

Administrative and Civil Approaches to Code Enforcement

League of California Cities
City Attorneys Conference

Speaker:

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Overview

- Administrative
 - Administrative citations
 - Civil penalties
 - Administrative hearings
 - Permit revocations
- Civil
 - Injunctive relief
 - Drug/Red Light Abatement
 - STEP (Gangs)
 - Receiverships
 - Graffiti
- Cost Recovery



Administrative Approach

- The administrative process best suited to non-serious, non-emergency violations.
- Administrative enforcement may include:
 - citations and fines
 - administrative enforcement hearings
 - permit revocation/modification hearings.

Advantages of the Administrative Approach

- More informal than criminal and civil processes.
- Rules of evidence generally do not apply.
- APA does not apply unless adopted.
- Good first enforcement tool.
- Administrative citations can be efficient and cost-effective.

Disadvantages

- An administrative order alone does not:
 - give legal authority for a city to enter property or abate nuisances
 - have legal weight to force compliance
 - insulate the city from liability for damage or injury caused during an inspection or abatement as does a warrant.
- The matter may end up in court regardless of the administrative order.

Administrative Citations

- Gov. Code § 53069.4(a)(1) authorizes a city to levy administrative fines for code violations:

The legislative body of a local agency. . . may by ordinance make any violation of any ordinance enacted by the local agency subject to an administrative fine or penalty. The local agency shall set forth by ordinance the administrative procedures that shall govern the imposition, enforcement, collection, and administrative review by the local agency of those administrative fines or penalties.

Citations continued...

- Procedure for the issuance and enforcement of citations is developed by the city with some guidance from State law.
- Administration citations are issued by the city, and if not paid (subject to ordinance):
 - Send to collection agency
 - Lien
 - special assessment on the subject property

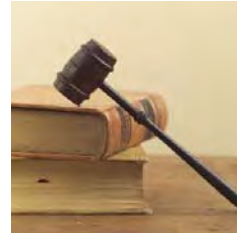


Civil Penalties

- Cities may also provide, by ordinance, that violations of local ordinances are subject to a civil penalty up to \$1,000.
- Additional State statutes authorize a city to assess civil penalties specifically for distressed properties.
- Civil penalties - subject to constitutional limitations on excessive fines.

Enforcement Hearings

- “Quasi-judicial” hearing in which a neutral, disinterested hearing officer or board hears testimony, takes evidence, and renders a ruling regarding violations of the municipal code.
- Administrative hearing process must comply with Due Process:
 - proper notice + fair hearing



Enforcement Hearing Process

- The process begins:
 - by appeal of an administrative citation,
 - upon discovery of a public nuisance, as defined in its municipal code, or
 - upon appeal of initial enforcement action taken by the city, such as issuance of a notice of violation (if ordinance provides for an appeal of NOV).

Permit Revocations or Modifications



- Administrative hearings can be utilized to satisfy due process requirements when a city seeks to modify or revoke a permit, such as a conditional use permit.
- Once a permittee has incurred substantial expense and acted in reliance on a permit, the permittee may acquire a fundamental vested right- a constitutionally protected property right.
- Due process requirements must be met before a permit can be revoked or modified.

Special Consideration for City Attorneys

- City may seek legal counsel to represent code enforcement/planning staff in a prosecutorial role
- Or the neutral decision maker, such as the city council, may seek legal counsel in an advisory role.
- Due process, prohibits the same attorney from performing both functions.

Due Process Wall

- *Morongo Band of Mission Indians v. State WRCB*: Due Process not violated when same attorney provided advisory services to the hearing board and served as prosecutor in an *unrelated matter*.
- Proper Due Process wall: advisory attorney has no involvement or preparation in the prosecution, and vice versa.



Civil Approach to Code Enforcement

- A civil lawsuit may be filed to abate violations of a municipal code or certain State laws.
- Civil remedies are most appropriate for cases with more substantial violations, sympathetic or sensitive violators, and where other approaches are likely to be ineffective.

Advantages of a Civil Approach



- Lower burden of proof than is required in criminal enforcement,
- Civil penalties paid directly to the city,
- Lack of a right to a jury trial in most nuisance abatement cases,
- Interlocutory remedial orders, and
- Strong legal authority to recover attorney's fees and costs

Disadvantages

- Typically a slower process than criminal and administrative code enforcement.
- Civil litigation can be more costly than other methods.
 - NOTE: cost recovery

Injunctive Relief

- Enforcement
 - Any person or entity bound by an injunction may be charged with contempt for disobeying it.
 - If the violator disobeys a permanent injunction (court judgment), the city may petition the court to appoint a receiver to enforce the judgment/injunction. CCP § 564(b)(3).

Legal Theories for Injunctive Relief

- Nuisance *Per Se*
 - Nuisance *per se* exists whenever “a legislative body with appropriate jurisdiction, in the exercise of the police power, expressly declares a particular object or substance, activity, or circumstance, to be a nuisance.
 - Must have two elements to establish a nuisance *per se*:
 - a valid ordinance identifying a nuisance; and
 - a violation of that ordinance.

Legal Theories Cont'd. . .

- Public Nuisance in Equity
 - A public nuisance is “one which affects at the same time, an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage may be unequal.” Civil Code § 3479
 - A nuisance is anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property.

Legal Theories Cont'd. . .

- Violations of the State Housing Law
 - Authorizes injunctive relief and receivership.
 - Requirements: City declares a building to be substandard and the property owner fails to obey city's order to abate conditions
 - Available remedies include:
 - Receiver
 - Injunctive relief
 - Restrictions on property owner's right to claim mortgage interest deductions
 - Fines
 - Relocation of tenants at owner's expense
 - Attorneys' fees and staff costs for city

Legal Theories Cont'd. . .

- Drug Abatement Act
 - Any building or place where any illegal drug activity occurs = nuisance subject to abatement. Health & Saf. Code §§ 11570–11587.
 - Remedies:
 - TRO/injunctive relief
 - Eviction of occupants
 - Board up
 - Payment to city/drug fund of fines
 - Payment of rent
 - Attorneys' fees

Legal Theories Cont'd. . .



- Red Light Abatement Act
 - Any building or place used for prostitution, lewd behavior, or any other criminal sexual behavior that could lead to transmission of AIDS = nuisance subject to abatement
 - i.e. “massage parlor”
 - Same remedies as Drug Abatement Act

Legal Theories Cont'd. . .

- California Street Terrorism Enforcement and Prevention (“STEP”) Act
 - Authorizes a city to file a lawsuit against gang members.
 - 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 offenses involving dangerous or deadly weapons, can be declared a public nuisance under this law. Pen. Code §§ 186.20–186.33.

STEP Cont'd...

