amendment generally requires that the City of _____ obtain an
13 inspection warrant for a non-consensual entry onto private property to conduct an inspection.
14 (*Camara v. Municipal Court* (1967) 387 U.S. 523, 528-529.) However, “[i]t is questionable
15 whether an entirely vacant building, used neither for a residence nor a commercial purpose,
16 encompasses any privacy of the kind protected by the Fourth Amendment.” (*City etc. of San*
17 *Francisco v. City Investment Corp.* (1971) 15 Cal.App.3d 1031, 1039.) Nevertheless, in an
18 abundance of caution, the City is applying for an inspection warrant.

19 **A. This Court Is Authorized by Code of Civil Procedure Sections 1822.50 *Et***
20 ***Seq.* To Issue a Civil Inspection Warrant to the City of _____.**

21 Code of Civil Procedure section 1822.50 provides that:

22 “An inspection warrant is an order, in writing, in the name of the people, signed
23 by a judge of a court of record, directed to a state or local official, commanding him to
24 conduct any inspection required or authorized by state or local law or regulation relating
25 to building, fire, safety, plumbing, electrical, health, labor, or zoning.”

26 Code of Civil Procedure § 1822.51 provides that:

27 “An inspection warrant shall be issued upon cause, unless some other provision of
28 state or federal law makes another standard applicable. An inspection warrant shall be

1 supported by an affidavit, particularly describing the place, dwelling, structure, premises,
2 or vehicle to be inspected and the purpose for which the inspection is to be made. In
3 addition, the affidavit shall contain either a statement that the consent to inspect has been
4 sought and refused or facts or circumstances reasonably justifying the failure to seek
5 consent.”

6 The inspection warrant shall issue under Code of Civil Procedure section 1822.54:

7 “If the judge is satisfied that the proper standard for issuance of the warrant has
8 been met, he or she shall issue the warrant particularly describing each place, dwelling,
9 structure, premises or vehicle to be inspected and designating on the warrant the purpose
10 and limitations of the inspection, including the limitations required by this title.”

11 In *City and County of San Francisco v. Municipal Court* (1985) 167 Cal.App.3d 712,
12 719, the court stated that a civil inspection warrant must be justified by reasonable governmental
13 interests. Where the governmental interest at stake is to enforce building standards and thereby
14 prevent conditions that are hazardous to public health and safety, the test for determining
15 reasonableness may vary with the particular municipal program being enforced. (*Id.*)
16 “Enforcement, obviously, cannot be accomplished without inspection and *Camara* permits an
17 inspection with a warrant to enforce building codes.” (*Id.* at 720.) Thus, the court authorized an
18 inspection warrant to allow redevelopment officers to enter private property to determine
19 whether that property complied with redevelopment standards. (*Id.*)

20 **B. All Prerequisites For the Issuance of An Inspection Warrant Are Met in the**
21 **Instant Action.**

22 This Application satisfies all prerequisites for the issuance of an inspection warrant. As
23 required by C.C.P. § 1822.54, the proposed Inspection Warrant describes each building, place,
24 structure, or premises to be inspected and designates the purpose and limitations of the
25 inspection. As provided in C.C.P. § 1822.55, the proposed Inspection Warrant is effective for
26 not more than fourteen (14) days. The proposed Warrant provides that the inspection shall be
27 made within prescribed hours and in the manner required by C.C.P. § 1822.56.

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IV.
CONCLUSION

Based upon the foregoing and the Declaration of _____ attached hereto, the City of _____ respectfully requests that the Court issue an Inspection Warrant to permit the City of _____ to enter onto the Property in the absence of the owner and use reasonable force as necessary to (1) to inspect the exterior back-yard of the and (2) to enter the house and garage on the Property to inspect the interiors to ensure that the Property is in compliance with all applicable laws including, but not limited to, the _____ Municipal Code, and to determine the extent of the damage and the threat to the public's health and safety.

DATED: _____

Respectfully submitted,

JENKINS & HOGIN, LLP

By: _____
[NAME]
Attorneys for CITY OF _____

1 (ATTORNEY NAME)
2 (FIRM NAME)
3 (ADDRESS)

4
5 Attorneys for

6
7
8 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF _____**

10
11 In the Matter of the CITY of
12 _____'s application for issuance
13 of an Inspection Warrant for the real
14 property located at [enter address] owned
15 by [enter owner's name].

CASE NO.

**EXECUTION AND RETURN OF
INSPECTION WARRANT**

16
17
18 I, ___[Name]___, ___[Title]___ of the City of _____,
19 ___[Department/Division]___, certify that I personally executed the attached inspection warrant
20 by inspection of the place, premises, building, or structures described therein during the time
21 allowed and in the manner specified by such warrant. The inspection is now complete.

