



BEST BEST & KRIEGER
ATTORNEYS AT LAW

CONFISCATED WEAPONS PETITIONS

February 13, 2013

Matthew R. Silver, Associate, Best Best & Krieger LLP

Curtis Wright, Associate, Best Best & Krieger LLP

Best Best & Krieger LLP

18101 Von Karman Avenue
Suite 1000
Irvine, CA 92612

Responding to Realignment Impacts in the Community

by Matthew R. Silver and Curtis R. Wright

Matthew R. Silver and Curtis R. Wright are attorneys at Best Best & Krieger LLP specializing in all aspects of code enforcement and nuisance abatement litigation.

California's Public Safety Realignment law, which went into effect over a year ago, mandates that the state reduce the number of inmates in its prisons to 137.5 percent of the intended capacity by June 27, 2013. The legislation stemmed from a federal order issued by a three-judge panel, which was affirmed by the U.S. Supreme Court. The law essentially shifted responsibility for the supervision of low-level offenders—whose last offense was nonserious, nonviolent, and not sex-related—from the state to the local jurisdictions where they were originally sentenced.

At its core, realignment was intended to relieve California's overcrowded prisons by: incarcerating low-level offenders in local jails rather than transferring them to state custody; and giving local agencies responsibility for monitoring prisoners freed on probation.

Realignment implementation is under way throughout the State. During this process, if cities experience an increase in crime, nuisances, or other negative externalities, they can draw on their own police powers and certain State laws to abate problems at essentially no cost other than staff time. Cities' own police powers can be used as the legal basis for adopting and enforcing local ordinances that define and regulate nuisances, aesthetics, and certain criminal behaviors.¹ In addition, specific State statutes empower cities to deal with problems ranging from drug use and prostitution, to graffiti and gangs.

Community policing and comprehensive code enforcement strategies are particularly effective when criminal activity is related in some manner to real property, whether criminals are utilizing property for drugs, gangs, illegal sexual activity, counterfeiting, gambling, or other criminal conduct. Property related criminal activities negatively affect entire communities, perpetuating a vicious cycle of crime and blight. Consequently, it is imperative that cities use every available tool to address criminal conduct at its source. Cities may enforce certain existing State laws or adopt their own ordinances based on their specific needs.

Using California Statutes to Regulate Municipal Crime

Drug activity. The California Drug Abatement Act² allows cities, through their city attorney, to remove occupants from any building or place where any illegal drug activity occurs. Cities can obtain an immediate order, prior to trial, requiring the nuisance building to be vacated and boarded against entry for up to one year. Violations of that order are punishable by fines up to \$10,000 and six months imprisonment. In addition, the fixtures, furniture, and appliances in the building that were used for illegal drug-related activities can be removed. Furthermore, a fine up to \$25,000 may be imposed against each defendant, half of which is payable to the prosecuting city. The property owner may also be ordered to contribute to the city's drug prevention programs. Finally, the city is entitled to recover all of its attorneys' fees and investigation costs, which may be secured by a lien or special assessment against the property itself.

Prostitution and sexual crimes. The Red Light Abatement Act³ allows any city, through its city attorney, to vacate and board up for one year any building or place used for prostitution, lewd behavior, or any other criminal sexual behavior that could lead to transmission of AIDS. It also covers places used for illegal gambling. The same penalties and cost recovery rules apply as with the Drug Abatement Act. Cities may use both the Red Light Abatement Act and the Drug Abatement Act without passing an ordinance.

Financial and intellectual crimes. When a person is convicted of counterfeiting, manufacturing, possessing, or selling fake currency or goods, any nonresidential location where the activity took place may be shutdown and boarded-up for up to a year.⁴

Gang activity. A city can file a lawsuit against gang members through its city attorney under the California Street Terrorism Enforcement and Prevention Act.⁵ Every building or place in which gang members commit certain offenses, including robbery, murder, unlawful drug sales, rape, intimidation, theft, or burglary, as well as any offense involving dangerous or deadly weapons, can be declared a public nuisance under this law. In addition, a fine may be imposed against individual gang members and property owners, and the city may recover damages against the gang members on behalf of the community to improve the neighborhood. Attorneys' fees are recoverable if the city has a properly worded ordinance as discussed below. Gang injunction programs developed in cooperation with the local district attorney can also be an effective tool in combating gang crime.

Using Municipal Code Enforcement to Abate Nuisances and Fight Crime

Dilapidated buildings and properties. Properties occupied by criminals are more likely to be kept in poor condition, leading to increased blight and crime in the neighborhood. While many cities already have ordinances requiring properties to be adequately maintained, they should ensure their ordinances are sufficiently strict, specific, and well-drafted to provide them with ample authority to use substandard buildings or lack of property maintenance as an effective method to prosecute criminals. Under such ordinances, cities can seek criminal enforcement, civil fines, injunctions, appointment of receivers, and even demolition of the buildings and foreclosure.