- Remedies:
 - TRO/injunctive relief
 - Fines
 - Damages on behalf of community affected
 - Gang members and property owner both liable

Receiverships

- Court agent to bring property into compliance
- Acts in shoes of property owner
- Finances repairs or demolition from lien against property
- Lien can be first-priority
- Property equity does not matter
- For substandard buildings
- Attorneys' fees and staff costs

*Covered in more detail later in panel discussion

Graffiti Abatement

- City may declare, by ordinance, graffiti as a public nuisance and provide for its summary abatement.
- Costs for abating the graffiti can be collected from the tagger, or if a minor, from the tagger's parent or guardian
- Recovered through a lien against the property of either the tagger or the tagger's parent or guardian. Gov. Code § 38772.



Cost Recovery

- City has right to recover all costs involved in any code enforcement action
 - Attorneys' fees
 - Staff costs/investigative costs
 - Costs of physical abatement
 - Incidental costs
- MUST adopt proper ordinances
- Certain State laws also allow for cost recovery when enforcement taken per those statutes



Cost Recovery Cont'd. . .

- Due Process must be followed
 - “cost confirmation hearing”
 - Purpose: provide due process regarding *amount* of costs
 - Not to rehash existence of violations
 - Notice to persons affected
 - Lien vs. special assessment
 - Opportunity to be heard
 - Upon request or affirmative hearing

Cost Recovery Cont'd...

- City ordinance may provide for recovery of any code enforcement costs via lien or special assessment. Gov. Code §§ 38773, 38773.1, 38773.5(a).
- Foreclosure (limitations apply)
- Costs involved are recoverable

Cost Recovery Cont'd. . .

- Lien or special assessment
 - Lien - “first in time, first in right”
 - Special assessment – super priority
- Special assessment is added to the property in the same manner as property taxes. Gov. Code § 38773.5.

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LEAGUE OF CALIFORNIA CITIES
CITY ATTORNEYS' DEPARTMENT
SPRING 2014 CONFERENCE

PROTECTING NEIGHBORHOOD LIVABILITY:
THE EFFECTIVE USE OF HEALTH & SAFETY CODE
RECEIVERSHIPS

MAY 7, 2014
RENAISSANCE ESMERALDA
INDIAN WELLS

Kevin K. Randolph
Gresham Savage Nolan & Tilden, PC

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ATTORNEYS AT LAW

OVERVIEW

THE KEY PLAYERS IN A RECEIVERSHIP CASE

- A. City Side (Local Enforcement Agency)
- B. Property Side
- C. Receiver Side
- D. The Court

THE KEY STEPS IN A RECEIVERSHIP CASE

- A. Code Enforcement Identifies Standard Properties Eligible under *Health & Safety Code* section 17980.7
- B. Code Enforcement Sends Notices of Violation and Documents Property Conditions
- C. City Attorney Reviews File, Arranges for Site Inspection, and Prepares Pleadings
- D. Receiver's Appointment Hearing

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- E. Receiver Secures Property and Establishes Receivership Estate – Books, Insurance, Oath and Bond
- F. Post-Appointment: Receiver's Rehabilitation Options
- G. Receiver Completes Final Receivership Activities, Prepares Final Accounting, and Obtains Court's Discharge
- H. Non-Health & Safety Code Receivership Uses
- I. Particular Problems

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THE KEY PLAYERS IN A RECEIVERSHIP CASE

- A. City Side (Local Enforcement Agency)
 - 1. Code Enforcement / Building & Safety
 - 2. City Attorney / City Prosecutor
- B. Property Side
 - 1. Owner
 - 2. Lenders / Private Lienholders
 - 3. Federal / State Taxing Agencies (IRS, FTB) and Other Governmental Claimants (child support)

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- C. Receiver Side
 - 1. Receiver
 - 2. Property Manager
 - 3. Rehabilitation Contractors
 - 4. Real Estate Brokers
 - 5. Title Company
- D. The Court

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THE KEY STEPS IN A
RECEIVERSHIP CASE UNDER
HEALTH & SAFETY CODE
SECTION 17980.7(C)

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A. CODE ENFORCEMENT IDENTIFIES
SUBSTANDARD PROPERTIES ELIGIBLE UNDER
HEALTH & SAFETY CODE SECTION 17980.7

1. The statute applies to single family homes,
apartment complexes, and commercial property.
 - (a) The statute does not apply to vacant land.
2. Property must be “substandard” in order for a
receiver to be appointed.

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(a) *Health & Safety Code § 17920.3 –*

“Any building . . . or the premises on which the same is located, in which there exists *any* of the following listed conditions to an extent that it endangers the life, limb, health, property, safety, or *welfare of the public* or the occupants thereof shall be deemed and hereby is declared to be a substandard building:”

9

3. Examples from Section 17920.3 of what rises to the level of substandard:

10

- (a) Inadequate sanitation
(Lack of toilets, bathtubs, shower,
kitchen sink, running water, heating,
ventilation, lighting, insects/vermin,
sewage disposal system).



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- (b) Structural hazards
(Deteriorated foundation, flooring,
walls, ceiling, fireplaces or chimneys).



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- (c) Faulty weather protection (loose plaster, holes in walls, holes in the roof).



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- (d) Any building that the chief of the fire department or his/her deputy determines may cause a fire or explosion or provide a ready fuel to augment the spread and intensity of fire or explosion.

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- (e) The accumulation of weeds, vegetation, junk, debris, garbage, stagnant water, and similar materials or conditions that constitute fire, health, or safety hazards – aka, the “hoarder” clause.



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B. CODE ENFORCEMENT SENDS NOTICES OF VIOLATION AND DOCUMENTS PROPERTY CONDITIONS

I. Code enforcement:

- (a) Properly documents all code violations with dated pictures and detailed write-ups.
- (b) Serves notice of violations.

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- (i) the city must “issue an order or notice to repair or abate pursuant to this part” before filing a petition to have a receiver appointed under the Health & Safety Code. See *Health & Safety Code section 17980.6*
- (ii) the notice must contain the contact information of the agency that issued the notice or order, the date/time/location of any public hearing, and inform any lessor that it cannot retaliate against a lessee pursuant to Civil Code section 1942.5

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- (iii) the property owner and other parties with an interest in the property must be given a “reasonable amount” of time to comply with the Section 17980.6 notice
- (c) Serves notices of administrative hearings if the city has an ACP ordinance.
- (d) Refers non-compliant cases to city attorney.

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C. CITY ATTORNEY REVIEWS FILE, ARRANGES FOR SITE INSPECTION, AND PREPARES PLEADINGS

I. City attorney:

- (a) Reviews case file and looks for adequate documentation to support required Health & Safety Code findings.

