

## I. INTRODUCTION

California Health and Safety Code sections 11570 through 11587 are specialized public nuisance statutes designed to make property owners and managers civilly responsible for illegal drug activities conducted on their premises.

The Legislature enacted the Uniform Controlled Substances Act [hereafter Drug Abatement statutes] to provide law enforcement with a powerful tool to combat these illicit activities where other approaches are ineffective. The provisions are virtually identical to the Red Light Abatement Act found in Sections 11225 through 11235 of the California Penal Code.

By declaring that the use of property for the keeping, sale, use, manufacturing, distribution or giving away of controlled substances is a public nuisance, the city attorney may bring drug abatement actions using essentially the same procedures as those employed to abate other public nuisances<sup>1</sup>.

The courts' powers under the Chapter 10, Article 3 of the Uniform Controlled Substances Act (as codified in the Health and Safety Code) are extremely broad. The statutes allow or require the court to issue prohibitory and mandatory temporary injunctions that cover the spectrum from requiring specific affirmative actions to boarding up the premises and forbidding their use for one year. Once a public nuisance has been determined to exist, a judge is required to close the property for one year, except under very limited circumstances.

The purpose of the action is both to abate an ongoing public nuisance and prohibit future reoccurrences. Complaints can be filed using multiple legal theories, including H&S 11570 action, general public nuisance, public nuisance per se (using the city's public nuisance ordinances). In matters involving rental residential properties or businesses, Section 17200 of the Business and Professions Code may also be asserted.

To bring an action under H&S 11570, the city must allege the property is being used for a controlled substances purpose. A "controlled substances purpose" means the manufacture, cultivation, importation into the state, transportation, possession, possession for sale, sale, furnishing, administering, or giving away, or providing a place to use or fortification of a place involving, cocaine, phencyclidine, heroin, methamphetamine, or any other controlled substance, where those actions occur on the subject real property and the offenses are documented by a peace officer<sup>2</sup>. Where not otherwise specified, a controlled substance means "a drug, substance, or immediate precursor" listed in any schedule in H&S §11054 *et seq.*<sup>3</sup>

Drug abatement actions have proved to be a vital tool in eliminating "drug houses." These are locations which have long-standing reputations as places where illegal drugs are used, bought and sold and have histories of drug arrests, heavy foot and

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<sup>1</sup> H&S §11570: 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.]

<sup>2</sup> This documentation normally occurs in police reports prepared as a result of discovery of controlled substances, either on the real property on persons in and on the property and any related arrests. Further documentation is provided through declarations.

<sup>3</sup> Marijuana, however is treated separately in H&S §11357.

vehicle traffic, disturbances of the peace and related criminal activities. Typically, they have created an inordinate drain on police services and decreased the quality of life in otherwise peaceful neighborhoods.

Actions under H&S §11570 come to a city attorney's attention most commonly after referral by the police department following the discovery of controlled substances in either a business or dwelling. Sometimes the police department is seeking assistance to deal with locations known to them as drug houses where traditional enforcement (arrests and criminal prosecution) have failed to stop the problems. These locations are generally the subject of numerous citizen complaints, most of which provide the police with little help to take any actual enforcement action.

The goal of this paper is to provide guidelines to recognize when an 11570 action is appropriate. Additionally, this paper covers what legal standards must be met, the steps for bringing the complaint, legal strategies and available remedies.

## **II. PRELIMINARY STEPS**

### **A. Review Documented Property History.**

Once the police have referred a case for review for possible H&S 11570 action, all relevant police reports and calls for service at the subject property must be reviewed. Generally, a review of the last two to three years provides a clear picture of how serious the problem is and how aggressive the remedies should be. Multiple instances of drug activity are not required. A single act, together with the surrounding circumstances that tend to indicate a habitual practice is sufficient to establish the existence of a public nuisance<sup>4</sup>. Most importantly, convictions need not be shown. Arrests and other evidence of drug activity will suffice. Liability under the statutes is imposed on a theory of fault on the part of the property owners in the management of the property. The property owners need not have either personal knowledge or culpability for the nuisance. They bear the ultimate responsibility to manage their property, which is a responsibility that cannot be delegated<sup>5</sup>.