Graffiti. In dealing with gangs and other criminals, cities may enact helpful ordinances that allow them to hold "taggers," and the tagger's parents if the tagger is a minor, responsible for the damage they cause.⁶ Cities can punish graffiti vandalism criminally and can obtain damages for the cleanup costs and staff investigation time. Attorneys' fees and investigation costs are recoverable, and the city's award may be recovered by a lien, special assessment, or even by garnishing wages. Civil penalties of up to \$1,000 may also be imposed for each act of graffiti vandalism.

Sex offenders. Using their police powers, cities can enact ordinances restricting registered sex offenders who have been convicted of crimes against minors from engaging in conduct that leads to contact with minors—such as Halloween ordinances that restrict their right to attract and distribute candy to children on Halloween. Violations of municipal ordinances are misdemeanors, punishable by a fine of up to \$1,000 and six months in jail or on probation.⁷

Other criminal conduct. Cities may also enact nuisance ordinances that criminalize certain activities in which career criminals often participate and that affect the community's quality of life. Some common examples include: possessing an open container of alcohol in public, drinking alcohol in public, peddling or soliciting without a permit, selling goods near a school, trespassing in a closed park, and sleeping in public. These ordinances may declare these crimes to be misdemeanors punishable by up to a \$1,000 fine and six months imprisonment. Such ordinances must be carefully drafted though, to ensure compliance with constitutional limitations.

Municipal Enforcement Tools

Administrative Citations. Cities may enact ordinances that allow them to impose administrative fines for each violation of the municipal code.⁸ Subject to statutory limitations, the fine amount can be for up to \$1,000 per violation and can be recovered as a personal obligation of the offender or, for property related offenses, by a lien or special assessment upon the nuisance property. The ordinance should specify that separate fines may be imposed on each and every person responsible for the violation, including landowners for property related offenses, and may be separately imposed for each and every violation for each day that violation exists. Administrative fines, unlike those imposed in criminal cases, are paid to the city, and neither courts nor attorneys are required to enforce them. However, an abatement period and appeal process must be established for the offender. Cities should consult their attorney when establishing their administrative citation program to ensure statutory fine limitations and procedural protections are adhered to before citing offenders.

Nuisance Abatement Hearings. Cities may also consider establishing an administrative hearing process for declaring public nuisances and ordering offenders to abate nuisance conditions. Nuisance abatement hearings tend to lack sufficient bite for the amount of procedural effort involved to notice the hearing, prepare for the hearing, and hold the hearing, but are quicker and less expensive than judicial remedies. The hearing officer may be an uninvolved city employee or a neutral third party agency. The hearing officer's ruling may declare a condition to be a public nuisance, assess fines, order responsible parties to abate the nuisance, order summary abatement by the city, and provide for cost recovery similar to administrative citations. Cities should consult their attorney to ensure that all due process and statutory requirements are met when establishing an administrative nuisance abatement hearing program.

Emergency Abatement. Often incorrectly referred to as "summary abatement," cities may summarily abate nuisance conditions that pose an imminent threat to the health or safety of the public or property.⁹ "Summary abatement" best describes the act of the city correcting a nuisance itself, as opposed to compelling the responsible party to do so or obtaining the appointment of a neutral third party to correct the conditions. If an emergency exists, a city may take the initiative to summarily abate a nuisance condition to protect the public. However, this authority is limited to the minimum scope necessary to alleviate the emergency condition. If a city wishes to summarily abate non-emergency conditions, it must comply with pre-abatement procedural due process protections by seeking authority to perform the abatement through an alternative established process, such as an administrative nuisance abatement hearing, an abatement warrant, or a court order. Emergency abatements require the city to front the costs of

the nuisance abatement, but those costs may be recovered if the city has a properly worded cost recovery ordinance as discussed below.

Abatement Warrants. Although not expressly authorized by statute, California case law has adopted the California inspection warrant statutes and standards as the authority for obtaining abatement warrants.¹⁰ Thus, abatement warrants work very similar to, and in conjunction with, inspections warrants. Prior to seeking an abatement warrant, the code enforcement official must contact the possessor of the nuisance property and seek consent to inspect the property and abate the nuisances. If consent is refused, then the code enforcement official may seek a judicial abatement warrant.