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- (b) Obtains litigation guaranty – important to determine who has an interest in the property, including unpaid taxes, lenders, judgment lien holders, etc. All parties with an interest in the property must be named as a defendant. Include Doe defendants.

(i) ownership/title which is clear –

- known and locatable owners
- estates, trusts, and guardianship properties can be problematic
- traceable lender interests

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- (c) Reviews file to determine:
 - (i) adequacy of code enforcement notices
 - (ii) qualification under *Health & Safety Code section 17920.3*
- (d) Determines whether a receiver is warranted.
 - (i) a receiver is “a ministerial officer, agent, creature, hand, or arm of, and a temporary occupant and caretaker of property for the court, and he represents the court appointing him, and he is the medium through which the court acts.” (*Pacific Independent v. Workman’s Compensation Appeals Board* (1968) 258 Cal.App.2d 35)

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- (ii) a receiver may not enter into contracts, agreements, arrangements, or understandings with only one party prior to appointment CRC Rule 3.1179
- (e) Obtains voluntary consent from property owner or an inspection warrant, including receiver and its representatives.

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- (i) site inspection with the proposed receiver – the proposed receiver and its property manager should be given the opportunity to view the property with the Building & Safety Department and code enforcement

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- (ii) following site inspection, receiver undertakes feasibility review to determine that:
 - there is sufficient potential equity to pay rehabilitation costs (70% LTV for rehab loan max), receiver fees and costs, property liens, property taxes, governmental taxes / liens (IRS / BOE / FTB), and city enforcement costs and attorneys' fees

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- that the code violations can be remediated, i.e. no severe fire damage, illegal additions which cannot be removed without structural damage to the remainder of the property, current zoning compliance or grandfathered status
- that there are no historical overlay, encroachments, or other land use considerations which would interfere with rehabilitation

25

- (f) Prepares nuisance abatement complaint, petition to appoint receiver, proposed receivership order, and supporting declarations.
- (i) 3-day notice – The city must serve a 3-day notice on all parties before filing a petition to appoint a receiver

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(ii) complaint for nuisance abatement and to appoint a receiver –

- petition to appoint a receiver
- memorandum of points and authorities
- declaration of code enforcement officers
- declaration of the city attorney
- declaration of the receiver

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- proposed order appointing a receiver, which must include the following:
 - specific findings supporting the receiver's appointment (Section 17920.3 substandard conditions)
 - owner's due process satisfaction – notice and reasonable opportunity to cure and correct
 - the receiver's bond amount (usually left blank for court)

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- the receiver's immunities
- the receiver's specific powers and duties
- (g) Files and serves pleadings.

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D. RECEIVER'S APPOINTMENT HEARING

1. City attorney presents city's case and addresses court's questions and concerns.
2. Receiver's counsel addresses any issues concerning receiver's qualifications, compensation, bonding, and the receiver's appointing order.
3. Owner's and lender's counsel will either oppose the motion on substantive grounds or seek more time to comply. But oftentimes the matter is uncontested.

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E. RECEIVER SECURES PROPERTY AND
ESTABLISHES RECEIVERSHIP ESTATE –
BOOKS, INSURANCE, OATH AND BOND

I. The receiver:

- (a) Obtains receiver's bond as specified in appointing order.
- (b) Files receiver's oath and bond.
- (c) Prepares and records certificate of receiver's lien (lessons learned from Chula Vista).

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- (d) Secures property, changes locks, posts notices.
- (e) Meets with neighbors.
- (f) Completes initial inventory.
- (g) Arranges for regular property maintenance and routine site inspections (with photos).
- (h) Obtains tax identification number.

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F. POST-APPOINTMENT: RECEIVER'S REHABILITATION OPTIONS

I. Option I. Standard receiver-directed rehabilitation and post-rehabilitation sale.

- (a) Receiver conducts full inspection and prepares scope of work.
 - (i) requires coordination with and support of Building & Safety
 - rehabilitation scope often more extensive than original code violations due to need to address subsequently discovered violations and make property marketable

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- (b) Receiver bids the rehabilitation work to multiple general contractors.
- (c) Receiver evaluates bids, selects contractor, and prepares construction contract.
 - (i) receiver ensures that contractors are licensed and insured
- (d) Receiver obtains “as-is” and “as-if” property appraisals.

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- (e) Receiver identifies rehab lender and negotiates loan terms.
 - (i) sample terms: 12% APR, 4-5% origination fee; 3% extension fee (after 6 mos.), 60-70% LTV
- (f) Receiver obtains court approval of loan and rehab plan.
 - (i) super-priority status for receiver's certificate and trust deed (*City of Riverside v. Horspool* (2014) 223 Cal.App.4th 670)

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- (g) Receiver obtains lender's policy of title insurance.
- (h) Receiver issues notice to proceed, funds the rehabilitation loan, and administer draw requests and change orders throughout construction period.
- (i) Receiver markets property.
 - (i) following completion of rehabilitation work, receiver negotiates MLS listing agreement with brokerage firm
 - public auction alternative

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- (ii) receiver selects best offer, drafts and negotiates purchase agreement, and opens escrow
 - receiver offers property owner and lienholder opportunity to redeem property
- (iii) receiver obtains court approval of sale, ensuring that sale is “free and clear” of existing owner’s rights and existing lienholders’ claims (*City of Riverside v. Horspool*)
 - sales are subject to overbid up until court hearing
- (iv) receiver obtains title policy for new owner

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- (j) Receiver completes sale and obtains court’s approval of sales proceeds distribution.
 - (i) receiver may record owner-occupancy covenant at close of escrow in exchange for city’s waiver of enforcement costs and fees
- (k) Typical Order of Distribution.
 - (i) property taxes and IRS liens (paid / released at close of escrow)

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(ii) receivership and rehabilitation expenses

- the receiver is paid first from the proceeds of the property under its control. (*Andrade v. Andrade* (1932) 216 Cal. 108, 110)
- receiver's fees and costs are entitled to priority over all liens recorded on the property, provided the lienholders are named in the complaint. (*Schreiber v. Ditch Road Investors* (1980) 105 Cal.App.3d 675, 679)

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- if there are insufficient funds in the receivership estate to pay for the receiver's fees and costs, a court can order one or more of the parties to pay

(iii) the city's enforcement costs and attorneys' fees

40

- under a recent change to *Health & Safety Code section 7980.7(d)(1)*, the court must order the property owner to pay all city enforcement costs. “Owner” includes any successor who had actual or constructive knowledge of the notice, order, or prosecution
- city’s costs of enforcement and attorneys’ fees recoverable from the owner under *Health & Safety Code section 17980.7(c)(11) and 17980.7(d)*. (But see, *City of San Francisco v. Ballard* (2006) 136 Cal.App.4th 381)

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- (iv) private lienholders, trust deeds, etc., in order of priority
 - issues remain as to priority to sales proceeds as between the city and prior lienholders
- (v) the owner

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2. Option 2. Receiver sells to investor buyer with receiver oversight – for properties without sufficient equity to allow receiver-directed approach.
- (a) Receiver obtains “as-is” and “as-if” appraisal and rehab scope of work and cost estimate.
 - (b) Receiver obtains court approval and sells to investor buyer for no less than “as-is” value.
 - (c) Buyer contracts with receiver to complete rehab work post-close of escrow.