22 Prior to making said inspection, I provided notice of the issuance of said warrant to be
23 given to ___[Name of person given notice]___, owner/occupant, by ___[describe manner of
24 giving notice]_____.

25 The inspection commenced and was completed on _____, _____, between
26 the hours of _____ and _____.

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The inspection warrant was fully executed and is now returned to the Honorable
____[Judge's Name]____.

Executed this ____ day of _____, 19____, at _____, California.

I certify and declare under penalty of perjury of the laws of the State of California that
the foregoing is true and correct.

[Name]
[Title]

1 (ATTORNEY NAME)
2 (FIRM NAME)
3 (ADDRESS)

4

5 Attorneys for

6
7

8 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF _____**

10

11
12 IN RE PROPERTY AT

13 _____

14
15

CASE NO.

**APPLICATION FOR INSPECTION
WARRANT UNDER C.C.P. SECTION
1822.50, ET SEQ.; DECLARATION**

16
17

18 THE CITY OF _____, CALIFORNIA, HEREBY submits its
19 Application for an Inspection Warrant as provided for by C.C.P. Sections 1822.50 *et seq.* This
20 Application is based upon the Memorandum of Points and Authorities and the Declaration of
21 _____, attached hereto, and upon any oral and documentary
22 evidence, which may be presented to the Court.

23

24 DATED:

Respectfully submitted,

25

26

By: _____

[NAME]

27

Attorney for CITY _____

28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 **The property located at _____ (“Property”),**

5

6 **II.**

7 **FACTS**

8

9 **III.**

10 **ABSENT CONSENT TO ENTER PRIVATE PROPERTY, A WARRANT**

11 **IS REQUIRED PRIOR TO ENTRY FOR PURPOSES OF INSPECTION**

12 The Fourth Amendment generally requires that the City of _____ obtain an

13 inspection warrant for a non-consensual entry onto private property to conduct an inspection.

14 (*Camara v. Municipal Court* (1967) 387 U.S. 523, 528-529.) However, “[i]t is questionable

15 whether an entirely vacant building, used neither for a residence nor a commercial purpose,

16 encompasses any privacy of the kind protected by the Fourth Amendment.” (*City etc. of San*

17 *Francisco v. City Investment Corp.* (1971) 15 Cal.App.3d 1031, 1039.) Nevertheless, in an

18 abundance of caution, the City is applying for an inspection warrant.

19 **A. This Court Is Authorized by Code of Civil Procedure Sections 1822.50 *Et***

20 ***Seq.* To Issue a Civil Inspection Warrant to the City of _____.**

21 Code of Civil Procedure section 1822.50 provides that:

22 “An inspection warrant is an order, in writing, in the name of the people, signed

23 by a judge of a court of record, directed to a state or local official, commanding him to

24 conduct any inspection required or authorized by state or local law or regulation relating

25 to building, fire, safety, plumbing, electrical, health, labor, or zoning.”

26 Code of Civil Procedure § 1822.51 provides that:

27 “An inspection warrant shall be issued upon cause, unless some other provision of

28 state or federal law makes another standard applicable. An inspection warrant shall be

1 supported by an affidavit, particularly describing the place, dwelling, structure, premises,
2 or vehicle to be inspected and the purpose for which the inspection is to be made. In
3 addition, the affidavit shall contain either a statement that the consent to inspect has been
4 sought and refused or facts or circumstances reasonably justifying the failure to seek
5 consent.”

6 The inspection warrant shall issue under Code of Civil Procedure section 1822.54:

7 “If the judge is satisfied that the proper standard for issuance of the warrant has
8 been met, he or she shall issue the warrant particularly describing each place, dwelling,
9 structure, premises or vehicle to be inspected and designating on the warrant the purpose
10 and limitations of the inspection, including the limitations required by this title.”