#### **1. Residences.**

These may be occupied by owners, their family members or by tenants. A review of all police reports from three years prior to the most recent, and calls for service during the same time period, should indicate if the present matter constitutes an isolated incident, is ongoing, or the property is the site of a large drug bust that went beyond a simple arrest for possession of a small amount of narcotics. If a search warrant was executed, review the probable-cause statement of the officer. The statement typically details controlled or undercover drug buys and/or surveillance information, which provides an excellent foundation for the 11570 action, in addition to the police report and supporting declarations.

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<sup>4</sup> *People v. Smith* (1920) 48 Cal.App. 253, 256 (Red Light abatement-prostitution)

<sup>5</sup> *Leslie Salt Co. v. San Francisco Bay Conservation, etc. Com.* (1983) 153 Cal.App.3d 605; *People v. Rouse* (1988) 202 Cal. App.3d Supp. 6 (strict liability applied to business owner for municipal code violations.)

## **2. Businesses.**

The most common businesses subject to drug abatement action are bars, restaurant/bar combinations, pool halls or similar establishments. There is usually a significant history of police activity at the business, including multiple drug arrests for possession and sale, drug seizures, fights, noise complaints, shootings, assaults, violations of alcohol laws and other criminal activities. These businesses also tend to be well known to law enforcement personnel, who usually have tried to work with the business and property owners to no avail. A review of all calls for service and police reports can establish whether the business can be enjoined under an 11570 action. These generally take longer than actions against residential properties, primarily because the owners and operators often appear to be working with the police and city attorney's office to abate the drug activities and related nuisances, but then fail to take all the reasonable remedial efforts to abate the problems on the property<sup>6</sup>.

### **B. Discuss Property History and Reputation with Police Officers and Neighbors.**

It's beneficial to include discussions with involved police officers in the review of the property history, and even neighbors in some instances. Information beyond the police reports can lead to additional support for injunction requests and helps establish that the subject property has a reputation in the community as a place where drugs are kept, sold or used. This information is presented in the form of declarations in support of the injunction. Neighbors who have been adversely impacted by drug houses in their neighborhood are often willing to provide declarations. Some neighbors may actually be eager to provide declarations, especially in situations where ongoing complaints failed to trigger a cure and left them frustrated with the local authorities.<sup>7</sup>

### **C. Identify the Potential Defendants**

A check of the county tax assessor's records will show the owner of record and a mailing address, if different from the subject property. All property owners are potential defendants, including a trust and the trust administrator.

Owners of the business are also potential defendants, as are tenants, lessees, property managers or other persons having control and dominion over the subject property.

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<sup>6</sup> An additional cause of action under §17200 of the Business and Professions Code is also available for unfair business practices due to the unlawful conduct. The unlawful practices prohibited by 17200 include any practice forbidden by law, including civil, criminal, federal, state, or municipal, statutory, regulatory or court-made. *Hewlett v. Squaw Valley Ski Corp.* (1997) 54 Cal. App.4<sup>th</sup> 499. This would apply to rental residential property as well.

<sup>7</sup> It's been my experience that, not only are neighbors willing to get involved, allowing them to do so often creates or enhances a positive relationship between police and the citizens. It is also not unheard of for those neighbors to invite both the attorney for City and the police who to this paper is a sample declaration from such a neighbor.

#### **D. Demand Letter**

After determining that the property is a candidate for the 11570 action, the next step is to write a letter to all possible defendants advising them of the illegal drug activity and demanding they abate the public nuisance. The letter should include a deadline for them to provide the City with a detailed written plan of the specific steps they intend to take to abate the illegal activities.

The letter need only provide a general summary of the facts that prompted the letter and the legal consequences of a successful complaint pursuant to relevant state statutes (see Attachment 1 for sample letter), the specific demand and the deadline.

If the letter is to the owner, it should demand that he or she institute an unlawful detainer action against the tenants (or immediate family member) within 30 days. If the letter is to a non-owner, there is no minimum statutory time for compliance<sup>8</sup>. You may wish to put the full burden on the property owner rather than seek assignment of the right to bring an unlawful detainer action.