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- (i) buyer prepares scope of work and performance schedule that receiver approves as condition to close of escrow
- (ii) buyer's obligation is secured by performance trust deed in receiver's favor
- (ii) receiver monitors buyer's construction progress and compliance with completion milestones
- (d) Receiver is discharged after work is complete and accepted by the city.

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G. RECEIVER COMPLETES FINAL RECEIVERSHIP ACTIVITIES, PREPARES FINAL ACCOUNTING, AND OBTAINS COURT'S DISCHARGE

H. NON-HEALTH & SAFETY CODE RECEIVERSHIP USES

1. Foreclosure of city abatement liens.
2. Zoning and illegal uses.
 - (a) Medical marijuana dispensaries and other property uses constituting a nuisance
Health & Safety Code section 17920.3(c)

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I. PARTICULAR PROBLEMS

1. Deceased, intestate owner with scattered heirs.
2. Incompetent owner.
3. Reluctant courts.
4. Rip van Winkle lenders.
5. Syndicated lending interests.
6. Title surprises.
7. Construction surprises.

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CASE STUDIES

47

9578 GARFIELD STREET
RIVERSIDE, CA

Residential Property

48





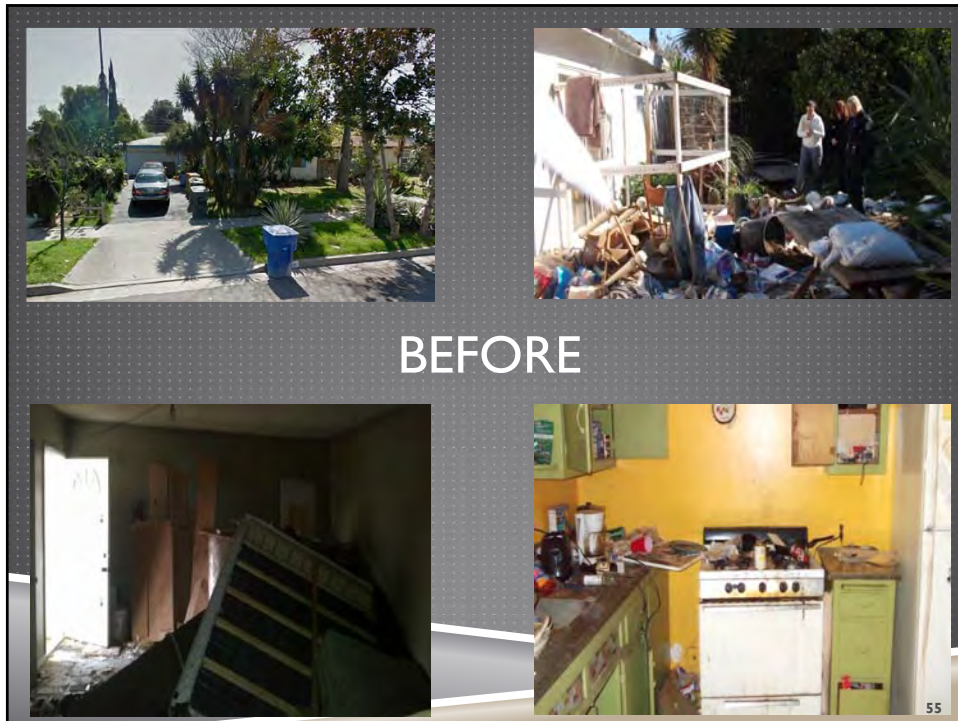
When receiver was appointed: 12-6-11
When receiver was discharged: 11-2-12
Rehabilitation costs: \$69,150
Average pre-receiver area price per sq. ft.: \$86.04
Sales price / price per sq.ft: \$205,200 / \$136.66
City recovery: \$18,996
Owner occupancy covenant: No (rental duplex)

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8258 OAKHURST PLACE
RIVERSIDE, CA

Residential Property

54



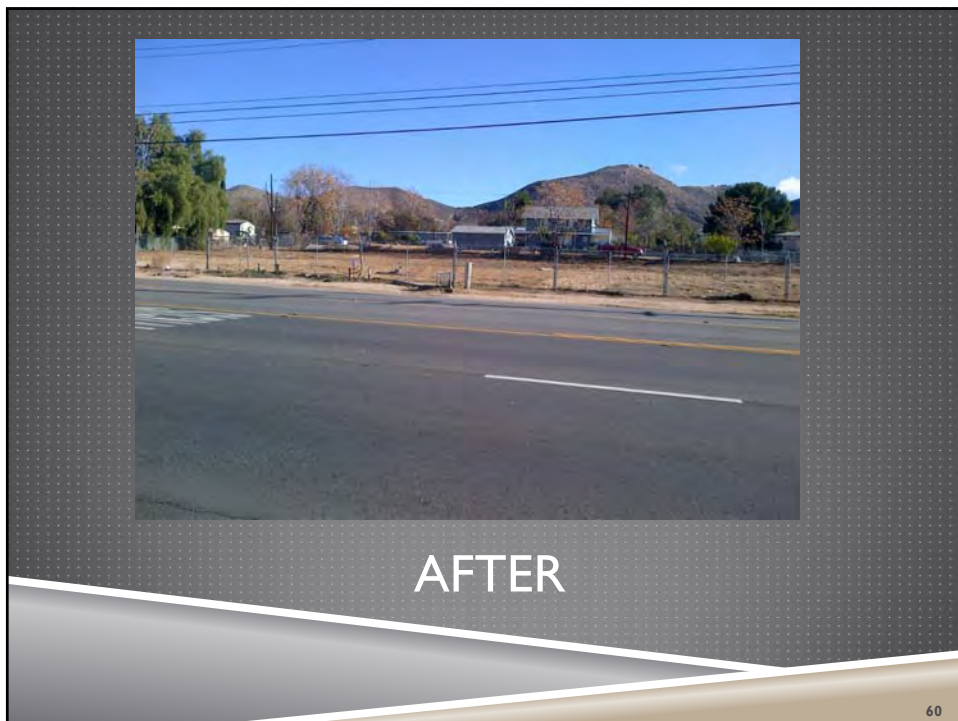
When receiver was appointed: 4-26-13
When receiver was discharged: 1-14-14
Rehabilitation costs: \$91,000
Average pre-receiver area price per sq. ft.: \$165.71
Sales price / price per sq.ft.: \$233,000 / \$206.56
City recovery: \$39,130
Owner occupancy covenant: Yes (25 years)