11 In *City and County of San Francisco v. Municipal Court* (1985) 167 Cal.App.3d 712,
12 719, the court stated that a civil inspection warrant must be justified by reasonable governmental
13 interests. Where the governmental interest at stake is to enforce building standards and thereby
14 prevent conditions that are hazardous to public health and safety, the test for determining
15 reasonableness may vary with the particular municipal program being enforced. (*Id.*)
16 “Enforcement, obviously, cannot be accomplished without inspection and *Camara* permits an
17 inspection with a warrant to enforce building codes.” (*Id.* at 720.) Thus, the court authorized an
18 inspection warrant to allow redevelopment officers to enter private property to determine
19 whether that property complied with redevelopment standards. (*Id.*)

20 **B. All Prerequisites For the Issuance of An Inspection Warrant Are Met in the**
21 **Instant Action.**

22 This Application satisfies all prerequisites for the issuance of an inspection warrant. As
23 required by C.C.P. § 1822.54, the proposed Inspection Warrant describes each building, place,
24 structure, or premises to be inspected and designates the purpose and limitations of the
25 inspection. As provided in C.C.P. § 1822.55, the proposed Inspection Warrant is effective for
26 not more than fourteen (14) days. The proposed Warrant provides that the inspection shall be
27 made within prescribed hours and in the manner required by C.C.P. § 1822.56.

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IV.
CONCLUSION

Based upon the foregoing and the Declaration of _____ attached hereto, the City of _____ respectfully requests that the Court issue an Inspection Warrant to permit the City of _____ to enter onto the Property in the absence of the owner and use reasonable force as necessary to (1) to inspect the exterior back-yard of the and (2) to enter the house and garage on the Property to inspect the interiors to ensure that the Property is in compliance with all applicable laws including, but not limited to, the _____ Municipal Code, and to determine the extent of the damage and the threat to the public's health and safety.

DATED: _____

Respectfully submitted,
JENKINS & HOGIN, LLP

By: _____
[NAME]
Attorneys for CITY OF _____

1 (ATTORNEY NAME)
2 (FIRM NAME)
3 (ADDRESS)

4

5 Attorneys for

6
7

8 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF _____**

10

11
12 IN RE PROPERTY AT

13 _____

14
15

CASE NO.

**APPLICATION FOR ABATEMENT
WARRANT; MEMORANDUM OF
POINTS AND AUTHORITIES;
DECLARATION OF**

_____ **IN
SUPPORT THEREOF**

16
17

[Proposed] Abatement Warrant Filed under
Separate Cover

18
19

20 **TO THE CLERK OF THE COURT**

21 **THE CITY OF _____** submits its Application for an Abatement
22 Warrant as provided for by C.C.P. Sections 1822.50, *et seq.* This application is brought pursuant
23 to California Civil Code §§3491 and 3494 and Code of Civil Procedure §1822.50 *et seq.*, and is
24 based upon the Memorandum of Points and Authorities and the Declaration of _____,
25 Declaration of _____, and Exhibits A through H attached thereto, and upon any
26 oral and documentary evidence which may be presented to the Court.

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DATED: _____, City Attorney

By: _____

_____,
Attorneys for the
CITY OF _____

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The City of _____ seeks an order authorizing it to enter the property located at 138 1st Street, _____, California (the "Property") for the purpose of abating a public nuisance. The structure, which at one time was a residence, is water damaged and filled with mold in the interior. (See Declaration of _____ ("_____"), ¶ 7.) The roof is also water damaged and could collapse at any time. (_____, ¶ 7.) In addition, the structure is being supported by damaged and rotted beams that undermine its structural integrity. (_____, ¶ 7, 9.) The Property remains covered in trash and debris, has peeling paint and continues to sit neglected and in a state of disrepair. (_____, ¶ 4, 15.) The Property is unoccupied. (_____, ¶ 15.) The north wall is composed only of damaged drywall without any siding normally found on the outside of a house, so it does not properly serve as a barrier against rodents, pests, intruders, or the elements. (_____, ¶ 15.) On July 1, 2003, the City rendered the structure uninhabitable by declaring it unsafe to occupy. (_____, ¶ 9.) In spite of the City's repeated requests, _____ failed to remedy the nuisance existing on his Property. (_____, ¶ 15.)

Further, this Property endangers the public safety because the Property is not properly fenced or otherwise secured from intruders. (_____, ¶ 15.) Therefore, it is available to hide criminal activity and is an attractive nuisance for children.

The City Council, after a noticed public hearing on May 23, 2006, determined that there was sufficient evidence of a public nuisance and ordered the abatement of the Property by August 23, 2006.¹ The City's nuisance finding was not challenged in court by the Property owner, and his time to do so has long since expired. (See Code of Civil Procedure §1094.6.)

Before the City may enter onto private property to abate the public nuisance, however,

¹ Minutes of the Regular Meeting of the City Council of the City of _____, California, held on May 23, 2006, 5.c. ("Minutes"), attached as Exhibit "E," and Resolution No. _____ of the City of _____, California Ordering Abatement of Nuisance Violations at the Property at _____ ("Resolution"), attached as Exhibit "G."