#### **E. Determining Compliance with Demand Letter.**

Who decides if the owner has adequately responded to the demand letter? You do. Clearly, those owners who simply ignore the letter or deny that any problem exists have inadequately addressed the matter. Similarly, property owners who immediately begin and follow through with eviction actions against their offending tenants clearly are complying. Any business that does not provide a reasonable and complete plan to control its patrons, employees or tenants (including, but not limited to, hiring qualified and trained security guards, interior and exterior lighting, adequate parking, posting of signs, capital improvements to property, owner membership in neighborhood or local merchants' associations, attending property management training programs, making cosmetic improvements to the property and any other steps necessary to remedy the problem and enhance the abatement process) is not complying with the notice.

It is typical for an owner to ignore the notice, deny the existence of the problem, or move rapidly to ameliorate it. Often, it is obvious whether legal action will be necessary. After handling a significant number of these, with varying degrees of actual compliance and the property's history, it becomes a matter of experience as to whether the nuisance will be abated short of filing a complaint. One telltale sign that you're headed for a complaint is a lack of response to the demand letter. If the deadline for the property owner to provide a detailed plan of how they intend to abate the public nuisance has passed with no contact or a only vague assurance it won't happen again, file the complaint!

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<sup>8</sup> See H&S §11571.1 for an action for unlawful detainer and all notice and procedural requirements. Note: The cities of Los Angeles, Long Beach, Oakland and San Diego are subject to additional reporting requirements when bringing unlawful detainer actions under this section.

### **III. Bringing the Abatement Action**

#### **A. Complaint**

Once it has been determined that the defendants will not voluntarily abate the public nuisance, whether by tenant eviction or any other reasonable method, the next step is to prepare the complaint. At a minimum, the causes of action are preliminary and permanent injunction allowed for abatement of a general public nuisance, public nuisance per se<sup>9</sup>, violation of the Health and Safety Code. [H&S §11570, Code of Civil Procedure §731 and Civil Code §3480] and a prayer for preventive measures, civil penalties,<sup>10</sup> reasonable attorney fees, plaintiff's costs in bringing the action, and damages which include costs of enforcement and investigation (police costs).<sup>11</sup>

#### **1. Parties**

Pursuant to H&S §§11571 and 11571.5 the city attorney is authorized to bring the action in the name of the People. Therefore, the caption for the plaintiff should read *People of the State of California, ex rel. Jane Smith* (city attorney's name), *City Attorney for the City of \_\_\_\_\_*.<sup>12</sup>

Depending on the nature of the subject property, at a minimum, all property owners must be named as defendants. In the event of rental properties or businesses, all property managers and business owners are also named. Additionally, I will usually name those residential tenants involved in the drug activity as defendants in order to extend all injunctions or judgments to them.

#### **2. Use of Verified Complaints**

Under CCP §446, answers to complaints filed by a public agency or governmental entity are required to be verified. A better practice is to add a verification paragraph as well and move to strike any unverified answers.

The advantage of using a verified complaint along with at least one declaration is that the Court can order a temporary restraining order or preliminary or default judgment granting a permanent injunction based on either a verified complaint and/or declarations.

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<sup>9</sup> Using both the violations of H&S §11570 and violation of the local municipal code's public nuisance statute as the basis for the public nuisance per se cause of action.

<sup>10</sup> H&S §11581(b) allows imposition of civil penalties up to \$25,000. However, one-half of the civil penalties collected pursuant to this section are required to be sent to the state to be deposited in the Restitution Fund in the State Treasury.

<sup>11</sup> H&S §11579 (lien for costs) and CC §3496(c) allows for costs of investigation and discovery and reasonable attorney fees in any case in which a governmental agency seeks to enjoin the use of a building or place or seeks to enjoin in or upon any building or place, the unlawful sale, manufacture, service, storage, or keeping or giving away of any controlled substance as authorized by the H&S Code. Also see Gov't Code §38773.5.

<sup>12</sup> *City of Oakland v. McCullough* (1996) 46 Cal. App. 1 opinion that the action had to be brought in the City's name, and not the name of the People, was rendered inapplicable following subsequent Legislative action specifically authorizing a city attorney to bring the action in the name of the people.