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32430, 32440, 32444 MISSION TRAIL
WILDOMAR, CA

Abandoned Residential
(Commercial-Zoned) Property

58



When receiver was appointed: 6-5-13
When receiver was discharged: Ongoing
Rehabilitation costs: \$46,489
Sales price/price per sq.ft.: On market
City recovery: approx. \$36,000
Owner occupancy covenant: No
(vacant commercial property)

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4890 VAN BUREN AVENUE
RIVERSIDE, CA

Commercial Property:
Abandoned Gas Station
with Active UST Cleanup Order

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When receiver was appointed: 7-9-12
When receiver was discharged: 9-9-13
Rehabilitation costs: As-Is Sale
Sales price / price per sq.ft.: \$525,000 / \$28.41
City recovery: \$98,965
Owner occupancy covenant: No
(vacant commercial property)

65

4406 MICHAEL STREET
RIVERSIDE, CA

Residential Property

66



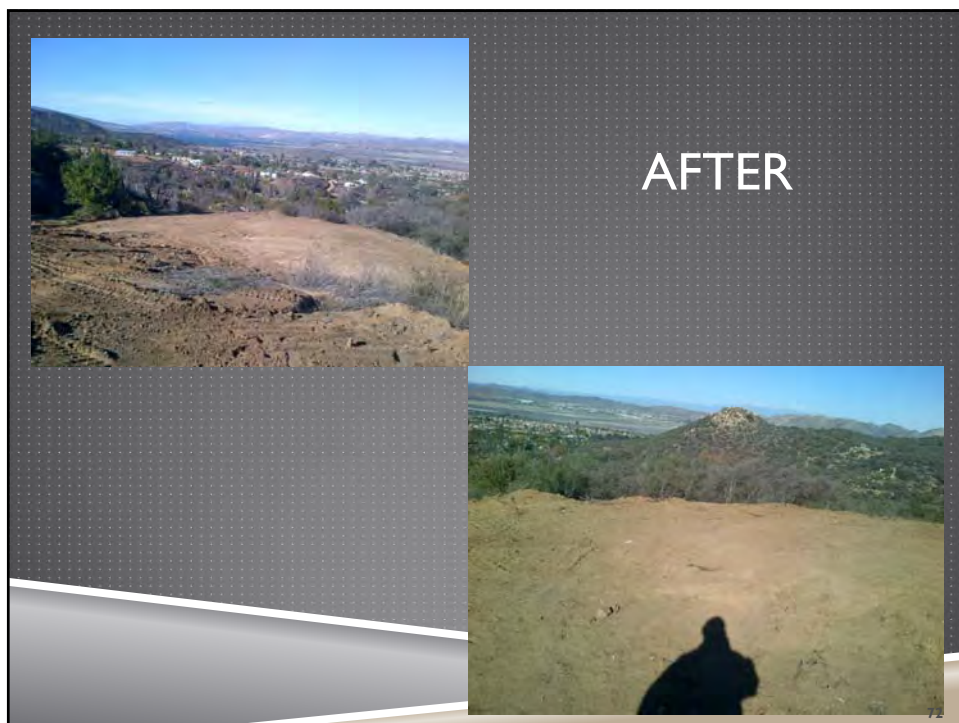
When receiver was appointed: 5-17-13
When receiver was discharged: 12-13-13
Rehabilitation costs: \$70,000
Average pre-receiver area price per sq. ft.: \$140.13
Sales price / price per sq.ft.: \$190,000 / \$174.47
City recovery: \$33,869
Owner occupancy covenant: Yes (25 years)

69

35050 MARGO ROAD
UNINCORPORATED
LAKE ELSINORE, CA

Vacant Residential Property

70



When receiver was appointed: 8-28-12
When receiver was discharged:
Rehabilitation costs: \$14,260
Average pre-receiver area price per sq. ft.: \$0.07
Sales price / price per sq.ft.: \$45,000 / \$0.10
County recovery: \$2,000

73

4278 MISSION INN AVENUE
RIVERSIDE, CA

Historical Residential Property

74



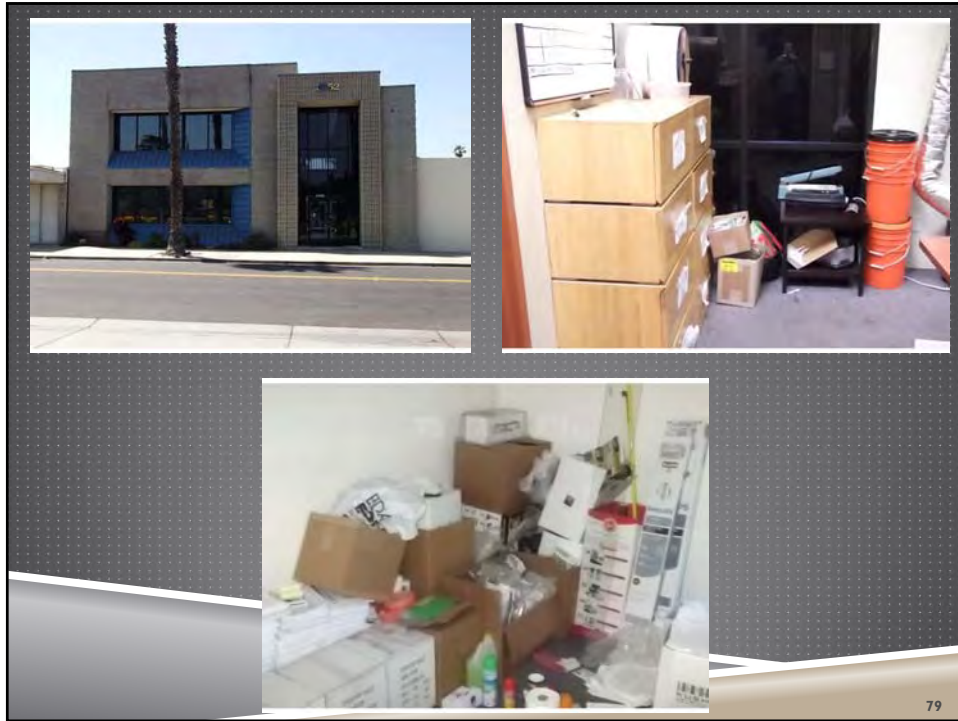
When receiver was appointed: 3-21-13
When receiver was discharged: 2-4-14
Rehabilitation costs: \$110,000
Average pre-receiver area price per sq. ft.: \$140.03
Sales price / price per sq.ft.: \$235,000 / \$178.03
City recovery: \$9,893
Owner occupancy covenant: Yes (25 years)