1 the Fourth Amendment requires that the City obtain an abatement warrant. (*Gleaves v. Waters*
2 (1985) 175 Cal.App.3d 413, 419-420.) The procedures for obtaining an inspection warrant, set
3 forth in Code of Civil Procedure § 1822.50 *et seq.*, have been approved by courts to obtain an
4 abatement warrant.² Code of Civil Procedure §§1822.51 and 1822.52 require that an inspection
5 warrant be issued upon a showing that probable cause to believe grounds for the abatement exist.
6 As shown in the declaration of _____ and the attached photographs, the City has
7 demonstrated that the condition of the Property constitutes a nuisance. Further, given the
8 Property owner's failure to make the necessary repairs, abatement by the City is the only
9 reasonable solution.

10 The City afforded the Property owner, _____, every opportunity to make
11 the necessary repairs and remedy the dangerous conditions at the Property. The City Council
12 ordered the demolition of the front unit on the Property and ordered that the back unit be either
13 rehabilitated or demolished within 90 days to eliminate the nuisance violations. (See Minutes, at
14 p. 10, and Resolution.)³ _____ caused the demolition of the front unit on or
15 around September 15, 2006. (_____, ¶ 12.) However, the two units shared a
16 common wall, so when the front unit was demolished, it left the drywall of the rear unit exposed
17 to the elements, worsening the problems of the rear unit. (_____, ¶ 12.) To date,
18 _____ has failed to make the necessary repairs to the rear unit and the 90 days
19 allotted has long since passed. (_____, ¶ 15.) Therefore, the City of
20 _____ submits that this application for an abatement warrant authorizing it to
21 abate the public nuisance at the Property is supported by probable cause and should be issued.

22 ///

23 _____
24 ²*Flahive v. City of Dana Point* (1999) 72 Cal.App.4th 241, 246 at fn. 8; *People v. Todd Shipyards Corp.*
25 (1987) 192 Cal.App.3d Supp. 20, 30-31 (upheld warrant obtained under Code of Civil Procedure §
1822.50 *et seq.*, which authorized the search and subsequent seizure of documents and samples).

26 ³ The latter order was not reflected in the resolution which called for the demolition of both structures, but
27 it was reflected in the minutes as a concession to _____ who had appeared at the public
28 hearing claiming that the back unit was salvageable and requesting time to refurbish it. (See Minutes at p.
10.) The City's Director of Community Development indicated that the City would accept a
refurbishment plan by _____ as long as the public nuisance was abated within 90 days.
(Minutes, at p. 10.)

1 **II. STATEMENT OF FACTS**

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4 **III. THIS COURT IS AUTHORIZED TO ISSUE AN ABATEMENT WARRANT TO**
5 **THE CITY OF _____ SO THAT IT MAY EXERCISE ITS**
6 **CONSTITUTIONAL POLICE POWER AUTHORITY TO ABATE PUBLIC**
7 **NUISANCES**

8 Civil Code §3491 provides three remedies for a public nuisance: 1) indictment or
9 information; 2) a civil action; or 3) abatement. The City is authorized to pursue any of the three
10 options. (*Selma Pressure Treating Co. v. Osmose Wood Preserving Co.* (1990) 221 Cal.App.3d
11 1601, 1616 (public entity, like individuals, is able to pursue full panoply of remedies for
12 nuisance).) _____ Municipal Code §8.28.070D sets forth in part, “If it is
13 determined that the [Property] does constitute a public nuisance, the council may order the same
14 abated within a reasonable time.”

15 The Fourth Amendment, however, under certain circumstances, requires that the City of
16 _____ obtain an abatement warrant prior to the City’s non-consensual entry onto
17 private property to abate the public nuisance. (*Gleaves v. Waters* (1985) 175 Cal.App.3d 413,
18 419-420.) The procedures for obtaining an inspection warrant, set forth in Code of Civil
19 Procedure § 1822.50 *et seq.*, have been used as a model for obtaining an abatement warrant.
20 (*Flahive v. City of Dana Point* (1999) 72 Cal.App.4th 241, 246 at fn. 8; *People v. Todd*
21 *Shipyards Corp.* (1987) 192 Cal.App.3d Supp. 20, 30-31 (Court upheld warrant obtained under
22 Code of Civil Procedure § 1822.50 *et seq.*, which authorized the search and subsequent seizure
23 of documents and samples).) The *Flahive* court cited with approval the use of the procedures set
24 forth in Code of Civil Procedure §1822.50 *et seq.* for issuance of an abatement warrant:

25 “We note, however, the procedure the City employed appears to pass
26 constitutional muster because it mirrored the statutory requirements for
27 other types of warrants. The warrant was issued upon probable cause to
28 believe grounds for the abatement existed, shown by an affidavit which
also particularly described the place to be inspected. The warrant was in
writing, directed to a state or local official, and commanded the abatement
authorized by an appropriate law. The warrant particularly described the

1 place where the abatement was to take place and designated the purpose
2 for the intrusion and limitations on it. The warrant was valid for a
3 reasonable time and limited the hours during which it could be executed.
4 The owner's presence was not required, but the City was required to post
notice on the property at least 24 hours before the abatement. Only
reasonable force to execute the warrant was authorized."