To obtain an abatement warrant, the code enforcement official must provide a superior court judge with an abatement warrant application, a declaration in support of the application justifying the issuance of the warrant, and a proposed warrant complying with all civil rights safeguards. A memorandum of points and authorities by an attorney is not required; however, courts are often unfamiliar with abatement warrants, and since abatement warrants are a creature of judicial precedent, it may be advisable for the city to submit a memorandum with the warrant application to edify the court.

The proposed abatement warrant should be carefully drafted to authorize inspection of the appropriate portion of the nuisance property, and authorize abatement of specific nuisances once the presence of the nuisance is verified. In addition, abatement warrants must typically be executed at a reasonable time, after reasonable notice, without forcible entry, and in the presence of the owner or occupant, unless otherwise justified and ordered by the court. An abatement warrant only insulates a city from liability if it is properly sought and executed, so the scope of the inspection and the abatement authority of the warrant must be clearly delineated in the warrant and adhered to during execution.

Once the inspection and abatement are completed, the abatement warrant must be returned to the court along with a written account of what the inspection revealed and what abatement actions were taken.

The benefit of seeking an abatement warrant, as opposed to summarily abating the nuisance, is immunity from liability for what may otherwise be considered civil rights violations. The only real drawback to abatement warrants is that the city must front the costs of performing the abatement; however, these costs may be recovered as long as the city has a properly worded cost recovery ordinance as discussed below.

Criminal Prosecution. If administrative remedies are not sufficient, cities may enforce violations of their municipal codes through criminal prosecution.¹¹ The criminal process is longer and more expensive than administrative enforcement, but is cheaper than civil litigation and carries potentially severe penalties. The risk of criminal fines and imprisonment will motivate most offenders to come into compliance. However, the criminal process is not very effective against indigent offenders with severe code violations that they do not have the means to correct. In such cases, civil remedies may be more effective.

Probation. When criminally prosecuting code violations, the city's most potent weapon is probation. Probation allows the offender to avoid imprisonment by placing conditions on their liberty discouraging recidivism. These conditions can be tailored on a case-by-case basis to maximize the effectiveness of their deterrent effect on individual offenders. Creative terms of probation may include prohibitions against: associating with certain people such as gang members; going to certain places associated with their criminal activity; using drugs; drinking alcohol; or even entering bars. In addition, a term of probation may include requiring offenders to waive their Fourth Amendment rights, thereby allowing police to search the offender or nuisance property without a warrant. Probation can last up to three years, and any violation may result in jail time, fines, or additional probation. Nonetheless, probation is a win-win for the offender and the city. The offender avoids potentially severe fines and imprisonment, while the city is able to establish an effective deterrent to recidivism, customized to the specific offender, with severe penalties for recurring violations. Offenders that violate the terms of their probation are subject to the agreed upon punishment for their original offense, plus an additional punishment for their new offense. Thus, a minor municipal violation may be used to effectively prevent more serious criminal conduct without adding to over-burdened jails.

Civil Injunctions. A civil nuisance abatement injunction is an order by a court to cease or correct a nuisance condition. The civil process is typically longer and more expensive than cities' other abatement options, but can be very effective. Violation of an injunction can result in civil or criminal contempt, fines, sanctions, or even imprisonment. Violation of a court injunction is also an excellent basis for initiating receivership proceedings. Similar to the other code enforcement tools, the majority of the costs involved in civil nuisance abatement proceedings should be recoverable if a city has a properly worded cost recovery ordinance.

Receiverships. The ultimate code enforcement tool, receiverships can be used to enforce either previously issued court orders or properly issued administrative orders against nuisance properties.¹² Due to the severity of the receivership remedy, it is best reserved for severely dilapidated and dangerous properties. When properly leveraged, receiverships will result in the complete rehabilitation of a nuisance property without any rehabilitation costs to the city. The rehabilitation costs for the property are borne by the receiver instead of the city, and can be secured against the nuisance property as a super-priority lien. Once the rehabilitation is complete, the receiver can recover the costs of the receivership directly from the property owner or through sale of the nuisance property. The litigation costs necessary to obtain the appointment of the receiver must be fronted by the city, but those are typically minimal compared to the cost of the rehabilitation and can be recovered through the receivership.

Nuisance Abatement Cost Recovery Ordinances

Cities may enact ordinances that allow for recovery of all costs, expenses, and fees associated with administrative, civil, and criminal nuisance abatement actions. In fact, if properly leveraged, civil penalties can be used to generate revenue for cities.