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3752 ELIZABETH STREET
RIVERSIDE, CA

Commercial Property:
Medical Marijuana Dispensary
(Lessee)

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When receiver was appointed: 4-26-13
When receiver was discharged: 9-23-13
Receivership costs: \$15,700
Property was returned to property owner upon payment of receivership expenses

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BENEFITS OF RECEIVERSHIP TO CITY

- Enforcement cost recovery
- Property value increase
- Preserve housing stock
- Enhancing neighborhood pride of ownership
- Eliminating nuisance and illegal activities
- Reducing recidivist properties with occupancy covenants
- Receiver's expenses and rehabilitation costs are paid for by property's equity and not city funds

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CALIFORNIA'S DRUG ABATEMENT ACT: A Powerful Civil Tool to Address Drug Crimes

Yvonne R. Meré, Deputy City Attorney
Office of the City Attorney, City and County of San Francisco
Dennis Herrera, City Attorney



League of California Cities
2014 City Attorneys' Spring Conference
May 7, 2014

What is the Drug Abatement Act ("DAA")?

- Every building or place used for the purpose of **unlawfully selling, serving, storing, keeping, manufacturing, or giving away any controlled substance**, precursor, or analog specified in this division, **and every building or place wherein or upon which those acts take place, is a nuisance** which shall be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or private nuisance.
Emphasis added.



What Conduct Violates the DAA?

unlawfully selling, serving, storing,
keeping, manufacturing, or giving
away any controlled substance



Conduct – Must be Unlawful

■ Medical cannabis?

- Medical Marijuana Program Act (“MMPA”) codified in Health and Safety Code §11362.7 *et seq.* exempts certain individuals from “criminal liability” for violating §11570, not civil remedies in DAA



Conduct – Sell, Serve, Store, Keep, Manufacture or Give Away

■ What about pure possession?

- No published case
- How to distinguish “use” from “keeping” or “storing”

■ Consider other claims and theories

- Public nuisance (Civil Code Sections 3479/3480)



Conduct - Applies to “Controlled Substances”

- Health and Safety Code §11007 - “a drug, substance, or immediate precursor which is listed in any schedule in Section 11054, 11055, 11056, 11057, or 11058.”



Examples of Controlled Substances

- Opiates, opium derivatives, heroin, hallucinogenic substances, marijuana, mescaline, peyote, depressants, Gamma hydroxybutyric acid (also known as GHB), and cocaine base (Health and Safety Code §11054);
- Coca leaves cocaine, stimulants including amphetamine and methamphetamine, and depressants including amobarbital and pentobarbital (Health and Safety Code §11055); and
- Stimulants, depressants, any substance which contains any quantity of a derivative of barbituric acid or any salt thereof, and hallucinogenic substances (Health and Safety Code §11056).



Who are the Parties to a DAA case?

- **Plaintiff – People of the State of California**
 - District Attorney
 - County Counsel
 - City Attorney of any incorporated city or of any city and county
- **Defendant**
 - person conducting or maintaining the nuisance
 - owner, lessee, or agent of the building or place in or upon which the nuisance exists



What Are the Available Remedies?

- Injunctive Relief
- Civil Penalties
- Attorney's Fees and Costs of Investigation



Remedies - Injunctive Relief

- Health and Safety Code §11573 provides that “the court or judge shall allow a temporary restraining order or injunction to abate and prevent the continuance or recurrence of the nuisance.”
 - Orders arguably run *in rem*
 - “may enjoin subsequent owners, commercial lessees, or agents”



Remedies - Injunctive Relief (cont'd)

- Issue orders to protect lay witnesses (§11573.5(a))
- May close the premises pending trial or permanently (§11573.5(b)); §11581(b)(1))
- Collect rents until nuisance is abated (§11573.5(b))
- Relocation assistance (§11573.5(b) and (d))
- Assistance to seniors and disabled persons (§11573(e)(1)-(4))
- Physical and capital improvements at the property (§11573(f)(1)(A)-(G))
- Order the owner to reside in the property until abated (§11573(f)(1)(H))
- Removal and sale of fixtures (§11581(a))
- Monies (damages) for drug treatment, prevention and education programs (§11581(c)(1))



Remedies – Civil Penalties

- “not to exceed twenty-five thousand dollars (\$25,000) against any or all of the defendants, based upon the severity of the nuisance and its duration.” (§11581(b)(2))
 - one half of the penalties go to the Restitution Fund of the State Treasury
 - one half to the city or county depending on the Plaintiff



Remedies – Fees and Costs

■ Civil Code Section 3496

- “costs, including the costs of investigation and discovery, and reasonable attorney's fees”
 - Police Department costs making arrests, conducting surveillance, and investigations
- “reasonable”
 - Can ask for prevailing market rates not just actual incurred fees



Building a Case – Gathering Documents

■ Contact your local Police Department and gather:

- all police incident reports;
- calls for service to the police;
- investigative or chron files, photos, etc.;
- lab results (consider a litigation or evidentiary hold);
- any applicable police permits or licenses; and
- gather criminal histories on potential defendants as authorized by Penal Code §11105(b)



Building a Case – Penal Code §11105(b)

b) The Attorney General shall furnish state summary criminal history information to any of the following, if needed in the course of their duties, provided that when information is furnished to assist an agency, officer, or official of state or local government, a public utility, or any other entity, in fulfilling employment, certification, or licensing duties, Chapter 1321 of the Statutes of 1974 and Section 432.7 of the Labor Code shall apply....(3) District attorneys of the state...(4) Prosecuting city attorneys of any city within the state...(5) **City attorneys pursuing civil gang injunctions pursuant to Section 186.22a, or drug abatement actions pursuant to Section 3479 or 3480 of the Civil Code, or Section 11571 of the Health and Safety Code.** *Emphasis added.*



Building a Case – Police Reports

■ What to look for?