### 3. Threshold Evidence Required

The evidence required for a finding that a property is a “drug house” has been established through case law. As discussed previously, a single act is sufficient when the totality of the circumstances is taken into account. Allegations of those incidents giving rise to the action must be pleaded in the complaint. At this initial stage, the evidence to support the allegations is provided primarily through declarations. At a minimum, attach to the complaint the declaration of the officer who is the “lead” in the case [see Attachment 2 for sample Declaration]. This declarant must be a peace officer who can qualify as an “expert” witness in drug identification, drug trafficking and drug use and who has some personal knowledge of the illegal activities on the subject property. Even general reputation information known to the officer can be used and is sufficient circumstantial evidence to help prove the existence of a public nuisance.<sup>13</sup> Additional declarations are also helpful, including those made by neighbors.

The burden of proof is the same as in any civil action: a preponderance of evidence.

#### B. Use of Default Judgment versus Motion for Preliminary Injunction.

H&S §11573 authorizes the issuance of a preliminary injunction to abate and prevent the continuation or reoccurrence of a public nuisance as defined under the Drug Abatement Act. Often, merely filing the complaint with supporting declarations and exhibits proves to be sufficient. Surprisingly, a significant number of defendants do not even file an answer and a default judgment can be taken without the added time and expense of drafting the motion for preliminary injunction, the memorandum of points and authorities and attending a hearing on the injunction motion.

Additionally, answering defendants more often than not enter into a stipulated judgment for the permanent injunction and agree to pay attorney fees and costs. They do so to avoid having the premises boarded up and taken out of use for a year. They may also realize that at this stage, the attorney fees and costs are lower than if they mount what they know will likely be an unsuccessful defense.

If the defendant answers and is unwilling to enter into a stipulated judgment then filing a preliminary injunction is the next step.

Use of a preliminary injunction tends to be most useful when the offending property is a business (especially bars and similar businesses) because the order can require implementation of a wide variety of security methods. These include requiring the owner to spend a specific amount of time at the property to monitor patrons and employees.

A preliminary injunction can only be used to effect closure of the subject property prior to trial if a prior order or injunction has not resulted in abatement of the public nuisance.<sup>14</sup>

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<sup>13</sup> See *People v. Macy* (1919) 43 Cal.App. 479 (lewd acts); *People el rel Hicks v. Sarong Girls* (1974) 42 Cal.App.3d 556, 561.

<sup>14</sup> See H&S §11573.5(b)

## IV. REMEDIES

### A. Default Judgment or Judgment After Trial

When requesting a judgment from the court granting a permanent injunction based on the declarations supporting the complaint, it's important to remember that if the judge concludes from the complaint and declarations, or trial testimony, that a nuisance exists, the remedy of closure is mandatory.

H&S §11581 reads in relevant part:

(a) "If the existence of the nuisance is established in the action, an order of abatement **shall** be entered as a part of the judgment, which order **shall** direct the removal from the building or place of all fixtures... and other moveable property used in conducting, maintaining, aiding or abetting the nuisance....

(b)(1) The order **shall** provide for the effectual **closing of the building or place** against its use **for any purpose**, and for keeping it closed for a period of **one year**. This subdivision is **intended to give priority to closure.**"

The sole exceptions to the mandatory closure provision are found in H&S §11581(c)(1). That subsection seems to allow the court to avoid closure only if the court finds that any vacancy resulting from the closure "may create a nuisance or that closure is otherwise harmful to the community." In that situation, the court may order the person who is responsible for the existence of the nuisance, or the person who knowingly permits controlled substances to be unlawfully sold, served, stored, kept, or given away in or from a building he or she owns, to pay damages in an amount equal to the fair market rental value of the building or place for one year to the city bringing the action for use in various drug abuse programs. This is in addition to all other conditions of the injunction.

It would be difficult to prove to the court that closure of a drug house would harm the community or would somehow "create" a nuisance. A closure which is "harmful to the community" might be one involving a senior citizen center, mental health facility or hospital. As mentioned, these are not typical sites of public nuisances. [A sample Order is included as Attachment 3.]

## V. SUMMARY

Drug Abatement actions have proven to be an extremely powerful and valuable tool that growing number of communities, neighborhoods, and cities have embraced to end often long-standing problems with drug dealing, the associated crime and disproportional drain on police services at the subject locations.

Because the defenses are very limited, essentially that the incidents described in the action didn't occur, defendant owners quickly learn that their options are few if any. Rather than have their house or business boarded up for a year, owners often agree to sell and leave.