To do so, cities must adopt ordinances declaring violations of municipal, State, and federal laws to be public nuisances. The ordinance should specifically authorize recovery of all court costs, attorneys' fees, administrative costs, staff wages, and any other expenses incurred in any action taken to abate or prevent those nuisances, whether the action is administrative, civil, criminal, or

otherwise.¹³ The ordinance should allow for the city to recover those costs through a lien or special assessment against the nuisance property. The ordinance should also specify that subsequent violations of the same ordinance within a year will result in the fines, penalties, or damages being tripled.¹⁴

However, any time a city is authorized to recover its costs as the prevailing party in a code enforcement action, the offender is also entitled to recovery of its costs from the city if the offender is determined to be the prevailing party. Thus, there is a risk that an unsuccessful code enforcement action may not just fail to cure a nuisance, but may also result in the city being liable to the offender. These risks can be mitigated by adding a clause to the city's cost recovery ordinance limiting cost recovery only to actions where the city elects the right to recover costs at the outset of the action. This will allow the city to limit its exposure on high risk cases. The problem with these limiting clauses is that cities rarely have a procedure in place to evaluate the case and elect whether to recover costs at the onset of the code enforcement action, resulting in the city's inability to recover those costs once the nuisance abatement action is complete.

Another clause that cities should include in their cost recovery ordinances is a limitation that the amount of attorneys' fees recovered by an offender may not exceed the reasonable amount of attorneys' fees incurred by the city. This will prevent a potential windfall to an offender that manages to defeat a code enforcement action after hiring a team of over-paid lawyers. The offender may still be able to recover attorneys' fees, but those fees will be limited to the amount of attorneys' fees reasonably incurred by the city in the action.

Cost recovery ordinances should also delineate an offender's procedural due process rights for determining and assessing the amount of costs that the city is entitled to recover. In civil cases, costs and fees are typically recovered through a motion prior to final disposition of the case. However, this does not address all of the other forms of code enforcement actions, and civil courts are often not the best forum for resolving these issues. Civil courts have become calloused towards awarding recovery of costs and fees due to the fact that most cases that do not settle involve legitimately ambiguous questions of law or fact. Courts are hesitant to award either side a large sum in recovery for pursuing these legitimate issues.

Instead, cities should consider delineating an administrative process for awarding and assessing recovery of costs at the conclusion of code enforcement actions. The administrative process does not have to involve a hearing, but must give the offender clear notice of the breakdown and amount of the costs being assessed, notice of his right to request an administrative hearing on the matter within a reasonable time and the procedure for doing so, and notice that failure to request a hearing will result in a waiver of the offender's right to contest the costs. If the offender requests the hearing, the city will need to hold it within a reasonable time and will need to give the offender reasonable advance notice of the hearing and an opportunity to obtain relevant evidence to use in defense at the hearing. The cost of the administrative hearing may also be recoverable if the city provides clear notice of that fact and the amount before the hearing was requested. Cities should consult their attorney to establish a cost recovery process that complies with all constitutional due process requirements.

Once the amount of costs to be recovered has been determined, the city may recover the costs as a personal obligation of the offender or, for land-use related nuisances, through a lien or special

assessment on the nuisance property itself. A special assessment is a powerful municipal tool whereby the nuisance abatement costs may be recorded as a priority lien on the property and sent to the county tax assessor to be charged to the property owner through regular property tax assessments. The special assessment lien takes priority over most voluntary liens and, if it is not paid, may be foreclosable in the same manner as other tax liens.

Conclusion

As the process of realignment continues to shift increased responsibility for inmates to the local level, city officials should keep in mind their available options for addressing nuisances and increased crime in the community without overburdening city budgets and local jails. With properly drafted ordinances and an understanding of which remedy is appropriate for a specific situation, cities can target and eliminate problems that arise within their jurisdiction, and can recover much, if not all, of their code enforcement costs. Although using these tools comes with the drawback of impacting staff and attorney time, at least the costs associated with that time are often recoverable. The impacts of realignment, therefore, can be minimized while reducing blight, nuisances, and crime simultaneously. For most cities, this is a worthwhile effort.

¹ Cal. Const., art. XI, § 7.

² Health & Saf. Code, §§ 11570–11587.

³ Pen. Code, §§ 11225–11235.

⁴ Bus. & Prof. Code, §§ 17800–17802.

⁵ Pen. Code, §§ 186.20–186.33.

⁶ Gov. Code, § 38772.

⁷ Pen. Code, § 19; Gov. Code, § 36901.

⁸ Gov. Code, § 53069.4.

⁹ Gov. Code, §§ 38772–38773.6.

¹⁰ *Flahive v. City of Dana Point* (1999) 72 Cal.App.4th 241; Code Civ. Proc., §§ 1822.50–1822.60.

¹¹ Gov. Code, § 36900.

¹² Code Civ. Proc., § 564(b)(3); Health & Saf. Code, § 17980.7(c).

¹³ Gov. Code, §§ 38773–38773.5.

¹⁴ Gov. Code, § 38773.7.