- Nuisance activity associated with narcotics
 - Heavy traffic, increased crime, loitering, noise, gangs, people under the influence
- The drug activity must be *connected to a particular property*
- Police Reports should reflect this nexus

Police Report

Report Type: Initial

San Francisco Police Department INCIDENT REPORT


031417513

Incident Number 031417513	Reported Date/Time 12/04/2003 21:03	Occurrence On/From Date/Time 12/04/2003 21:03	Occurrence To Date/Time	CAD Number 033383600
Type Of Incident Firearm, Possession By Prohibited Person - 12080				
Location Of Occurrence 1540 DOWD STREET			Type Of Premise Sidewalk	
Arrest Made Yes	Non-Suspect Incident	Suspect Known	Suspect Unknown	Reporting Unit 3D93
Related Case Numbers : 031408772 Reported To Bureau : CELIS, 694, 12/04/2003 23:15 How Cleared : Adult Booked Copy To : AFS/APS, ATF Assigned By : RBG, 154				
Location Sent To : ON-VIEW Assign To : NARCOTICS Copies To (Name Of Units) : DA/1,OR/1 Report Status : Signed				
I declare under penalty of perjury, this report of _____ pages is true and correct, based on my personal knowledge, or is based on information and belief following an investigation of the events and parties involved.				
Prop 115 Certified: 5 Yrs <input type="checkbox"/> Post Training <input checked="" type="checkbox"/> Signature: <i>[Signature]</i>				
Reporting Officer GREINER, ROBERT	Star 154	Station MISSION	Watch 1800-0400	Date 12/05/2003 00:51
Reported By SGT. K. CHING #1139	Star	Station Mission Station	Watch	Date
OIC Approval Officer SGT. K. CHING #1139	Star	Station Mission Station	Watch	Date
Report Status Signed	Juv. Involved	How Cleared Adult Booked	Assigned To NARCOTICS	Copy To AFS/APS, ATF

Report Type: Initial		San Francisco Police Department		031417513	
INCIDENT REPORT					
OFFENSE	1	Cocaine, Base/Rock Offense - 16621			
OFFENSE	2	Marijuana Offense - 16010			
OFFENSE	3	Probation Violation - 26170			
OFFENSE	4	Hallucinogenics Offense - 16410			
OFFENSE	5	Warrant Arrest, Local SF Warrant - 63010			
OFFENSE	6	Stay Away Order Violation - 15151			

Report Type: Initial		San Francisco Police Department		031417513	
INCIDENT REPORT					
PROPERTY	Property Code E - Evidence	Item PLASTIC BAGGIE	Brand MOORE		
	Serial Number	Color			
	Quantity : 1	Narcotics Lab Number : 03211536			
	Seized By (Star) : 154	Seized From Where : DOOR HANDLE OF 61 WOODWARD ST.			
PROPERTY	Description : CONTAINING NINE (9) OFF WHITE MEDIUM SIZE ROCKS OF SUSPECTED CRACK COCAINE.				
PROPERTY	Property Code E - Evidence	Item SNEAKER	Brand	Model	
	Serial Number	Color WHITE/GRAY			
	Quantity : 1	Seized By (Star) : 1078			
	Seized From Where : 110 68 WOODWARD ST.	Description : CONTAINING (E1) FIREARM			
PROPERTY	Property Code E - Evidence	Item SMALL BROWN CIGARETTE	Brand	Model	
	Serial Number	Color BROWN			
	Quantity : 1	Narcotics Lab Number : 03211536			
	Seized By (Star) : 1078	Seized From Where : (B1) LEONARD			
PROPERTY	Description : SMALL BURNED CIGARETTE CONTAINING SUSPECTED MARIJUANA FOUND IN THE FRONT RIGHT JACKET POCKET				
PROPERTY	Property Code E - Evidence	Item COMPUTER DISK	Brand IBM	Model	
	Serial Number	Color BLACK			
	Quantity : 1	Description : COMPUTER DISK CONTAINING FIVE (5) DIGITAL PHOTOS OF THE SCENE.			

INCIDENT NARRATIVE	
On 12/04/03 at 2103 hrs. Ofc. Arquero #1958 and I were in full uniform and in a marked patrol vehicle.	
On the above date and time we were contacted by Sgt. Ching #1133 who informed us on the following information.	
<p>Sgt. Ching #1133 arrived on scene and instructed us to look in the area of 65-69 Woodward street regarding possible Narcotics. He also informed us to look in the area for a gate on the east side of Woodward street that does not lock. During our investigation Ofc. Najarro #1078 noticed a (E4) sneaker sitting next to some recycling bins in front of 65-69 Woodward street. Upon further investigation of the (E4) sneaker he noticed a (E1) small black hand gun inside it. Ofc. Najarro #1078 secured the items and seized both the (E4) sneaker and the (E1) small black hand gun. Additionally, I noticed that the front gate to 63- A Woodward street was open and not secured. On further investigation I noticed a small piece of plastic sticking out of the door handle to 61 Woodward street. I then pulled on the small piece of plastic and found a (E2) small plastic baggie containing nine (9) off white rocks. Through my training and experience I believed the off white rocks to be that of crack cocaine. I then seized them and informed Sgt. Ching #1133. The area was searched for any additional weapons or narcotics but resulted negative.</p>	
<p>(B1) Leonard was transported back to mission station by deputy who took charges back to mission station back to Mission station by 3061, Ofc. Toppini #4084.</p>	
<p>Prior to leaving the area I took five (5) digital photos and stored them on a (E3) computer disk.</p>	
<p>On arrival to Mission station (B1) Leonard was strip searched. During the search Ofc. Najarro #1078 found a small brown half burned cigarette containing a green leafy substance. Through his training and experience Ofc. Najarro #1078 believed the green leafy substance to be that of suspected marijuana. Ofc. Najarro #1078 seized it. No other contraband was found during the search.</p>	
<p>Ofc. Arquero #1958 and myself conducted a strip search of (B2) Leapaga. While searching (B2)</p>	



Building a Case – Gathering Documents (Property Information)

- Gather information regarding the property or premises, i.e. owner? manager? other agent? desk clerk? etc.
- Conduct an asset and property search.



Building a Case – Gathering Documents (Other Evidence)

- Emergency Services or 911 records
- Zoning and Planning documents
- District Attorney's files
- ABC
- Federal agencies (DEA, DOJ)



Building a Case – Interview Law Enforcement Officers

- Talk to officers that are assigned the area of the city where the property is located;
- Contact other officers in investigative or detective bureaus that are responsible for narcotics crimes;
- Ask officers if they have had any contact with the property owner, manager, or other party responsible for the property or premises.



Building a Case –Interview Non-Police Witnesses

- Community organizations;
- Legal assistance and tenant rights organizations;
- Organizations that operate in the community that teach/reinforce personal safety awareness; and
- Neighborhood homeowner and merchant associations.