5 Code of Civil Procedure §§1822.51 and 1822.52 require that an abatement warrant be
6 issued upon a showing that probable cause to believe grounds for the abatement exist. As shown
7 in the Declaration of Mr. _____, the City has demonstrated that the condition of the
8 Property constitutes a nuisance and has further demonstrated that abatement by the City, given
9 the Property owner's failure to make the necessary repairs, is the only reasonable solution.

10 A city has police power authority to declare what activities or uses constitute a nuisance
11 and, in an effort to protect the general welfare, to enact regulations designed to eliminate or
12 reduce the occurrence of a nuisance. (California Constitution, Article XI, § 7.) A city council
13 may, by ordinance, declare what constitutes a nuisance and may establish procedures for the
14 abatement of the nuisance at the Property owner's expense. (Government Code § 38771.)
15 Pursuant to this police power authority, the City enacted _____ Municipal Code §
16 8.28 *et seq.*, which sets forth the condition of property that constitutes a public nuisance and
17 provides that the intent of the City's nuisance law is to protect the inhabitants against all forms of
18 nuisance growing out of any condition which is injurious to health, or detrimental to the public
19 safety and general welfare and interferes with the comfortable enjoyment of life or property.

20 Here, the undisputed evidence establishes that the Property constitutes a public nuisance.
21 The structure's damaged condition, the overgrowth of vegetation, and the presence of trash and
22 debris all provide a cover for potential criminal activity, an attractive nuisance, a fire hazard and
23 an eyesore that is detrimental to the community. Photos attached as Exhibits A, B, C and F to
24 the Declaration of Mr. _____ clearly confirm these findings.

25 **IV. THE CITY IS AUTHORIZED TO ABATE THE NUISANCE CONDITIONS AT**
26 **138 FIRST STREET**

27 Since 2003, City staff has observed ongoing violations of state and local law at the
28 Property. The numerous efforts to contact _____ to resolve this matter and bring
the Property into compliance with state and local law have been unsuccessful. Due to the lack of

1 response from _____, the City is left to abate the public nuisance for the welfare
2 and benefit of its citizens. Given the fact that _____ has maintained the vacant
3 and damaged structure at the Property since at least 2003, there is no reason to believe he will
4 remedy the ongoing hazardous conditions in the foreseeable future.

5 When appropriate, administrative abatement proceedings against a substandard structure
6 may demand demolition. When a property owner has been given ample notice and opportunity
7 to correct or repair a structure constituting a nuisance, but has failed to do so, demolition of the
8 structure by the government to abate the nuisance is a regulatory action within the City's police
9 power. (*Duffy v. City of Long Beach* (1988) 201 Cal.App.3d 1352; *Leppo v. City of Petaluma*
10 (1971) 20 Cal.App.3d 711, 716.)

11 The City afforded the Property owner every opportunity to make the necessary repairs to
12 the structure and the Property. Despite the City's requests that _____ take the
13 necessary steps to bring the Property into compliance with state and local law,
14 _____ has failed to do so. Moreover, the City afforded the Property owner with
15 an opportunity to be heard and a chance to cross-examine witnesses and controvert evidence.
16 _____ has had minimal contact with the City and voiced his objections at the
17 hearing. Given the continuous nature of the violations since at least 2003, demolition of the
18 structure, along with securing the premises from intruders, and vermin control, lot clearing, and
19 installation of fencing at the Property, are necessary to eliminate the nuisance conditions
20 presenting health and safety issues, as well as being visible to adjoining properties and public
21 property.

21 **V. CONCLUSION**

22 Based upon the foregoing, the City of _____ respectfully requests that this
23 Court grant its application and issue an abatement warrant authorizing the City of
24 _____ or its duly authorized representatives to enter onto the Property and to
25 remove and abate the existence of the public nuisance resulting from a perpetual lack of
26 maintenance.

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DATED: March 7, 2008

_____, City Attorney
JENKINS & HOGIN, LLP

By: _____
_____, Attorneys for the
CITY OF _____