Drug Lab/Drug House



Evidentiary and Factual Challenges

- Strict liability for owners, lessees, and agents for the drug nuisances at properties they own, lease, or are responsible for
 - *Lew v. Superior Court* - no allegation in that case that the owners or managers of the property were the ones engaging in the illegal narcotics activity. *Lew* held that there is no requirement "that the unlawful activity, which makes the building a nuisance, be conducted by the owner of the building, a tenant of the building or a person entering with permission." *Lew v. Superior Court* (1993) 20 Cal.App.4th 866, 871
- Courts want to see notice or knowledge



Evidentiary and Factual Challenges (cont'd)

- Lack of criminal convictions
 - potential to weaken the action (i.e. if the problem is so bad, why are there no successful prosecutions?)
- Pleading beyond CA minimum
 - Helps tee up preliminary injunction or TRO
- Use of Lay Testimony and Evidence
 - Reputation evidence permitted
 - Be mindful of risks to lay witnesses
- Nexus between Drug Crime and Property



Other Concurrent Theories/Causes of Action in DAA Cases

- Unfair Competition Law (CA Business and Professions Code Section 17200 *et seq.*)
 - **Any business act or practice that is unlawful, unfair, or fraudulent**
 - Remedies:
 - Injunctive Relief: Injunction to stop unlawful practices
 - Money: civil penalties up to \$2,500 per violation; extra \$2,500 per violation if conduct affected elderly or disabled persons
 - Disgorgement of profits
 - Restitution

Other Concurrent Theories/Causes of Action in DAA Cases (cont'd)

■ Public Nuisance Law (CA Civil Code Section 3479/3480)

- **Anything which is injurious to health... or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property...**
- **Remedies**
 - Injunctive Relief: Injunction to stop nuisance
 - Money: Possible money damages as compensation to the extent the nuisance directly harms public property

A Sample Complaint

15 FIRST CAUSE OF ACTION
16 FOR PUBLIC NUISANCE BROUGHT BY PLAINTIFFS PEOPLE OF THE STATE OF
17 CALIFORNIA AND THE CITY AND COUNTY OF SAN FRANCISCO AGAINST ALL
18 DEFENDANTS BASED ON THE SALE OF NARCOTICS AND NARCOTICS
PARAPHERNALIA AT AZAAL
(Health And Safety Code Sections 11570 -11587)

6 SECOND CAUSE OF ACTION
7 FOR PUBLIC NUISANCE BROUGHT BY PLAINTIFFS PEOPLE OF THE STATE OF
8 CALIFORNIA AND CITY AND COUNTY OF SAN FRANCISCO AGAINST ALL
DEFENDANTS
(Civil Code Section 3479 et seq.)

1 THIRD CAUSE OF ACTION
2 FOR UNFAIR AND UNLAWFUL BUSINESS PRACTICES BROUGHT BY PLAINTIFF
3 PEOPLE OF THE STATE OF CALIFORNIA AGAINST ALL DEFENDANTS
(California Business and Professions Code Sections 17200-17210)

Stipulated Injunction and Judgment

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED: MONETARY JUDGMENT

1. That pursuant to California Health and Safety Code Section 11571 et seq. (the Drug Abatement Act), California Health and Safety Code Section 17980.7(d)(1) (the State Housing Law), San Francisco Housing Code Section 204(c)(2), and California Business and Professions Code Section 17200 et seq. (the Unfair Competition Law), the Court hereby imposes a Monetary Judgment against Defendant TABER A. ALGAHIM for civil penalties in the total amount of \$30,000, payable to

2. Defendants shall pay the Judgment in 45 monthly installments of \$666.66, beginning on August 1, 2012 and continuing until a final payment of \$666.67, on April 1, 2018.

3. Payment shall be made by cashier's check or money order, made payable to the "City and County of San Francisco" and delivered to the following address:
San Francisco City Attorney's Office
1390 Market Street, Sixth Floor
San Francisco, California 94102
Attention: Jerry Threat, Deputy City Attorney.

4. If Defendant fails to timely pay any installment of this Judgment in the manner and the amount set forth herein, Defendants will be in violation of this Judgment, all amounts owed under this Judgment shall become immediately due, and the total unpaid sum of the Judgment will begin to accumulate interest at the rate of 10% annually, beginning with the first day of any delinquency.

5. This Stipulated Judgment and Injunction will be recorded. Upon receipt of the full and complete payment of the entire amount owed, including any applicable interest and additional fees or penalties imposed, Plaintiffs will, upon request, file and record a Satisfaction of Judgment with respect

2
STIPULATED JUDGMENT AND INJUNCTION, CASE CODE: 12-317726

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to this Judgment, except that such a Satisfaction shall not be filed unless or until the Stipulated Injunction has also been fully satisfied.

7. shall be entitled to any and all reasonable attorneys' fees and costs incurred in pursuing, enforcing, and collecting this Judgment, if necessary.

Stipulated Injunction and Judgment

PERMANENT INJUNCTION

IT IS HEREBY FURTHER ORDERED that, upon entry of this Judgment, Defendant Algaheim and his partners, officers, agents, servants, employees, and representatives, and all persons acting in concert or participating with him, are hereby enjoined and restrained, during the pendency of this injunction, from engaging in, committing, or performing, directly or indirectly, any and all of the following acts:

1. maintaining Azaal Market, also known as Barah market, located at 200 Leavenworth Street, San Francisco, California (the "Business") as a public nuisance due to the unlawful sale, storage, service or distribution of controlled substances at the Business, in violation of Health and Safety Code Section 11573; and

2. operating the Business from 12:00 a.m. to 7:00 a.m. every night.

IT IS FURTHER ORDERED that Defendant Algaheim and his partners, officers, agents, servants, employees, and representatives, and all persons acting in concert or participating with him, shall be required during the pendency of this injunction to:

3. employ a uniformed and licensed security guard to patrol the Business during the hours of 8 p.m. to midnight, if operating during those hours, and halt all illegal activities thereon;

4. maintain operable at all times, a digital video security system that continuously films and records both the interior of the Business and its frontage; and

5. post and maintain signs on the front door and front gate, if any, to the Business and by the cash register stating:

"THE OWNERS OF THIS STORE AND PROPERTY ARE UNDER COURT ORDER FOR MAINTAINING THIS PROPERTY AND BUSINESS IN VIOLATION OF THE CALIFORNIA HEALTH AND SAFETY CODE. ANY ILLEGAL SALE OF CONTROLLED SUBSTANCES IN OR AROUND THIS BUILDING COULD SUBJECT THE OWNERS TO CIVIL PENALTIES. ANY QUESTIONS OR COMMENTS MAY BE ADDRESSED TO THE CITY ATTORNEY'S OFFICE AT 415-554-3914."



Key to DAA Cases

- Develop and gather evidence from law enforcement and community sources
- Find a nexus between the behavior and the property
- Give responsible parties the ability to abate the nuisance
- And if the above fails to address the drug nuisance, pursue litigation

Good Luck



And if you need assistance, the San Francisco City Attorney's Office is always happy to help!
(415) 554-3800